

Transnational Insolvency 101: A New Guide to Cross-Border Bankruptcy Proceedings

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I. Introduction

The enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) brought with it Chapter 15, a new bankruptcy law that addresses “Ancillary and Other Cross-Border Cases.” Chapter 15 is intended to facilitate cooperation between the United States and foreign countries in the context of transnational insolvency cases.¹ In large measure, Chapter 15 incorporates the Model Law on Cross-Border Insolvency (“Model Law”) promulgated by the United Nations Commission on International Trade Law (“UNCITRAL”).²

For perspective, the seeds of this law were sown forty years ago when the General Assembly of the United Nations made Resolution 2205 (XXI) of December 17, 1966, wherein it created the United Nations Commission on International Trade Law. The United Nations Commission on International Trade Law’s charge was to further “harmonization and unification of the law of international trade and in that respect bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade.”³ As international trade has expanded in the ensuing four decades, so has the need for cooperation and coordination in the context of business failures and insolvency.

¹ Pub. L. No. 109-8, § 801 (2005).

² U.N.G.A., 52d Sess., Supp. No. 17 (A/52/17). The full text can be found on the internet at 1997 - UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment, http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html (last visited April 28, 2006). As of April of 2006, the following countries have adopted the Model Law (with effective dates in parentheses): Eritrea, Japan (2000), Mexico (2000), Poland, Romania (2003), South Africa (2000), within Serbia and Montenegro, Montenegro (2002), British Virgin Islands, overseas territory of the United Kingdom of Great Britain and Northern Ireland (2005), and the United States of America (2005).

³ G.A. Res. 52/158, U.N. Doc. A/52/649 (Jan. 30, 1998).

The provisions contained in the Model Law were influenced by the debates and discussions that led to the European Union Insolvency Regulation No. 1346/2000 of May 29, 2000 (“EU Insolvency Regulation”).⁴ The purpose of the EU Insolvency Regulation is to coordinate and define relationships between member countries of the European Union in insolvency cases.

Chapter 15 balances the interests, opportunities and rights of various different, sometimes competing, parties impacted by cross-border insolvencies. It is a rather delicate and multi-faceted balancing prescription among countries, institutions, courts, creditors and debtors of different countries.

Arguably, Chapter 15 is a masterful framework of diplomacy to facilitate well-managed and successful cross-border reorganizations among contending interests. Others would say it is a awkward effort to accommodate all competing parties and mollify those who would resist foreign intervention or complication of domestic law. All would agree, however, it is a necessary and promising tool to manage complex cross-border insolvencies in an increasingly globalized economic world.

This article is intended to explain and simplify an innovative and complex new law. A law that is certain to be more complicated and possibly controversial as it is applied over the next few years. It is also to provide a “nuts and bolts” guide to the new realities of Chapter 15 and how it will likely impact all bankruptcy practitioners sooner or later. The goal thereby is to focus on (1) the purpose, (2) the new “terms of art,” (2) the implementation, and (3) the practical realities of Chapter 15.

⁴ The EU Insolvency Regulation can be found at: <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServe.do?uri=CELEX:32000R1346:EN:HTML> (last visited Apr. 28, 2006).

II. The Purpose of Chapter 15

Chapter 15 was enacted to incorporate the Model Law to provide an effective way to manage cross-border insolvency cases.⁵ Flowing from the purpose of enacting Chapter 15 are five “objectives.”

The five objectives are:

- Foster cooperation and communication by and between courts of the United States and foreign courts in cross-border insolvency cases.⁶
- Establish greater legal certainty for trade and investment.⁷
- Establish fair and efficient administration of cross-border insolvencies.⁸

⁵ 11 U.S.C. § 1501(a) provides:

(a) The purpose of this chapter is to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency with the objectives of—

(1) cooperation between—

(A) courts of United States, United States trustees, trustees, examiners, debtors, and debtors in possession; and

(B) the courts and other competent authorities of foreign countries involved in cross-border insolvency cases;

(2) greater legal certainty for trade and investment;

(3) fair and efficient administration of cross-border insolvencies that protects the interest of all creditors, and other interested entities, including the debtor;

(4) protection and maximization of the value of the debtor’s assets; and

(5) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

⁶ 11 U.S.C. § 1501(a)(1). Although permeating all sections Chapter 15, the cooperative elements are expressly evident in 11 U.S.C. §§ 1503, 1508-1509, 1525-1527, 1529-1530.

⁷ 11 U.S.C. § 1501(a)(2). Sections addressing legal certainty include, but are not limited to, 11 U.S.C. §§ 1505, 1513, 1518, 1522-1523, 1532.

⁸ 11 U.S.C. § 1501(a)(3). For example, administrative elements are addressed in 11 U.S.C. §§ 1505, 1507, 1509, 1512, 1514, 1518-1523, 1532.

- Better protect and maximize the value of the debtor’s assets.⁹
- Promote and facilitate in the rescue of financially troubled businesses, saving jobs and protecting investments.¹⁰

These objectives will be illustrated, generally, later in this article and in the context of implementing Chapter 15.

III. New “Terms of Art” Contained in Chapter 15

Chapter 15 creates an entirely new set of terms and phrases necessary for understanding and implementing the law. The lexicon is new and unique to Chapter 15 and includes the following terms.

A. Debtor. A key new term that seems familiar is “debtor.” The term “debtor” in Chapter 15 differs from the term “debtor” in the context of every other Chapter of the Bankruptcy Code.¹¹ In Chapter 15, “debtor” means any entity that is the subject of a foreign proceeding.¹² As the House Report to BAPCPA noted:

“Debtor” is given a special definition for this chapter. This definition does not come from the Model Law, but is necessary to eliminate the need to refer repeatedly to “the same debtor as in the foreign proceeding.”¹³

B. Foreign Court. A “foreign court,” as defined in 11 U.S.C. § 1502(3), is a court, as we understand it in the United States, but it also includes administrative agencies which in some foreign jurisdictions control the insolvency process. Thus, “foreign court” under Chapter 15 need not be an actual “court” but may also be some “other authority competent to control or supervise a foreign proceeding.”¹⁴

C. Foreign Proceeding. The term “foreign proceeding” is found in 11 U.S.C. § 101(23) rather than in the definitions contained in 11 U.S.C. § 1502. A “foreign proceeding” is:

⁹ 11 U.S.C. § 1501(a)(4). Protection and maximization of value of a debtor’s assets are addressed in 11 U.S.C. §§ 1522-23, 1532, among other sections.

¹⁰ 11 U.S.C. § 1501(a)(5).

¹¹ Compare 11 U.S.C. § 101(13) with 11 U.S.C. § 1502(1).

¹² 11 U.S.C. § 1502(1).

¹³ H.R. Rep. No. 109-31, 109th Cong., 1st Sess. 1502 (2005).

¹⁴ 11 U.S.C. § 1502(3).

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.¹⁵

In other words, a “foreign proceeding,” is the bankruptcy case or insolvency matter—judicial or administrative—that is being tended to by the “foreign court.”

D. Foreign Representative. A “foreign representative” is also not defined in 11 U.S.C. § 1502, but is defined in 11 U.S.C. § 101(24). A “foreign representative” is:

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.¹⁶

Put another way, the foreign representative is the designated agent authorized to manage the foreign proceeding and to represent the debtor in the United States courts and other foreign courts.

E. Foreign Main Proceeding. A “foreign main proceeding” is defined as a “foreign proceeding pending in the country where the debtor has the *center of its main interests*.”¹⁷

F. Center of Main Interests. There is no specific definition of a debtors’ *center of main interests*. The interpretation of what exactly constitutes a debtor’s “*center of main interests*” will probably be a key litigation point in Chapter 15 cases.¹⁸ The European Union has

¹⁵ 11 U.S.C. § 101(23).

¹⁶ 11 U.S.C. § 101(24). Interestingly, it appears that there is a need for a technical amendment to section 101, so as to add the term “body.” While “person” is defined in 11 U.S.C. § 101(41), “body” is not a defined term under the Bankruptcy Code. Reference to “body” is also made in 11 U.S.C. §§ 1516(a), 1517(a)(2), 1527(1) with no linkage to any defined term. The Model Law provides that a foreign representative applying for recognition must be “a person or body within the meaning of article 2(d).” Model Law, art. 17. Article 2(d) contains the definition of “foreign representative,” which means, “a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs to act as a representative of the foreign proceeding.”

¹⁷ 11 U.S.C. § 1502(4).

¹⁸ Hon. Samuel L. Bufford, Hon. Burton R. Lifland, Christopher J. Redmond, M.O. Sigal, Lindsee P. Granfield, *A Companion to the ABA Panel Discussion Regarding New Chapter* (continued...)

seen some litigation with respect to the concept of the “centre of main interests.” The EU Insolvency Regulation provides that the member country in which the debtor’s “centre of main interests” is situated shall have jurisdiction to “open” the main insolvency proceedings.¹⁹ While the “centre of main interests” in the EU Insolvency Regulation is not specifically defined—as it is also not defined in Chapter 15—the preamble of the EU Insolvency Regulation states that “the centre of main interests should correspond to the place where the debtor conducts the administration of his interests^[20] on a regular basis and is therefore ascertainable by third parties.”²¹ There is also a rebuttable presumption that the “centre of main interests” is the country where the registered office is located, absent proof to the contrary.²² This presumption is also incorporated in 11 U.S.C. § 1516(c). Under EU Insolvency Regulation, arts. 16 and 17, the opening of a proceeding in one country should then be *automatically* recognized in another European Union country, except where the effects of such recognition would be manifestly contrary to its public policy.²³

The unique distinction made in determining just what constitutes a “foreign main proceeding” is key to the cooperation and facilitation goals of Chapter 15. For example, after recognition under 11 U.S.C. § 1517, a foreign representative may commence a voluntary bankruptcy case under section 301 or 302 of the Bankruptcy Code, “if the foreign proceeding is a foreign main proceeding.”²⁴ Moreover, if the foreign proceeding is recognized as a foreign *main* proceeding, 11 U.S.C. § 1520 takes effect, and, among other things, applies the automatic

¹⁸(...continued)

15 of the Bankruptcy Code and International Insolvency - A Chapter 15 Primer (The ABA Center for Continuing Legal Education, the Bankruptcy Abuse and Consumer Protection Act Series Continuing Legal Education Program June 1, 2005).

¹⁹ EU Insolvency Regulation, art. 3(1).

²⁰ The use of the word “interests” here means “business.” In other words, the center of main interests should correspond to the place where the debtor regularly does *business*, such that a third party would believe that the location is the debtor’s headquarters—or such similar center of operation. Thus, the center of main interests would not be a “branch” location.

²¹ EU Insolvency Regulation, Recitals ¶ 13.

²² EU Insolvency Regulation, art. 3(1).

²³ EU Insolvency Regulation, art. 26.

²⁴ 11 U.S.C. § 1511(a)(2).

stay of 11 U.S.C. § 362 “with respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States.”²⁵

G. Foreign Non-Main Proceeding. It would seem logical that, if there is a “foreign main proceeding,” there must be a “foreign nonmain proceeding.” And so there is under 11 U.S.C. § 1502(5). A “foreign nonmain proceeding” is a proceeding other than a foreign main proceeding, pending in a country where the debtor has an establishment.” To be clear, in order to be recognized as a foreign nonmain proceeding, the debtor must *at least* have an “establishment” in the foreign country.²⁶ What this means is that, unlike 11 U.S.C. §109(a), a case may not be recognized if the sole basis of jurisdiction is the location of assets in the United States.²⁷

H. Establishment. 11 U.S.C. § 1502(2) defines the term “establishment” as “any place of operations where the debtor carries out a nontransitory economic activity.” The definition of “establishment” is the centerpiece of a court’s analysis in determining whether the court is going to grant recognition of a foreign proceeding under 11 U.S.C. § 1517(b). This definition is a paradigm shift from the Bankruptcy Code’s eligibility requirements of a debtor in 11 U.S.C. § 109(a), where a person may be a debtor if that person “resides or has domicile, a place of business, or property in the United States.” In other words, a foreign proceeding may not be recognized under 11 U.S.C. § 1517(b) if the debtor only has assets in that jurisdiction, but no “establishment” of operations.²⁸

I. Recognition. 11 U.S.C. § 1502(7) defines the term “recognition” as “the entry of an order granting recognition of a foreign main proceeding or a foreign nonmain proceeding under this chapter.” This definition was included to facilitate the drafting of other sections of Chapter 15.²⁹ “Recognition” is the “gateway” to entering the United States legal system, after which a foreign representative can access any and all courts in the United States judicial system.

Recognition is the seminal and triggering event that accords legitimacy for a foreign proceeding and grants authority and rights to a foreign representative. Without recognition, nothing happens. With recognition, many things are possible.

²⁵ 11 U.S.C. § 1520(a)(1).

²⁶ Guide to Enactment of Model Law, ¶ 21 and 75.

²⁷ 8 *Collier on Bankruptcy* ¶ 1502.02[5], at 1502-4 (Alan N. Resnick & Henry J. Sommer, eds., 15th ed. rev. 2005).

²⁸ Guide to Enactment of Model Law, ¶s 21, 73 and 75.

²⁹ *Id.* at ¶ 1502.02[7], at 1502-4. *See, e.g.*, 11 U.S.C. §§ 1509, 1515-1521 (among others).

IV. Implementation

A. The Reach of Chapter 15

Chapter 15 facilitates and streamlines what was once a cumbersome process by creating a *single* “gateway” for a foreign representative of a foreign proceeding to enter into the United States legal system—and *all* courts in the United States. On the other hand, Chapter 15 also impacts the “outbound” process. That is, Chapter 15 governs the authority of a United States bankruptcy court and representatives in the process (i.e. trustees and debtors-in-possession) to act in a foreign country. While the focus of this article will be on this “inbound” process, the “outbound” process is equally important and necessary for international cooperation in insolvency proceedings. Chapter 15 is not a one-way street. It is a two-way boulevard.

B. Summary of the Process of Recognizing a Foreign Proceeding

To initiate the process of implementing Chapter 15 for a foreign insolvency proceeding—or opening that “gateway” for a foreign representative to access the United States legal system—the *recognition* by a United States court of the foreign proceeding is *essential*. If a foreign representative does not apply for and obtain recognition, then that foreign representative cannot access the United States court system anywhere.³⁰ In effect, once recognition is granted, the “gateway” is opened, from which many other doors may be opened.

A case under Chapter 15 is commenced by the filing of a petition for recognition of a foreign proceeding under 11 U.S.C. § 1515.³¹ Jurisdiction for the Chapter 15 case is found in 28 U.S.C. § 1334. Importantly, a court *may not* abstain from a recognition proceeding.³² Moreover, a petition for recognition and other matters under Chapter 15 are core proceedings and thus, as a practical matter, relegated to United States bankruptcy courts.³³

The venue of a case ancillary to a foreign proceeding is governed by 28 U.S.C. § 1410, which has been completely revamped in conjunction with the enactment of Chapter 15. A case under Chapter 15 can be filed in a United States district court or a United States bankruptcy court:

(1) in which the debtor has its principal place of business or principal assets in the United States;

³⁰ See, e.g., *United States v. J. A. Jones Const. Group, LLC*, 333 B.R. 637, 638-39 (E.D.N.Y. 2005).

³¹ 11 U.S.C. § 1504.

³² 28 U.S.C. § 1334(c).

³³ 28 U.S.C. § 157(b)(2)(P).

(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 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.³⁴

Unlike the former language of 28 U.S.C. § 1410, which governed foreign proceedings under 11 U.S.C. § 304, the revised statute allows for a *single* entry point—the “gateway”—for foreign representatives to seek access to any state or federal court in the United States.³⁵ Under the former version of the statute, 11 U.S.C. § 304, multiple cases in different venues where litigation was pending or property was located was sometimes required.³⁶

When a foreign representative has determined the proper venue, that representative must file an application for recognition under 11 U.S.C. § 1515.³⁷ This application must be accompanied by:

(1) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative;

(2) a certificate from the foreign court affirming the existence of such foreign proceeding and of the appointment of the foreign representative; or

(3) [absent the above evidence], *any other evidence* acceptable to the court of the existence of such foreign proceeding and of the appointment of the foreign representative.³⁸

In addition, the foreign representative must also file a statement identifying all foreign proceedings with respect to the debtor that are known and all documents filed must be translated into English.³⁹ In recognition that some jurisdictions may be less formal than the United States, the United States court receiving the application for recognition may (1) presume that the foreign

³⁴ 28 U.S.C. § 1410.

³⁵ 8 *Collier on Bankruptcy* ¶ 1501.03[7], at 1501-10.

³⁶ *Id.*, at 1501-11.

³⁷ FED.R.BANKR.P. 1010 [Interim] and 2002(q)(1) [Interim] set forth the noticing requirements of the application for recognition.

³⁸ 11 U.S.C. § 1515(b) (emphasis added).

³⁹ 11 U.S.C. § 1515(c) and (d).

proceeding is what it says it is: a foreign proceeding, and (2) presume that the documents submitted are authentic.⁴⁰

C. An Overview of the Entry and Effect of an Order of Recognition

Once the application for recognition is filed, *the matter must be considered and decided by the United States court “at the earliest possible time.”*⁴¹ In other words, the intent of the drafters of Chapter 15 is that these matters should be attended to swiftly—further streamlining the international cooperation and facilitation of the insolvency case. Once the court recognizes the foreign proceeding and the “gateway” to the U.S. has been opened, several doors become accessible to the foreign representative. These subsequent doors and ensuing corridors include various rights and opportunities acting through and exclusively in Chapter 15, or through and by, if necessary, filing further bankruptcy cases under Title 11. By way of example,

- A foreign representative can participate as a party in interest in any bankruptcy case and insolvency proceeding under Title 11.⁴²
- Subject to certain limitations, the court, *itself*, “may provide additional assistance to a foreign representative under this title or under the laws of the United States.”⁴³
- A foreign representative, subject to certain limitations, can sue or be sued in any court in the United States.⁴⁴
- A foreign representative can bring an involuntary or voluntary bankruptcy case under Title 11.⁴⁵
- A foreign representative can seek orders of a court staying executions against a debtor’s assets and entrusting assets to a person such as an examiner.⁴⁶

⁴⁰ 11 U.S.C. § 1516(a) and (b).

⁴¹ 11 U.S.C. § 1517(c) (emphasis added).

⁴² 11 U.S.C. § 1512.

⁴³ 11 U.S.C. § 1507(a).

⁴⁴ 11 U.S.C. § 1509(b)(1).

⁴⁵ 11 U.S.C. § 1511(a).

⁴⁶ 11 U.S.C. § 1519(a).

It is fair to conclude that the foreign representative of a foreign proceeding that is recognized in the United States courts is equipped with a full and diverse bundle of legal rights and opportunities. However, there are some important qualifications and limitations on these broad powers.

First—and of paramount importance— there is nothing in Chapter 15 that prevents a United States court from refusing to take action governed by Chapter 15 if the court determines such action is “manifestly” contrary to the public policy of the United States.⁴⁷ Anything found to be “manifestly” against the public policy of the United States is not permitted and is not to be allowed by the United States court.

One must realize, however, that this “public policy” exception is intended to be construed more narrowly in an international context than in a purely domestic context.⁴⁸ Thus, the action must be “manifestly” contrary to the public policy of the United States—not just contrary to the public policy of the United States.⁴⁹ Simply put, the “public policy” exception should only “be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State.”⁵⁰

If, however, a court does determine that the “public policy” exception is valid and the court declines to recognize the foreign proceeding, the court may then issue any appropriate order necessary to prevent the foreign representative from obtaining comity or cooperation from *any court in the United States*.⁵¹ This “public policy” exception of 11 U.S.C. § 1506 is *not* just limited to the “recognition” decision, but is applicable to *any* other types of decisions to be made by the court with respect to a case under Chapter 15.

Second, in making a determination with respect to whether additional assistance should be provided to a foreign representative, the United States court:

shall consider whether such additional assistance, consistent with the principles of comity, will reasonably assure—

- (1) just treatment of all holders of claims against or interests in the debtor’s property;

⁴⁷ 11 U.S.C. § 1506.

⁴⁸ 8 *Collier on Bankruptcy* ¶ 1506.01, at 1506-1.

⁴⁹ *See* Guide to Enactment of Model Law, ¶¶ 87-89.

⁵⁰ *Id.* at 89.

⁵¹ *See* 11 U.S.C. § 1506.

- (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
- (3) prevention of preferential or fraudulent dispositions of property of the debtor;
- (4) distributions of proceeds of the debtor’s property substantially in accordance with the order prescribed by this title; and
- (5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.⁵²

These factors are essentially the same as the factors—in different order of presentation and with distinctive emphasis on “comity”—considered under pre-BAPCPA 11 U.S.C. §304(c).

D. Fostering of Communication, Cooperation, and Diplomacy

1. Mandatory Nature of Communication, Cooperation, and Diplomacy

Under Chapter 15, cooperation and direct communication between and among judges, trustees, debtors, and creditors in cross-border cases is essential and central to the entire process. Congress, in enacting various provisions of Chapter 15, has directed expansive communication and transparency of proceedings. 11 U.S.C. § 1525 enables—indeed mandates—court-to-court communication:

- (a) Consistent with section 1501, the court *shall* cooperate to the maximum extent possible with a foreign court or a foreign representative, either *directly* or through the trustee.
- (b) The court is *entitled* to communicate directly with or to request information or assistance *directly* from, a foreign court or a foreign representative, subject to the rights of a party in interest to notice and participation.⁵³

11 U.S.C. § 1526 provides for direct communications between trustees, foreign courts, and foreign representatives, as follows:

- (a) Consistent with section 1501, the trustee or other person including an examiner, authorized by the court, *shall*, subject to the supervision of the court,

⁵² 11 U.S.C. § 1507(b).

⁵³ 11 U.S.C. § 1525 (emphases added).

cooperate to the maximum extent possible with a foreign court or a foreign representative.

(b) The trustee or other person, including an examiner, authorized by the court is *entitled*, subject to the supervision of the court, to communicate *directly* with a foreign court or a foreign representative.⁵⁴

The words emphasized in the text above are set out to stress the mandatory nature of the cooperation between courts.⁵⁵ The language utilized with reference to the intended cooperation is not a permissive “should” or “may” but is the obligatory “shall.” Moreover, a court, trustee, or “other person,” including an examiner, is, subject to some limitation, “entitled” to communication—and consequently, cooperation. This is the centerpiece to the functionality of Chapter 15. Without it, attempted communications may fall upon deaf ears.

It is also noteworthy that the communications may be done “directly.” This streamlines the process. As the Guide to the Enactment of the Model Law notes:

The ability of courts, with appropriate involvement of the parties, to communicate “directly” and to request information and assistance “directly” from foreign courts or foreign representatives is intended to avoid the use of time-consuming procedures traditionally in use, such as letters rogatory. This ability is critical when courts consider that they should act with urgency. In order to emphasize the flexible and potentially urgent character of cooperation, the enacting State may find it useful to include in the enactment of the Model Law an express provision that would authorize the courts, when they engage in cross-border communications [...], to forgo the use of formalities (e.g. communication via higher courts, letters rogatory or other diplomatic or consular channels) that are inconsistent with the policy behind the provision.⁵⁶

The court, however, in initiating a communication with a foreign court or foreign representative is not completely unfettered.⁵⁷ Other than for scheduling and administrative matters, the notice of a court’s intent to communicate is required consistent with and pursuant to FED.R.BANKR.P. 2002(q)(2)[Interim].⁵⁸ Under this Rule, the court must give notice of at least 20

⁵⁴ 11 U.S.C. § 1526 (emphases added).

⁵⁵ See Guide to Enactment of Model Law, ¶ 174.

⁵⁶ Guide to Enactment of Model Law, ¶ 179.

⁵⁷ It does not appear that the Interim Rules necessarily subject a trustee or other court authorized person to comply with the notice requirements discussed in this paragraph.

⁵⁸ FED.R.BANKR.P. 5012 [Interim] provides:

(continued...)

days by mail to the debtor, all administrators in foreign proceedings involving the debtor, all entities against whom provisional relief is sought, and all parties to litigation then pending in the United States in which the debtor is a party.⁵⁹ The Notice must also identify the subject of the anticipated communication and advise that any entity that wishes to participate in the communication shall advise the court not later 5 days before the scheduled communication of its desire to participate in the communication.⁶⁰

Further guidelines (“Guidelines”) to court-to-court communications have been crafted and published by the American Law Institute (“ALI”) and the International Insolvency Institute (“III”).⁶¹ These Guidelines were originally prepared in conjunction with court-to-court communications between NAFTA nations (Mexico, United States and Canada).⁶² The ALI and III promulgated the Guidelines so as to be useful whenever there were transnational insolvency cases.⁶³ The text of the Guidelines is now available in English, Chinese, French, German, Italian, Japanese, Korean, Portuguese, Russian, Swedish, and Spanish.⁶⁴

⁵⁸(...continued)

Except for communications for scheduling and administrative purposes, the court in any case commenced by a foreign representative shall give at least 20 days’ notice of its intent to communicate with a foreign court or a foreign representative. The notice shall identify the subject of the anticipated communication and shall be given in the manner provided by Rule 2002(q). Any entity that wishes to participate in the communication shall notify the court of its intention not later than 5 days before the scheduled communication.

⁵⁹ FED.R.BANKR.P. 2002(q)(2)[Interim] and 5012 [Interim].

⁶⁰ *Id.*

⁶¹ American Law Institute, GUIDELINES APPLICABLE TO COURT-TO-COURT COMMUNICATIONS IN CROSS-BORDER CASES (2003). *See* Appendix A, hereto. These Guidelines were originally contained as Appendix B to the publication: American Law Institute, TRANSNATIONAL INSOLVENCY: COOPERATION AMONG THE NAFTA COUNTRIES, PRINCIPLES OF COOPERATION AMOUNT THE NAFTA COUNTRIES (2000).

⁶² The North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 296, art. 102(1)(a).

⁶³ *Id.*

⁶⁴ The various translations are available on the website of the International Insolvency Institute at: <http://www.iiiglobal.org/international/guidelines.html> (last visited April 28, 2006).

2. Other Salient Forms of Cooperation and Coordination

11 U.S.C. § 1527 sets forth a non-exclusive (and permissive) list of suggested forms of cooperation. As is acknowledged in the House Report to BAPCPA, the listing in section 1527 is derived from the protocols previously used by courts.⁶⁵ Section 1527, in effect, puts into practice the general concept of comity as expressed by the Supreme Court in *Hilton v. Guyot*, wherein the Court held that:

“‘Comity,’ in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other person who are under the protection of its laws.’”⁶⁶

Specifically, section 1527 provides:

Cooperation referred to in sections 1525 and 1526 may be implemented by any appropriate means, including—

- (1) appointment of a person or body, including an examiner, to act at the direction of the court;
- (2) communication of information by any means considered appropriate by the court;
- (3) coordination of the administration and supervision of the debtor’s assets and affairs;
- (4) approval or implementation of agreements concerning the coordination of proceedings; and
- (5) coordination of concurrent proceedings regarding the same debtor.⁶⁷

The non-exclusive list provides a framework from which courts may implement specific procedures so as to foster comity.

⁶⁵ H.R. Rep. No. 31, 109th Cong., 1st Sess. 1527 (2005). One such case is *In re Maxwell Communication Corp.*, 93 F.3d 1036, 1046-1050 (2d Cir. 1996), wherein the Second Circuit analyzed the concept of comity in detail.

⁶⁶ 159 U.S. 113, 163-64, 16 S.Ct. 139, 143, 40 L.Ed. 95 (1895); see *In re Maxwell Communications Corp.*, at 1046.

⁶⁷ 11 U.S.C. § 1527.

E. Simplified and Streamlined Procedures, Part I: The Tools Available to a Foreign Representative from the Inception of the Filing of a Petition for Recognition; Provisional or Emergency Relief

Once an application for recognition is filed, *and before a petition for recognition is granted*, there are tools available to a foreign representative to protect assets and preserve the rights of creditors. For example,

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 interest 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 a part of the debtor’s assets located in the United States to the foreign representative or another person authorized by the court, including an examiner, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, 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).⁶⁸

The additional relief which can be granted to a foreign representative *before* recognition, as referenced in section 1519(a)(3), includes relief that may be granted *after* recognition as follows:

- (1) “suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent that this right has not been suspended under section 1520(a).”⁶⁹
- (2) “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.”⁷⁰
- (3) “granting any additional relief that may be available to a trustee, except for relief available under section 522, 544, 545, 547, 548, 550, and 724(a).”⁷¹

In recognition of the swift and urgent need for open communications and, thus, coordination among different courts, 11 U.S.C. § 1518 also provides:

⁶⁸ 11 U.S.C. § 1519(a) (emphasis added).

⁶⁹ 11 U.S.C. § 1521(a)(3).

⁷⁰ 11 U.S.C. § 1521(a)(4).

⁷¹ 11 U.S.C. § 1521(a)(7).

From the time of filing the petition for recognition of a foreign proceeding, the foreign representative *shall* file with the court promptly a notice of change of status concerning—

- (1) any substantial change in the status of such foreign proceeding or the status of the foreign representative appointment; and
- (2) any other foreign proceeding regarding the debtor that becomes known to the foreign representative.⁷²

This mandate for full disclosure, candor, and transparency ensures accurate and timely information being provided to the court.⁷³ Importantly, the House Report to BAPCPA suggests that failure of the foreign representative to provide the information to the court on a timely basis may result in sanctions being imposed on the foreign representative.⁷⁴

While the foreign representative has obligations flowing to the foreign proceeding and to the United States court upon application for recognition, the foreign representative becomes empowered simply by the process of filing an application for recognition. There is an extensive array of tools for the foreign representative to target and manage assets of the debtor and preserve the interest of the creditors *from the moment of the filing of an application for recognition of a foreign proceeding*.

F. Simplified and Streamlined Procedure, Part II: Once Recognition is Granted

Once the foreign proceeding is granted, the provisional relief available to a foreign representative by way of 11 U.S.C. § 1519(a) ceases by virtue of 11 U.S.C. § 1519(b), unless the court extends that provisional relief. The reason for the possible extension of the provisional measures, as detailed in the Guide to the Enactment of the Model Law, is that: “The court might wish to do so, for example, to avoid a hiatus between the provisional measure issued before recognition and the measure issued after recognition.”⁷⁵

However, in most instances it would appear that the termination of the available relief under section 1519(a) is replaced with much more powerful and sustained powers under 11

⁷² Emphasis added.

⁷³ H.R. Rep. No. 31, 109th Cong., 1st Sess. 1518 (2005).

⁷⁴ *Id.*

⁷⁵ Guide to Enactment of Model Law, ¶ 139.

U.S.C. §§ 1520-21. Section 1520 sets forth relief that is available—or is implemented after recognition—as a matter of right.⁷⁶ The import of section 1520 is three-fold:

- (1) Application of 11 U.S.C. §§ 361, 362, 363, 549, and 552.⁷⁷
- (2) The ability to commence an action or proceeding to preserve a claim.⁷⁸
- (3) The ability to commence a case under Title 11.⁷⁹

In addition, section 1521 provides for certain relief that is more permissive in nature—that is, it *may* be granted upon recognition. The first “bundle” of relief that may be granted is such relief that is necessary for the protection of assets of the debtor and/or to protect the interests of creditors.⁸⁰ This relief includes:

- (1) staying commencement or continuation of actions or proceedings concerning the debtor’s assets, rights, obligations, or liabilities to the extent they have not been stayed under 11 U.S.C. § 1520(a);⁸¹
- (2) staying execution against the debtor’s assets to the extent they have not been stayed under 11 U.S.C. § 1520(a);⁸²
- (3) suspending the right to transfer, encumber or dispose of assets to the extent they have not been suspended under section 1520(a);⁸³

⁷⁶ H.R. Rep. No. 31, 109th Cong., 1st Sess. 1520 (2005).

⁷⁷ 11 U.S.C. § 1520(a).

⁷⁸ 11 U.S.C. § 1520(b).

⁷⁹ 11 U.S.C. § 1520(c).

⁸⁰ 11 U.S.C. § 1521(a).

⁸¹ 11 U.S.C. § 521(a)(1).

⁸² 11 U.S.C. § 521(a)(2).

⁸³ 11 U.S.C. § 521(a)(3).

- (4) providing for examination of witnesses and taking evidence with respect to debtor's assets, affairs, rights, obligations or liabilities;⁸⁴
- (5) entrusting administration or realization of debtor's assets within the United States to the foreign representative or another person, including an examiner, as authorized by the court;⁸⁵
- (6) extending relief granted under section 1519(a);⁸⁶ and
- (7) granting any other additional relief that may be available to a trustee, except for relief under 522, 544, 545, 547, 548, 550, and 724(a).⁸⁷

It should be noted that the relief set out herein does not expand or otherwise limit the scope of relief that may also be available under 11 U.S.C. § 105.⁸⁸

A second type of relief is that the court in either a nonmain or main foreign proceeding may, at the request of the foreign representative, entrust the distribution of the debtor's assets located in the United States to the foreign representative or another person, including an examiner, provided that the court is satisfied that the interests of the creditors located in the United States are sufficiently protected.⁸⁹

With respect to 11 U.S.C. § 1521, the relief available is not limitless and, in some cases, may be precluded, prohibited, restricted, or otherwise may be more difficult to obtain than at first blush. The court *must* be satisfied, in the context of a foreign nonmain proceeding, that the assets, under the laws of the United States, should be administered in the foreign nonmain proceeding or discovery and evidence requested deals with information required in that proceeding.⁹⁰ The court also may *not* enjoin a police or regulatory act of a governmental unit, including criminal proceedings. In the event that relief is being sought under 11 U.S.C. § 1521(a)(1), (2), (3), or (6), the same standards, procedures, and limitations that would apply to an injunctive hearing also apply.

⁸⁴ 11 U.S.C. § 521(a)(4).

⁸⁵ 11 U.S.C. § 1521(a)(5).

⁸⁶ 11 U.S.C. § 1521(a)(6).

⁸⁷ 11 U.S.C. § 1521(a)(7).

⁸⁸ H.R. Rep. No. 31, 109th Cong., 1st Sess. 1521 (2005).

⁸⁹ 11 U.S.C. § 1521(b).

⁹⁰ 11 U.S.C. § 1521(c).

G. Protecting the Creditors and Other Interested Parties

Chapter 15 has in place several features to protect creditors and other interested parties in addition to those already addressed. With respect to foreign creditors, the foreign creditors have the same rights regarding the commencement of, and participation in, a case under Title 11 as domestic—i.e., U.S.—creditors.⁹¹ Foreign creditors are also specifically ensured proper notice under Chapter 15 and the Federal Rules of Bankruptcy Procedure with additional time for foreign creditors in particular instances.⁹²

A predicate for granting relief under 11 U.S.C. §§ 1519 and/or 1521 is that the relief granted must “sufficiently” protect the interest of the creditors and other interested entities, including the debtor.⁹³ Relief under sections 1519, 1521, or the operation of debtor’s business may also be conditioned upon appropriate giving of security or the filing of a bond. In addition an examiner may be appointed under section 1522(d). Under 11 U.S.C. § 1523(a), the foreign representative is also granted standing to pursue actions under 11 U.S.C. § 522, 544, 545, 547, 548, 550, 553, and 724(a). These are powerful mechanisms to protect the interests of creditors, debtors and other parties.

V. The Practical Realities

Chapter 15 replaces the “homegrown” framework of procedural law relating to foreign proceedings that was 11 U.S.C. § 304. Chapter 15 is a product of many years of discussion, debate, and dialogue. Chapter 15 does not necessarily change the basic United States approach in dealing with foreign proceedings and the concept of “comity.”⁹⁴ What it does is provide a more detailed framework and streamlined procedure and adopt a more effective and user-friendly process to successfully conduct transnational bankruptcy cases.⁹⁵

Once the application for recognition is filed, the “gateway” to the United States court systems is cracked open—with certain powers, remedies, opportunities, and duties being activated

⁹¹ 11 U.S.C. § 1513.

⁹² 11 U.S.C. § 1514 and FED.R.BANKR.P. 1010 [Interim], 2002(q) [Interim], 2015(d) [Interim], 5012 [Interim].

⁹³ 11 U.S.C. § 1522(a). The word “adequately” in the Model Law, articles 21(2) and 22(1), has been changed to “sufficiently” in sections 1521(b) and 1522(a) to avoid confusion with the Bankruptcy Code’s defined term “adequate protection.” *See*, H.R. Rep. No. 31, 109th Cong., 1st Sess. 1521 (2005).

⁹⁴ Jay Lawrence Westbrook, *Chapter 15 at Last*, 29 Am. Bankr. L.J. 713, 725 (2005).

⁹⁵ *See, Id.* at 725-26.

immediately. Once recognition is granted, the “gateway” is fully opened with various doors and corridors available to the foreign representative. It is, both conceptually and practically, a more comprehensive, detailed, flexible framework for cross-border insolvency cases, and one very likely to insure more successful business rescues in the future.

Appendix A

Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases as Adopted and Promulgated in Transnational Insolvency: Principles of Cooperation Among the NAFTA Countries by the American Law Institute at Washington, D.C., May 16, 2000, and as Adopted by The International Insolvency Institute at New York, June 10, 2001

Guideline 1

Except in circumstances of urgency, prior to a communication with another Court, the Court should be satisfied that such a communication is consistent with all applicable Rules of Procedure in its country. Where a Court intends to apply these Guidelines (in whole or in part and with or without modifications), the Guidelines to be employed should, wherever possible, be formally adopted before they are applied. Coordination of Guidelines between courts is desirable and officials of both courts may communicate in accordance with Guideline 8(d) with regard to the application and implementation of the Guidelines.

Guideline 2

A Court may communicate with another Court in connection with matters relating to proceedings before it for the purposes of coordinating and harmonizing proceedings before it with those in the other jurisdiction.

Guideline 3

A Court may communicate with an Insolvency Administrator in another jurisdiction or an authorized Representative of the Court in that jurisdiction in connection with the coordination and harmonization of the proceedings before it with the proceedings in the other jurisdiction.

Guideline 4

A Court may permit a duly authorized Insolvency Administrator to communicate with a foreign Court directly, subject to the approval of the foreign Court, or through an Insolvency Administrator in the other jurisdiction or through an authorized Representative of the foreign Court on such terms as the Court considers appropriate.

Guideline 5

A Court may receive communications from a foreign Court or from an authorized Representative of the foreign Court or from a foreign Insolvency Administrator and should respond directly if the communication is from a foreign Court (subject to Guideline 7 in the case of two-way communications) and may respond directly or through an authorized Representative of the Court or through a duly authorized Insolvency Administrator if the communication is from a foreign Insolvency Administrator, subject to local rules concerning ex parte communications.

Guideline 6

Communications from a Court to another Court may take place by or through the Court:

- (a) Sending or transmitting copies of formal orders, judgments, opinions, reasons for decision, endorsements, transcripts of proceedings, or other documents directly to the other Court and providing advance notice to counsel for affected parties in such manner as the Court considers appropriate;
- (b) Directing counsel or a foreign or domestic Insolvency Administrator to transmit or deliver copies of documents, pleadings, affidavits, factums, briefs, or other documents that are filed or to be filed with the Court to the other Court in such fashion as may be appropriate and providing advance notice to counsel for affected parties in such manner as the Court considers appropriate;
- (c) Participating in two-way communications with the other Court by telephone or video conference call or other electronic means, in which case Guideline 7 should apply.

Guideline 7

In the event of communications between the Courts in accordance with Guidelines 2 and 5 by means of telephone or video conference call or other electronic means, unless otherwise directed by either of the two Courts:

- (a) Counsel for all affected parties should be entitled to participate in person during the communication and advance notice of the communication should be given to all parties in accordance with the Rules of Procedure applicable in each Court;
- (b) The communication between the Courts should be recorded and may be transcribed. A written transcript may be prepared from a recording of the communication which, with the approval of both Courts, should be treated as an official transcript of the communication;
- (c) Copies of any recording of the communication, of any transcript of the communication prepared pursuant to any Direction of either Court, and of any official transcript prepared from a recording should be filed as part of the record in the proceedings and made available to counsel for all parties in both Courts subject to such Directions as to confidentiality as the Courts may consider appropriate.
- (d) The time and place for communications between the Courts should be to the satisfaction of both Courts. Personnel other than Judges in each Court may communicate fully with each other to establish appropriate arrangements for the

communication without the necessity for participation by counsel unless otherwise ordered by either of the Courts.

Guideline 8

In the event of communications between the Court and an authorized Representative of the foreign Court or a foreign Insolvency Administrator in accordance with Guidelines 3 and 5 by means of telephone or video conference call or other electronic means, unless otherwise directed by the Court:

- (a) Counsel for all affected parties should be entitled to participate in person during the communication and advance notice of the communication should be given to all parties in accordance with the Rules of Procedure applicable in each Court;
- (b) The communication should be recorded and may be transcribed. A written transcript may be prepared from a recording of the communication which, with the approval of the Court, can be treated as an official transcript of the communication;
- (c) Copies of any recording of the communication, of any transcript of the communication prepared pursuant to any Direction of the Court, and of any official transcript prepared from a recording should be filed as part of the record in the proceedings and made available to the other Court and to counsel for all parties in both Courts subject to such Directions as to confidentiality as the Court may consider appropriate;
- (d) The time and place for the communication should be to the satisfaction of the Court. Personnel of the Court other than Judges may communicate fully with the authorized Representative of the foreign Court or the foreign Insolvency Administrator to establish appropriate arrangements for the communication without the necessity for participation by counsel unless otherwise ordered by the Court.

Guideline 9

A Court may conduct a joint hearing with another Court. In connection with any such joint hearing, the following should apply, unless otherwise ordered or unless otherwise provided in any previously approved Protocol applicable to such joint hearing:

- (a) Each Court should be able to simultaneously hear the proceedings in the other Court.
- (b) Evidentiary or written materials filed or to be filed in one Court should, in accordance with the Directions of that Court, be transmitted to the other Court or made available electronically in a publicly accessible system in advance of the

hearing. Transmittal of such material to the other Court or its public availability in an electronic system should not subject the party filing the material in one Court to the jurisdiction of the other Court.

- (c) Submissions or applications by the representative of any party should be made only to the Court in which the representative making the submissions is appearing unless the representative is specifically given permission by the other Court to make submissions to it.
- (d) Subject to Guideline 7(b), the Court should be entitled to communicate with the other Court in advance of a joint hearing, with or without counsel being present, to establish Guidelines for the orderly making of submissions and rendering of decisions by the Courts, and to coordinate and resolve any procedural, administrative, or preliminary matters relating to the joint hearing.
- (e) Subject to Guideline 7(b), the Court, subsequent to the joint hearing, should be entitled to communicate with the other Court, with or without counsel present, for the purpose of determining whether coordinated orders could be made by both Courts and to coordinate and resolve any procedural or nonsubstantive matters relating to the joint hearing.

Guideline 10

The Court should, except upon proper objection on valid grounds and then only to the extent of such objection, recognize and accept as authentic the provisions of statutes, statutory or administrative regulations, and rules of court of general application applicable to the proceedings in the other jurisdiction without the need for further proof or exemplification thereof.

Guideline 11

The Court should, except upon proper objection on valid grounds and then only to the extent of such objection, accept that Orders made in the proceedings in the other jurisdiction were duly and properly made or entered on or about their respective dates and accept that such Orders require no further proof or exemplification for purposes of the proceedings before it, subject to all such proper reservations as in the opinion of the Court are appropriate regarding proceedings by way of appeal or review that are actually pending in respect of any such Orders.

Guideline 12

The Court may coordinate proceedings before it with proceedings in another jurisdiction by establishing a Service List that may include parties that are entitled to receive notice of proceedings before the Court in the other jurisdiction ("Non-Resident Parties"). All notices, applications, motions, and other materials served for purposes of the proceedings before the Court may be ordered to also be provided to or served on the Non-Resident Parties by making such materials available electronically in a publicly accessible system or by facsimile

transmission, certified or registered mail or delivery by courier, or in such other manner as may be directed by the Court in accordance with the procedures applicable in the Court.

Guideline 13

The Court may issue an Order or issue Directions permitting the foreign Insolvency Administrator or a representative of creditors in the proceedings in the other jurisdiction or an authorized Representative of the Court in the other jurisdiction to appear and be heard by the Court without thereby becoming subject to the jurisdiction of the Court.

Guideline 14

The Court may direct that any stay of proceedings affecting the parties before it shall, subject to further order of the Court, not apply to applications or motions brought by such parties before the other Court or that relief be granted to permit such parties to bring such applications or motions before the other Court on such terms and conditions as it considers appropriate. Court-to-Court communications in accordance with Guidelines 6 and 7 hereof may take place if an application or motion brought before the Court affects or might affect issues or proceedings in the Court in the other jurisdiction.

Guideline 15

A Court may communicate with a Court in another jurisdiction or with an authorized Representative of such Court in the manner prescribed by these Guidelines for purposes of coordinating and harmonizing proceedings before it with proceedings in the other jurisdiction regardless of the form of the proceedings before it or before the other Court wherever there is commonality among the issues and/or the parties in the proceedings. The Court should, absent compelling reasons to the contrary, so communicate with the Court in the other jurisdiction where the interests of justice so require.

Guideline 16

Directions issued by the Court under these Guidelines are subject to such amendments, modifications, and extensions as may be considered appropriate by the Court for the purposes described above and to reflect the changes and developments from time to time in the proceedings before it and before the other Court. Any Directions may be supplemented, modified, and restated from time to time and such modifications, amendments, and restatements should become effective upon being accepted by both Courts. If either Court intends to supplement, change, or abrogate Directions issued under these Guidelines in the absence of joint approval by both Courts, the Court should give the other Courts involved reasonable notice of its intention to do so.

Guideline 17

Arrangements contemplated under these Guidelines do not constitute a compromise or waiver by the Court of any powers, responsibilities, or authority and do not constitute a substantive determination of any matter in controversy before the Court or before the other Court nor a waiver by any of the parties of any of their substantive rights and claims or a diminution of the effect of any of the Orders made by the Court or the other Court.