Using Chapter 15 to Overcome U.S. Securities Law Impediments to Effective Ancillary Relief in Cross-Border Reorganizations

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The U.S. capital markets provide a fertile resource for non-U.S. enterprises to raise capital through the issuance of securities to U.S. investors. When a foreign enterprise subsequently needs the benefit of insolvency proceedings in order to restructure its obligations to U.S. investors, the U.S. Bankruptcy Code[1] provides two mechanisms to enforce such a restructuring in the United States.[2] First, the foreign enterprise can reorganize its obligations under a foreign (usually its home country's) insolvency regime and seek assistance under new Chapter 15 to have the effect of such foreign proceeding "recognized" in the United States. Second, the foreign enterprise may directly file for Chapter 11 relief in the United States, either with or without concurrently seeking insolvency relief in its home jurisdiction.[3] In either case, the U.S. securities laws continue to apply unless there is specific statutory or judicial relief.

Both Chapter 11 and Chapter 15 are designed to facilitate business reorganizations, and in the case of Chapter 15, specifically to promote such reorganizations that occur in the cross-border context as a matter of international comity.[4] Given the continuing applicability of U.S. securities laws, but recognizing that full compliance with those laws could hinder reorganization efforts, Chapter 11 includes § 1145 of the Bankruptcy Code,[5] which exempts domestic Chapter 11 reorganizations from the registration requirement of the Securities and Exchange Act of 1933.[6] This "bankruptcy exemption" was enacted to advance the congressional policy favoring business reorganizations by relieving domestic debtors of the burden of SEC

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registration, which would impose an unnecessary layer of regulatory oversight that would result in needless cost and delay, especially given that Chapter 11 disclosure statements are required to contain substantial information that approximates in many respects the disclosure required for a registered securities offerings under the U.S. securities laws.[7]

However, in the context of ancillary proceedings, Congress has not provided a similar automatic "bankruptcy exemption" for cross-border reorganizations involving U.S. investors in securities. As a result, cross-border reorganizations have historically been burdened with strict compliance with U.S. securities laws (i.e., SEC registration or qualifying for a registration exemption other than § 1145). This burden can pose a substantial (and in some instances insurmountable) obstacle to the successful implementation of a foreign reorganization proceeding, even where such foreign proceeding otherwise deserves recognition in the United States under the U.S. Bankruptcy Code and principles of international comity.[8]

The recent § 304 proceeding[9] relating to the restructuring of Multicanal S.A., a large Argentine cable company, provides a striking example of how U.S. securities laws complications can substantially impair a valid foreign reorganization proceeding. Multicanal sought to implement a financial reorganization under an Argentine procedure known as an "acuerdo preventive extrajudicial" (or "APE," pronounced "ah-pay"), which is similar in key respects to a "prepackaged" Chapter 11 reorganization.[10] After obtaining approval by the Argentine court overseeing the APE (which approval was affirmed by the Argentine Supreme Court) and obtaining rulings by two U.S. courts that the APE provided the essential bankruptcy protections necessary to be granted comity under § 304 of the U.S. Bankruptcy Code (subject to one condition), Multicanal's restructuring was nonetheless halted by extensive litigation regarding how Multicanal would implement the court-approved restructuring (which involved an exchange of securities with U.S. investors) in compliance with the registration requirements of the U.S. securities laws.[11]

The *Multicanal* case exposes a gap in the congressional policy underlying former § 304 that, on the one hand, favored granting international comity to foreign reorganization proceedings but on the other hand, did not include a securities law exemption similar to § 1145 with respect to solicitations of U.S. investors.[12] However, in the author's view, Congress has filled this void through the broad discretionary powers granted to courts under new Chapter 15, which should permit foreign enterprises to obtain an expeditious judicial determination that an exemption from the

registration requirements of the U.S. securities laws will apply in appropriate cross-border cases. This article explores how these new powers can be used to apply the § 1145 and § 3(a)(10) exemptions to foreign reorganization proceedings entitled to U.S. recognition to avoid unnecessarily burdening (or worse, thwarting) such reorganizations due to U.S. securities laws complications.[13]

I. THE § 1145 EXEMPTION

1. Section 1145's Apparent Limitations

By its terms, § 1145 exempts, among other things, any "offer or sale under a plan of a security of the debtor… in exchange for a claim against… the debtor" from the registration requirement of the U.S. securities laws.[14] This language clearly applies to securities issued by a debtor pursuant to a plan of reorganization under Chapter 11 of the U.S. Bankruptcy Code. Congress has also expressly provided that § 1145 applies to securities offered or sold under a municipal debt adjustment plan under Chapter 9 of the U.S. Bankruptcy Code.[15] However, there is no statutory language expressly applying § 1145 automatically to securities issued in connection with a Chapter 15 case (or a proceeding under former § 304).

Indeed, § 1145's reference to securities offered or sold "under a plan" could be interpreted to limit its application to securities issued "under" a Chapter 11 or a Chapter 9 plan. Arguably, a technical distinction can be found in the fact that, in the Chapter 15 context, the securities are offered and sold "under" the foreign reorganization "plan," not a plan "under" the U.S. Bankruptcy Code.[16] However, granting recognition of a foreign reorganization proceeding is also, in essence, an "approval" of the securities exchanged under such plan granted in a case "under" Chapter 15.[17] Thus it is not clear that § 1145 provides an "automatic" exemption from the registration requirement of the U.S. securities laws to a foreign enterprise reorganizing under foreign insolvency law where such foreign proceeding is recognized in the United States through a Chapter 15 case.

2. Using Chapter 15 Powers to Apply § 1145

Chapter 15, which was enacted for the purpose of, among other things, facilitating foreign debt restructurings, does not refer to § 1145 or the U.S. securities laws. Nonetheless, Chapter 15 provides courts with broad discretionary powers to fashion appropriate relief to give effect to Chapter 15's purpose. Arguably, those powers can be used to extend the

§ 1145 exemption to foreign reorganizations in appropriate circumstances.[18] The following discussion first examines the statutory bases under Chapter 15 for extending the § 1145 exemption and then explores the policy and substantive requirements (most importantly the adequate disclosure requirement) for such an extension.

Section 1501 of the U.S. Bankruptcy Code states that Chapter 15 is intended to:

> provide effective mechanisms for dealing with cases of cross-border insolvency with the objectives of (1) cooperation… in cross-border insolvency cases; (2) *greater legal certainty for trade and investment*; (3) *fair and efficient administration of cross-border insolvencies*…; (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.[19]

Chapter 15 provides several layers of relief that may be granted to foreign enterprises once the U.S. court has "recognized" a foreign insolvency proceeding under Chapter 15.[20] Through § 1521, Congress authorized courts to "grant any appropriate relief" that is "necessary to effectuate the purpose of [Chapter 15] and to protect the assets of the debtor or the interests of the creditors."[21] Section 1521 provides an illustrative list of "appropriate relief," which includes "granting *any additional relief that may be available to a trustee*" except for certain avoidance powers available to a trustee under the U.S. Bankruptcy Code.[22] In other words, § 1521 would appear to provide the court with discretion to apply any provision of the U.S. Bankruptcy Code providing a right to relief to a "trustee" (except for certain avoidance powers) where it would be "appropriate" to advance Chapter 15's purpose.[23] Chapter 15 defines "trustee" to mean "a trustee, a debtor in possession under any chapter of this title, or a debtor under chapter 9."[24]

Section 1145 relief is frequently invoked by Chapter 11 trustees/debtors-in-possession and Chapter 9 debtors. Indeed, Chapter 11 confirmation orders commonly include express provisions determining that the § 1145 exemption covers securities issued under a Chapter 11 plan. Such confirmation order provisions are, in essence, declaratory relief that § 1145 applies to the securities involved in the Chapter 11 plan. It logically follows that § 1521(a) should be interpreted to permit application of § 1145 under appropriate circumstances.

Moreover, the scope of relief available under § 1521 is not limited to the types of relief listed in that section (such as "relief that may be available to a trustee."). By its terms, § 1521 permits a court to order any relief that it, in its discretion, deems "appropriate… *including*" the seven types of relief enumerated therein.[25] The term "including" used in § 1521 before the list of relief that may be granted is to be interpreted as "illustrative," not limiting or "exclusive."[26] Thus, even if § 1145 did not fit into any of the specific types of relief listed in § 1521(a), that section could still be interpreted to support application of § 1145 where the § 1521(a) standard is met.

Thus, § 1521(a) should empower a court to exercise its discretion to extend § 1145 relief to a foreign enterprise where "appropriate" under the circumstances and "necessary to effectuate" Chapter 15's purposes of, among other things, "facilitating the rescue of troubled businesses" and protecting the interests of creditors. As discussed below, the crucial issue regarding whether application of the § 1145 exemption is appropriate is whether the disclosure used by the foreign enterprise in connection with its reorganization is adequate.

In addition, § 1507 provides courts with expansive discretionary powers to provide "additional assistance" to the foreign enterprise in a Chapter 15 proceeding. That section provides:

> Subject to the specific limitations stated elsewhere in this chapter the court, if recognition is granted, *may provide additional assistance* to a foreign representative *under this title* or under other laws of the United States.[27]

Courts are directed to consider "principles of comity" and certain other statutory factors (which largely duplicate the general factors for granting injunctive relief under former § 304) in determining whether to grant such "additional assistance."[28] The U.S. Bankruptcy Code does not define what the term "additional assistance" means, but this provision is understood to import all of the relief that was previously determined to be available under former § 304 of the Bankruptcy Code, which courts had interpreted to provide virtually "blank check" authority to craft relief in aid of a foreign insolvency proceeding.[29] The power to grant "additional assistance… *under this title*" literally encompasses assistance under § 1145, which, like Chapter 15, is codified "under title 11" of the United States Code.[30]

As noted, the U.S. Bankruptcy Code does not incorporate § 1145 into Chapter 15 cases in the same direct and automatic manner that it is incorporated into Chapter 9 cases. Structurally, Chapter 9 expressly incorporates § 1145 (along with 75 other specific statutory provisions of Title 11) to render it applicable in Chapter 9 cases. This makes sense since Chapter 9 establishes the procedures and substantive rules for a main domestic proceeding to restructure municipalities, including the "adequate disclosure" requirement of § 1125, the statutory companion to § 1145.[31] On the other hand, Chapter 15 specifically incorporates some provisions of Title 11 that are to automatically apply upon "recognition" (e.g., §§ 362, 363)[32] and specifically excludes application of others (e.g., avoidance powers under §§ 547 & 548).[33] In addition, recognizing that a Chapter 15 case is an ancillary proceeding designed to support foreign plenary proceeding, Congress granted courts broad discretionary powers to grant any relief appropriate under the circumstances, including an incorporation in §§ 1507 and 1521(a)(7) of all rights of trustee and all other assistance under Title 11 other than the provisions of Title 11 specifically excluded by Chapter 15.[34]

It makes sense that § 1145 is not among the "automatic" statutory provisions applicable to a foreign enterprise's reorganization upon "recognition" in a Chapter 15 case. The automatic relief set forth in § 1520 simply provides specific minimum expedited protections to aid a foreign proceeding that satisfies the relaxed statutory prerequisites for recognition under Chapter 15. The automatic provisions focus upon the protection and use of the foreign enterprise's assets. Unlike the procedure to obtain recognition under § 304, which required a more extensive examination of the substantive and procedural aspects of the foreign proceeding under the former § 304(c) factors, Chapter 15 reduces the process to obtain the automatic statutory relief to a streamlined documentary process unless it is challenged by a party-in-interest.[35] After all, a Chapter 15 case is not the "main" insolvency proceeding, but rather a derivative proceeding in aid of the central insolvency proceeding reorganizing the foreign enterprise's affairs outside of the United States.

Additional proceedings, which examine more than this minimal documentary showing, are required to obtain relief beyond the "automatic" statutory relief.[36] Thus, a foreign enterprise would be required to show that applying § 1145 is appropriate under the circumstances because: (a) there is "adequate disclosure" (which, as discussed below, is necessary to be consistent with the requirements of § 1145's statutory counterpart,

§ 1125); and (b) applying the exemption is either (1) "necessary to effectuate the purpose of… chapter [15] and to protect the assets of the debtor or the interests of creditors" pursuant to § 1521,[37] or (2) "consistent with the principles of comity" and will satisfy the former § 304 factors recodified in § 1507(b).

Requiring this additional showing is proper and congruent with the congressional intent behind § 1145 and Chapter 15. The § 1145 "bankruptcy exemption" results from a pragmatic congressional policy compromise. First, Congress recognized that bankruptcy proceedings can provide a substitute for the disclosure protections ordinarily supplied through the SEC registration process. As a leading treatise states:

> The securities laws are concerned primarily with the quality of information available to persons purchasing and selling securities. Sections 1125 and 1126 of the Bankruptcy Code establish certain disclosure requirements with respect to the solicitation of acceptances or rejections of a plan of reorganization. These include the requirement that a disclosure statement… contain "adequate information" creating an environment of regulated disclosure albeit different from the requirements of the securities laws.[38]

The legislative history to the 1978 enactment of the Bankruptcy Code indicates that Congress sought to fix inefficiencies in the various reorganization proceedings under the former Bankruptcy Act (which, in the case of public companies, involved extensive SEC involvement and valuation determinations) by crafting Chapter 11 as a proceeding focused upon disclosure and creditor choice. The House Report states:

> The premise underlying the consolidated chapter 11 of this bill is the same as the premise of the securities law. If adequate disclosure is provided to all creditors and stockholders whose rights are to be affected, then they should be able to make an informed judgment of their own, rather than having the court or the Securities and Exchange Commission inform them in advance of whether the proposed plan is a good plan. Therefore the key to the consolidated chapter is the disclosure section… The bill permits the disclosure statement to be approved without compliance with the very strict rules [of the U.S. securities laws because]…. court supervision of the disclosure statement will protect the public investor from any serious inadequacies in the disclosure statement.[39]

Congress also recognized that, absent a "bankruptcy exemption," U.S. securities laws issues would unnecessarily burden efficient reorganizations, which are the bedrock policy objective underlying Chapter 11.[40] Section 1145's legislative history states:

> Present law presents a creditor with great uncertainty if he wants to sell securities received in a bankruptcy reorganization. This uncertainty acts as a retarding force on the flexibility of the reorganization process…. From a bankruptcy perspective, unless creditors are permitted to dispose of securities issued under the plan in a public market without filing a registration statement, the flexibility of the plan is impaired.[41]

Section 1145 represents a congressional compromise that balances the goals of regulating disclosure relating to the offers and sales of securities and the need to promote reorganizations for troubled businesses. Congress concluded that § 1145 is "necessary because the rigidity of the securities laws conflicts for the need for flexibility in bankruptcy case."[42]

> Bankruptcy law cuts across many others [sic] areas of the law. in the interaction between bankruptcy law and other laws, each bends somewhat to accommodate the policies of the other. The disclosure provisions of the bill are a compromise between the strict requirements of the securities laws and the near-absolute freedom of the present bankruptcy laws. *A compromise is essential. If nothing is to change when a company becomes insolvent, then the bankruptcy laws can offer that company little help.* The company would be no better off proceeding under the bankruptcy laws than under generally applicable law. *The compromise proposed in this section is a reasonable one that accounts for both the interest of the creditors in a successful reorganization and the interest of the public in preventing securities fraud*.[43]

This compromise is equally, if not more, appropriate in the cross-border reorganization context where adequate disclosure exists and strict enforcement of the registration requirement of the U.S. securities laws would burden (or worse, preclude) the foreign reorganization process.[44] Not applying § 1145 would directly contradict Congress's stated goal of enacting Chapter 15 to promote cooperation in cross-border cases and "provide greater legal certainty for trade and investment" to "facili-

tat[e]… the rescue of troubled businesses."[45] It would also advance Chapter 15's goal of "protecting the interests of all creditors" by eliminating uncertainty created by the U.S. securities laws, which often force foreign enterprises to adopt complicated structures in their reorganization plans that sometimes result in different and potentially adverse treatment of U.S. investors.[46] Moreover, an interpretation of §§ 1507 and 1521 that would force foreign enterprises to file Chapter 11 cases solely to qualify for the § 1145 exemption would undermine the fundamental purpose of ancillary relief—to provide foreign insolvency proceedings effective relief in the United States without forcing foreign enterprises to undertake the burden of commencing a plenary Chapter 11 case.[47]

Thus, where a foreign enterprise can show that under the circumstances of the case, strict enforcement of the registration requirement of the U.S. securities laws is unnecessary and burdensome because its restructuring will already provide adequate disclosure, a court should have the power to exercise its discretion to apply the § 1145 exemption in a Chapter 15 case.

The efficacy of this result is illustrated by Multicanal's § 304 case, which was initiated before Congress enacted Chapter 15. There the U.S. courts determined that Multicanal's restructuring satisfied (subject to Multicanal's agreement to implement a cure for certain discrimination) all of the § 304 requirements and was entitled to recognition and enforcement in the United States but for the issue of whether Multicanal was required to register the securities to be issued to U.S. investors under its reorganization plan. Furthermore, the U.S. courts reviewed Multicanal's disclosure materials and ruled that such materials were "extensive, voluminous and detailed,"[48] similar to the kind of disclosure used in large U.S. tender and exchange offers, and that *such disclosure was "adequate to permit a vote" on the plan.*[49] Nonetheless, the unresolved U.S. securities laws issues eclipsed all other issues and prevented implementation of a reorganization, the merits of which had been approved by a supermajority of Multicanal's creditors as well as numerous courts in the United States and Argentina. In essence, the U.S. securities laws issues aggressively pursued by a hold-out creditor became the "tail that wagged the dog" in the reorganization.

This result could be avoided under Chapter 15. In a Chapter 15 case, the court could have exercised its discretion under §§ 1507 and/or 1521 to apply § 1145 to Multicanal's restructuring, particularly in light of its express holding that disclosure was adequate for the vote on the reorgani-

zation plan. Doing so would be entirely consistent with Chapter 15's goal of facilitating foreign reorganization proceedings and would do no violence to the U.S. securities laws policy regarding adequate disclosure. The practical difference in Multicanal's case would be dramatic. Instead of being mired down in more than a year of additional litigation relating to U.S. securities laws issues, a Chapter 15 order would have enabled Multicanal to consummate its restructuring and make distributions to its creditors in a timely manner in accordance with such creditors' reasonable expectations.

II. THE § 3(a)(10) EXEMPTION

Chapter 15 can be used in a similar manner to obtain a judicial declaration that the § 3(a)(10) exemption applies to the securities to be issued in connection with a foreign reorganization proceeding if § 1145 is not available.[50] Section 3(a)(10) provides that the registration requirement of the 1933 Securities Act does not apply:

> [e]xcept with respect to a security exchanged in a case under Title 11, [to] any security which is issued in exchange for one or more bona fide outstanding securities, claims or property interests, or partly in such exchange and partly for cash, where the terms and conditions of such issuance and exchange are approved, after a hearing upon the fairness of such terms and conditions at which all persons to whom it is proposed to issue securities in such exchange shall have the right to appear, by any court, or by any official or agency of the United States, or by any State or Territorial banking or insurance commission or other governmental authority expressly authorized by law to grant such approval.[51]

According to the most recent decision in the *Multicanal* case, bankruptcy courts can exercise their jurisdiction under former § 304 (where still applicable) and under new Chapter 15 to hold the "fairness hearing" required by § 3(a)(10) and if appropriate, issue a declaration that the § 3(a)(10) exemption applies.[52] Generally speaking, the § 3(a)(10) exemption imposes two types of conditions: (a) procedural fairness requirements and (b) substantive fairness requirements.[53]

Procedurally, the Chapter 15 court must actually hold a "fairness hearing" and be apprised by the foreign enterprise that such hearing is being held for purposes of § 3(a)(10) before such hearing is held.[54] Adequate notice must be given to every person who may be issued securities under

the reorganization of the § 3(a)(10) hearing and the hearing must be open for participation by any person who may be issued the securities.[55]

Substantively, the *Multicanal* decision holds that the court must examine the "substantive fairness" of the terms and conditions of the exchange to the parties who will receive securities under the reorganization by examining the "value" involved in the exchange.[56] The court specifically rejected the notion that § 3(a)(10) could be satisfied purely by examining procedural fairness and adequacy of disclosure. Instead, the court suggested, but did not definitively rule, that "substantive fairness" in the context of a § 304 proceeding relating to a foreign reorganization proceeding should be guided by the requirements for confirmation of a Chapter 11 plan under § 1129 of the Bankruptcy Code (including the "best interests test").[57] On the other hand, the court indicated that a "full valuation hearing" would not be required.[58] The issue was never decided, because the case was ultimately settled shortly after this decision.

III. IMPLEMENTATION CONSIDERATIONS

Obviously, implementation of a strategy to seek § 1145 or § 3(a)(10) relief under Chapter 15 first requires commencement of a Chapter 15 case. Since resolving this U.S. securities laws issue will drive the structure of the foreign enterprise's solicitation of investors (one of the most significant procedural aspects of the foreign reorganization proceeding), it should be resolved at the earliest possible moment. Accordingly, a Chapter 15 case should be commenced as soon as possible, after commencement of the foreign proceeding.[59]

A Chapter 15 petition is a relatively simple document requiring basic documentary proof of the existence of the commencement of the foreign proceeding and the appointment of the foreign enterprise's "foreign representative."[60] To obtain § 1145/§ 3(a)(10) relief, the petition will need to be accompanied by additional evidence to persuade the court that it is appropriate to exercise its discretionary powers under the circumstances. As noted above, the court's discretionary powers derive from two sources: § 1507 and § 1521.

A request under § 1521 will require a showing that relief (a) is "necessary to effectuate the purpose" of Chapter 15, and (b) will protect the foreign enterprise's assets or its creditors. Clearly, a valid and efficient solicitation of the foreign enterprise's investors (without collateral risks of challenge/liability under U.S. securities laws) is "necessary" to effectuate a reorganization of a troubled business, which is one of Chapter 15's stat-

ed purposes. Such a solicitation will also protect the foreign enterprise's assets and its creditors by facilitating a faster and more efficient reorganization process. For example, Multicanal's creditors would have received their distributions long ago rather than being forced to wait while U.S. securities laws issues continue to be litigated. In addition, certainty as to U.S. securities laws issues clearly and substantially benefits creditors by providing them with securities that they can freely sell (unless a creditor is deemed an "underwriter") after the reorganization.[61]

Most importantly, a § 1521 request for § 1145 relief should include proof that the disclosure involved in the foreign proceeding's solicitation process will be adequate under the circumstances to justify an exemption from the U.S. securities laws. Such disclosure need not be identical to the disclosure that would be used in a domestic Chapter 11 reorganization as required by § 1125 of the U.S. Bankruptcy Code. In the Chapter 15 context, the foreign proceeding's process does not need to be identical to the U.S. process to be recognized as a matter of international comity.[62] Nonetheless, such disclosure should provide sufficient information for the foreign enterprise's stakeholders to make an informed investment decision regarding the reorganization plan, which is the fundamental policy underlying the U.S. securities laws and §§ 1125 and 1145 of the U.S. Bankruptcy Code.[63] Accordingly, disclosure should be modeled upon the type of disclosure statement that would be used in a similar domestic case under Chapter 11 with appropriate modifications for the circumstances of the case.

Where § 3(a)(10) relief is sought, the foreign enterprise will also need to comply with the substantive and procedural requirements of that exemption. Ample notice specifically advising the court and investors of the § 3(a)(10) hearing is required. Substantively, the foreign enterprise must be prepared to establish "substantive fairness," though the contours of such showing are not entirely clear.[64] The *Multicanal* decision suggests that a "value" analysis that considers § 1129 requirements might be required. A showing of adequate disclosure regarding the terms of the restructuring, coupled with the requisite creditor consents, might arguably also satisfy this requirement because the registration requirement of the U.S. securities laws is primarily concerned with adequate disclosure to permit an informed investment decision.[65]

A request under § 1507 will require a showing that granting relief (a) is "consistent with international comity" and (b) will satisfy the former § 304(c) factors that have been recodified under § 1507(b).[66] Arguably,

§ 1507 imposes a more substantial evidentiary burden because the § 1507(b) factors require a broader examination of the substantive and procedural aspects of the foreign proceeding than is required by § 1521. Again, however, the foreign proceeding does not need to be identical to a U.S. bankruptcy proceeding, but it must not be "repugnant" to U.S. law.[67] In addition, as discussed above, the foreign enterprise should also provide the court with comfort that there will be adequate disclosure and in the context of a § 3(a)(10) request, may need to make a "value"-based showing of fairness and comply with the strict notice requirements for the "fairness hearing."

As noted, the Chapter 15 case and its request to apply § 1145 and/or § 3(a)(10) should be filed at the earliest possible moment after commencement of the foreign proceeding. Relief under §§ 1507 and 1521 can only be granted when the foreign proceeding has been recognized "after notice and a hearing" pursuant to § 1517 of the U.S. Bankruptcy Code.[68] Where appropriate, a debtor may seek to expedite the recognition process, particularly in light of the fact that Chapter 15 directs courts to rule upon a Chapter 15 petition at the "earliest possible time."[69] In cases of acute exigency, a party may also seek interim relief, though the more prudent course with respect to the registration exemption issues would be to delay actual solicitation until after a final order has been entered.[70]

In uncontested Chapter 15 cases, a request for § 1145/§ 3(a)(10) relief should be decided expeditiously. Accordingly, such a strategy should resolve any U.S. securities laws registration issue on a faster timeframe than might result from seeking SEC registration or an SEC no-action letter regarding the availability of a registration exemption, both of which can be lengthy bureaucratic processes. It should be noted, however, that the Chapter 15 process would likely take considerably longer if there were any significant opposition to the foreign enterprise's reorganization. As the *Multicanal* case illustrates, a determined holdout creditor can challenge a foreign enterprise's restructuring through extensive litigation that can impose significant delay.

III. CONCLUSION

As the foregoing illustrates, the broad and flexible powers to grant discretionary relief under new Chapter 15 should be available to overcome the U.S. securities laws impediments to effective ancillary relief where the issuance of securities is involved. Using these powers to exempt the offer and sale of securities in connection with a foreign reorganization

proceeding that involves adequate disclosure would be a prudent exercise of judicial power that would advance Chapter 15's goal of facilitating foreign reorganizations without compromising the U.S. securities laws' important objective of regulating disclosure to prevent securities fraud.

Research References:

Norton Bankr. L. & Prac. 2d §§ 38:11, 152:16, 152:22, 152:22.1, 152:22.7; 8 Norton Bankr. L. & Prac. 2d 11 U.S.C. §§ 1145, 1501 to 1532; Bankr. Serv., L Ed §§ 45:624 to 45:633, 50A:1 to 50A:218

West's Key Number Digest, Bankruptcy ⚿ 2341, 3035, 3035.1

NOTES

1. See 11 U.S.C.A. § 101 et seq.

2. The success of these restructurings often depends upon the foreign enterprise's ability to enforce its restructuring in the United States because of, among other things, (a) the presence of material assets in the United States, (b) the presence of numerous U.S.-based creditors, (c) the foreign enterprise's need to obtain the cooperation and assistance of U.S.-based parties to consummate the restructuring in the most efficient manner (who might be hesitant if they faced the risk of litigation by disgruntled investors), and (d) the foreign enterprise's desire for legal finality so that it can do business in the United States and/or access the U.S. capital markets in the future without the risk of being sued by U.S. investors opposed to its restructuring.

3. For an extensive discussion of these U.S. Bankruptcy Code options available to foreign enterprises, see The Honorable Allan L. Gropper, Current Developments In International Insolvency Law: A United States Perspective, 15 J. Bankr. L. & Prac. 2 Art. 3 (April 2006).

4. See 11 U.S.C.A. § 1501 (stating that Chapter 15 was enacted, inter alia, to "facilitate[e] the rescue of financially troubled businesses, thereby protecting investment and preserving employment"); H.R. Rep. No. 595, 95th Cong. 1st Sess. 220 (1977) ("The purpose of a [Chapter 11] business reorganization case, unlike a liquidation, is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors and produce a return for its stockholders.").

5. 11 U.S.C.A. § 1145.

6. 15 U.S.C.A. § 77a et seq.

7. See H.R. Rep. No. 595, 95th Cong. 1st Sess. 228 (1977) (noting that § 1145 "permits the disclosure statement to be approved without the necessity for compliance with the very strict rules of Section 5 of the Securities Act of 1933 [because the cost of registration is often] prohibitive in a bankruptcy reorganization."); 8 Collier on Bankruptcy, ¶ 1145.01[1] (15th Ed. Revised) ("The justification for a relaxation of securities law registration requirements in connection with chapter 11 stems in part from the protections of chapter 11 itself, as well as the perceived unfairness of fettering participants in the chapter 11 process… with the added burdens of complying with the securities law requirements."); see also infra note 42.

8. See Honorable Allan L. Gropper, Memorandum on the Impact of the United States Securities Laws on the Restructuring of Non-U.S. Debt, 5, 9 (May 2003) (noting, before Chapter 15, that "the restrictions of the U.S. securities laws often impose burdens that may, in some cases, make a restructuring [of debt issued by a foreign enterprise] impossible. The U.S. securities laws may also make it impossible to restructure non-U.S. debt even in a foreign insolvency proceeding, forcing debtors to consider a filing in the United States that would otherwise be unnecessary.").

Hereinafter "Gropper, Impact of U.S. Securities Laws," which can be found at: http://www.iiiglobal.org/country/usa/Impact_of_the_United_States_Gropper.pdf.

9. Former § 304 of the U.S. Bankruptcy Code is the statutory predecessor to Chapter 15, which was repealed as part of the enactment of Chapter 15, effective as of October 17, 2005.

10. For a discussion regarding the similarities between the APE and U.S. prepacks, see In re Board of Directors of Multicanal S.A., 314 B.R. 486, 503-09 (Bankr. S.D. N.Y. 2004); see also In re Board of Directors of Telecom Argentina S.A., 2006 WL 686867 (Bankr. S.D. N.Y. 2006).

11. The Multicanal reorganization was aggressively resisted by a holdout creditor resulting in extensive litigation in the United States and Argentina. The U.S. litigation resulted in four published decisions, including: (a) In re Board of Directors of Multicanal S.A., 307 B.R. 384 (Bankr. S.D. N.Y. 2004), where the bankruptcy court held that § 316(b) of the Trust Indenture Act ("TIA") did not preclude § 304 relief relating to a restructuring of bonds issued under the TIA; (b) Multicanal S.A., 314 B.R. 486, where the bankruptcy court determined that Multicanal's APE satisfied § 304's requirements subject to implementation of a cure for discriminatory treatment of U.S. retail holders of the bonds; (c) Argentinian Recovery Co. LLC v. Board of Directors of Multicanal S.A., 331 B.R. 537, Fed. Sec. L. Rep. (CCH) P 93,584 (S.D. N.Y. 2005), where the district court affirmed the bankruptcy court's determinations but remanded the case to determine whether the cure could be implemented in a manner that complied with the registration requirements of the U.S. securities laws; and (d) In re Board of Directors of Multicanal S.A., 340 B.R. 154 (Bankr. S.D. N.Y. 2006), where the bankruptcy court ruled that it could hold a "fairness hearing" to determine whether issuance of securities under the APE qualified for the § 3(a)(10) exemption from the registration requirements of the U.S. securities laws.

12. See Gropper, Impact of U.S. Securities Laws at 1-10 (discussing complications that U.S. securities laws can impose upon the restructuring of foreign enterprises). These U.S. securities laws complications frequently arise because, as in the *Multicanal* case, some of the securities issued by the foreign enterprise are possessed by so-called "U.S. retail investors," who are U.S. based investors who are not "accredited investors" or "qualified institutional buyers" (a.k.a. "QIBs") under the U.S. securities laws. See Board of Directors of Multicanal, 340 B.R. 154 ("[T]he requirements of the United States securities laws may conflict with good faith efforts to restructure a foreign enterprise, leading in some cases (such as this one) to the conclusion that U.S. creditors who are not QIBs or accredited investors have to be treated differently from all others because of the requirements of our securities laws."); Multicanal S.A., 314 B.R. at 517-519 (discussing U.S. securities law problem regarding U.S. retail investors); Gropper, Impact of U.S. Securities Laws at 2. As a result, the private placement exemption under U.S. securities laws does not cover the solicitation of U.S. retail investors for purposes of the foreign enterprise's reorganization. For a further discussion of the complications raised by U.S. retail investors, see infra note 47.

13. Of course, other registration exemptions may be available to facilitate a foreign enterprise's restructuring. Popular exemptions include (1) the single issuer exchange offer exemption of § 3(a)(9) of the Securities Act of 1933 (the "Act"), see 15 U.S.C.A. § 77c(9); and (2) the "private placement" exemption of § 4(2) of the Act and Rule 144A and/or Regulation D issued by the SEC related thereto. However, each of these exemptions involve technical elements and limitations that may render them infeasible for some foreign enterprise restructurings. A discussion of each of these exemptions is beyond the scope of this article. For a comprehensive discussion of these exemptions in the context of foreign enterprise restructurings, see Gropper, Impact of U.S. Securities Laws at 2-3. Moreover, even where these exemptions are available, complying with their requirements imposes burdens on the foreign enterprise's solicitation process that are avoided in a Chapter 11 solicitation. For example, reliance upon the private placement exemption requires the foreign enterprise to determine which of its U.S. creditors are QIBs or "accredited investors" before soliciting votes upon its restructuring plan to avoid being deemed to have solicited U.S. retail investors. See Gropper, Impact of U.S. Securities Laws at 6; Multicanal S.A., 314 B.R. at 495, 517-518 (describing solicitation procedures used to comply with private placement restrictions). The solicitation documents used for U.S. investors in the Parmalat restructuring

(which occurred under Italian law with a § 304 proceeding in the United States) are a good example of the complexity of the solicitation process caused by U.S. securities laws concerns. See http://cp22.etdotcom.it/en/prospettoInformativo/Final%20US%20Supplemental%20Info%20Memo.pdf. By contrast, in a domestic Chapter 11 case, court approval of the disclosure statement is the only requirement imposed to satisfy the U.S. securities laws and the § 1145 exemption. There is no need to adopt complicated solicitation structures for different creditor groups, and all similarly situated creditors can be treated equally by receiving the same disclosure and the same consideration under the reorganization plan.

14. 11 U.S.C.A. § 1145(a)(1). The § 1145 exemption applies to both federal and state securities laws. 11 U.S.C.A. § 1145(a)(1). The exemption is subject to certain limitations, including an exception for securities that are issued to an "underwriter" as defined in 11 U.S.C.A. § 1145(b).

15. See 11 U.S.C.A. § 901 ("Sections…. 1145 of this title apply in a case under this chapter.").

16. Cf. Argentinian Recovery, 331 B.R. at 546 (noting that securities issued under an Argentine plan of reorganization were issued in a case under Argentine law, and therefore, for purposes of the § 3(a)(10) exemption, were not being issued in "a case under title 11" notwithstanding pendency of § 304 proceeding); Board of Directors of Multicanal, 340 B.R. 154 (in applying § 3(a)(10) noting that securities issued under APE reorganization plan were not exchanged "in a case under Title 11" and noting, in dicta, that if that were not the case, such securities would be prima facie eligible for the § 1145 exemption). These courts were interpreting the § 3(a)(10) exemption in an effort to extend comity to a foreign reorganization proceeding under former § 304. These courts were not considering whether § 1145 could be applied in a Chapter 15 case and these opinions should not be read to preclude such a result. In any event, if such a distinction were determined to render § 1145 per se inapplicable to Chapter 15 cases, then, as discussed infra in the section entitled "The Section 3(a)(10) Exemption," foreign enterprises still would be able to seek to have the court apply the § 3(a)(10) exemption.

17. Board of Directors of Multicanal, 340 B.R. 154, n.14 ("Recognition of a foreign insolvency proceeding under § 304 is also tantamount to 'approval.' Section 304 is premised on the grant of comity to a foreign proceeding." (citing authorities)).

18. As discussed infra in the section entitled "The Section 3(a)(10) Exemption," one court has already observed that the jurisdiction of a Chapter 15 case and these discretionary powers can be used to obtain a judicial declaration whether the § 3(a)(10) exemption from the registration requirement of the U.S. securities laws applies to a foreign reorganization proceeding. See Board of Directors of Multicanal S.A., 340 B.R. 154, n.17. This view of Chapter 15 jurisdiction is consistent with the Supreme Court's holdings that the Framers intended bankruptcy jurisdiction to be in rem in nature with the power to issue ancillary orders in aid of such jurisdiction. See Central Virginia Community College v. Katz, 126 S. Ct. 990, 1000, 163 L. Ed. 2d 945, 45 Bankr. Ct. Dec. (CRR) 254, 54 Collier Bankr. Cas. 2d (MB) 1233, Bankr. L. Rep. (CCH) P 80443 (U.S. 2006) ("The Framers would have understood that laws 'on the subject of Bankruptcies' included laws providing… for more than simple adjudications of rights in the res…. [C]ourts adjudicating disputes concerning bankrupts' estates historically have had the power to issue ancillary orders enforcing their *in rem* adjudications.").

19. 11 U.S.C.A. § 1501(a) (emphasis added).

20. See 11 U.S.C.A. § 1520 (providing certain automatic relief, including protection of the automatic stay under § 362 of the U.S. Bankruptcy Code); 11 U.S.C.A. § 1521 (providing discretionary relief that may be granted "where necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interest of the creditors"); 11 U.S.C.A. § 1507 (providing certain discretionary "additional assistance" that may be granted if certain factors are satisfied).

21. 11 U.S.C.A. § 1521(a).

22. 11 U.S.C.A. § 1521(a)(7). Notably, when seeking relief under § 1521(a)(7), the foreign enterprise does not need to meet the standards for the issuance of an injunction, which apply to other types of relief identified in § 1521(a). 11 U.S.C.A. § 1521(e).

23. Of course, not all relief available to a trustee would be "appropriate" in the Chapter 15 context. For example, relief available to a trustee that would affect the priority or claims allowance rules of the foreign proceeding would likely not be appropriate. Thus, § 510's subordination provisions, § 502's claims allowance rules, and § 503's administrative expense priority would likely interfere with the foreign proceeding and therefore not be appropriate. However, relief available to a trustee, such as § 1145 (and possibly § 1146's tax exemption), that promotes Chapter 15's goal of facilitating the foreign proceeding should be available where the circumstances otherwise justify.

24. 11 U.S.C.A. § 1502(6). Moreover, a debtor-in-possession is generally treated as the "trustee" in a Chapter 11 case where no trustee has been appointed. See 11 U.S.C.A. § 1107 ("Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights…. and shall perform all the functions and duties… of a trustee serving in a case under this chapter.").

25. 11 U.S.C.A. § 1521(a).

26. See 11 U.S.C.A. § 102(3) (use of terms "'includes' and 'including' [in Bankruptcy Code] are not limiting.").

27. 11 U.S.C.A. § 1507.

28. 11 U.S.C.A. § 1507(b). These factors set forth in § 1507(b) are substantially similar to the criteria previously required for granting ancillary relief under former § 304(c). 11 U.S.C.A. § 304(c) (providing similar factors). The only major change to the former § 304 standard is the exclusion of "comity" as a specific factor to clear up confusion that had resulted from § 304(c) mention of comity in the introductory language of § 304(c) and as a specific § 304(c) factor. See H.R. Rep. No. 109-31, 109th Congress, 1st Sess. 109 (2005). In contrast to the relief available under §§ 1519 and 1521, the language of § 1507 does not provide that "the standards, procedures and limitations applicable to an injunction" apply to relief granted under § 1507. Compare 11 U.S.C.A. § 1507 with 11 U.S.C.A. §§ 1519(e) & 1521(e).

29. See Westbrook, Multinational Enterprises in General Default: Chapter 15, the ALI Principles, and the EU Insolvency Regulation, 76 Am. Bankr. L.J. 1, 21 (2002) (indicating that Chapter 15 imported authority under former § 304 jurisprudence to the extent that it increases power of assistance under Chapter 15); H.R. Rep. No. 109-31, 109th Congress, 1st Sess. 109 (2005) ("[Section 1507] is intended to permit the further development of international cooperation begun under section 304, but is not to be the basis for denying or limiting relief otherwise available under this chapter."); Matter of Culmer, 25 B.R. 621, 624, 9 Bankr. Ct. Dec. (CRR) 1283, 7 Collier Bankr. Cas. 2d (MB) 867 (Bankr. S.D. N.Y. 1982) (holding that under § 304 courts were "free to mold appropriate relief in near blank check fashion."). It does not appear that any court has ever decided whether § 1145 could be applied in a § 304 proceeding. An argument could be made that the "blank check" discretionary relief available under § 304 could be used to extend such relief in appropriate circumstances, similar to those discussed herein.

30. One court has indicated that it believes the broad authority under § 1507(a) and § 1521(a) provides authority for a court to grant relief determining that the § 3(a)(10) exemption from registration under the U.S. securities laws applies to a foreign insolvency proceeding recognized under Chapter 15. See Board of Directors of Multicanal, 340 B.R. 154, n.17. There the court was considering its jurisdiction to issue a § 3(a)(10) determination in a § 304 proceeding and was not presented with any argument that § 1145 should apply. Again, as noted supra, note 23, it would not be appropriate to interpret § 1507(a)'s expansive language to render all provisions of Title 11 available in a Chapter 15 case.

31. See 11 U.S.C.A. § 901 (incorporating §§ 1125 and 1145).

32. See 11 U.S.C.A. § 1520(a) (incorporating, upon recognition, §§ 361, 362, 363, 549 & 552); see also 11 U.S.C.A. § 103(a) (incorporating §§ 307, 362(n), 555, 556, 557, 559, 560, 561 & 562).

33. 11 U.S.C.A. § 1521(a)(7). It should be noted that there is some inconsistency between the specific provisions of Chapter 15 and § 103 of the U.S. Bankruptcy Code, which provides general guidelines regarding the "applicability of chapters" of the U.S. Bankruptcy Code. See 11 U.S.C.A. § 103. For example, § 103(a) appears to provide that, of the various provisions of Chapters 1, 3, and 5 of the U.S. Bankruptcy Code, only the provisions of Chapter 1 and §§ 307, 362(n), 555 through 557, and 559 through 562 apply to Chapter 15 cases. 11 U.S.C.A. § 103(a). This is inconsistent with § 1520, which expressly provides that § 361, all of 362 (not simply § 362(n)), 363, 549, and 552 apply to Chapter 15 cases. See 11 U.S.C.A. § 1520(a); see also 11 U.S.C.A. § 1509(e) (providing that § 306 applies in Chapter 15 cases) and § 1522(d) (providing that § 322 applies to examiners appointed in Chapter 15 cases). Moreover, other provisions of § 103 would imply that no other provisions of Title 11 (including § 1145) apply to Chapter 15 cases. See e.g., 11 U.S.C.A. § 103(g) (providing that subchapters I-III of Chapter 11 apply only in Chapter 11 and Chapter 9 cases). This is patently inconsistent with Congress's express grant of broad discretionary powers to provide "additional assistance… under title 11" in § 1507(a) and "any appropriate relief" under § 1521. See 11 U.S.C.A. §§ 1507(a), 1521(a). It also directly conflicts with Chapter 15's provisions providing for the appointment of examiners, which expressly incorporate § 1104(d) and by necessity, impliedly incorporate other provisions of Chapter 11 governing examiners. See 11 U.S.C.A. § 1522(d) (incorporating § 1104(d)); see also 11 U.S.C.A. § 1521(a)(5) & (b) (providing for appointment of examiner); 11 U.S.C.A. § 1106 (duties of examiner). Applying § 103 literally would lead to the absurd result of rendering the express provisions of §§ 1507, 1521 and 1522 superfluous. The better interpretation is that § 103 simply supplements the Bankruptcy Code provisions made automatically applicable in a Chapter 15, but does not limit the provisions that may be incorporated pursuant Chapter 15's express language. The specific language of Chapter 15 should prevail over any conflicting general terms of § 103, particularly given Congress's mandate that any interpretation of Chapter 15 must "consider its international origin." 11 U.S.C.A. § 1508; See Collier ¶ 103.02, n.2 (noting that specific provisions of Chapter 13 should prevail over general provisions of other chapters made applicable through § 103); Collier ¶ 103.03[3] (noting that, notwithstanding § 103(b)'s mandate that certain Chapter 7 provisions only apply in Chapter 7 proceedings, numerous courts apply such Chapter 7 provisions in the Chapter 11 context).

34. For example, § 1507's sweeping power to grant "additional assistance… under… title [11] and other laws of the United States" is expressly "[s]ubject to the specific limitations stated elsewhere in [Chapter 15]." 11 U.S.C.A. § 1507(a). Therefore it could not be used to permit the use of U.S. avoidance powers in a Chapter 15 case. See 11 U.S.C.A. § 1521(a)(7). Additionally, relief under Chapter 15 may not be used to "enjoin a police or regulatory act of a governmental unit, including a criminal action or proceeding." 11 U.S.C.A. §§ 1519(d), 1521(d). This limitation should not preclude granting § 1145 relief to a foreign enterprise in a Chapter 15 proceeding. In the purely domestic context, the automatic stay under § 362 of the U.S. Bankruptcy Code similarly exempts actions by any "governmental unit… to enforce such governmental unit's… police and regulatory power…" 11 U.S.C.A. § 362(b)(4); see Collier ¶ 1521.05 (noting that § 1521(d) and § 1519(d) "exception[s] parallel[] the scope of the exceptions to the automatic stay contained in subsections 362(b)(1) and (4)."). But this limitation upon the injunctive power clearly does not preclude applying § 1145 in a Chapter 11 case. Moreover, a ruling that § 1145 applies to a particular reorganization is not technically "injunctive relief" but rather a declaration that the "bankruptcy exemption" crafted by Congress relieves a debtor from the registration requirements of the U.S. securities laws.

35. Westbrook, Multinational Enterprises in General Default, 76 Am. Bankr. L.J. at 14 ("Recognition of a foreign representative is presently a long and expensive process in many countries. Articles 15-17 of the Model law [i.e., §§ 1515 & 1517 of the Bankruptcy Code] are designed to make recognition as simple, fast and inexpensive as possible… recognition can be reduced to a simply documentary process unless challenged…"); Gropper, Current Developments, 15 J. Bankr. L. & Prac. 2 Art. 3 at 149 ("[T]he result of Chapter 15 in ancillary cases is that the ability of a for-

eign representative to gain recognition for a foreign main proceeding in the United States has been streamlined and simplified."). The petition must include (i) a decision commencing such foreign proceeding and appointing the foreign representative, (ii) a certificate of the foreign court affirming the existence of the foreign proceeding and the foreign representative's appointment, or (iii) in the absence of either of the foregoing, such other satisfactory evidence to establish the existence of the foreign proceeding and the foreign representative. 11 U.S.C.A. § 1515(a). Courts are entitled to presume the authenticity of the documents attached to the petition and are directed, "after notice and a hearing" to decide the issue of whether to recognize the foreign proceeding "at the earliest possible time." 11 U.S.C.A. § 1517(a) & (c).

36. 11 U.S.C.A. §§ 1521(a) & 1507.

37. 11 U.S.C.A. § 1521(a); see Collier ¶ 1521.01 (noting that § 1521(a) "conditions should not impose a high hurdle, they do require establishment of a nexus between the relief requested and a collective purpose relating to the assets of the debtor or creditor body as a whole.").

38. 8 Collier ¶ 1145.01[1]. See Argentinian Recovery, 331 B.R. at 545 ("As the Supreme Court has observed, '[t]he design of the [Securities Act] is to protect investors by promoting full disclosure of information thought necessary to informed investment decisions.'" (quoting Securities and Exchange Commission v. Ralston Purina Co., 346 U.S. 119, 124, 73 S. Ct. 981, 97 L. Ed. 1494 (1953)); 8 Collier, ¶ 1145.02[1][a] ("When interpreting § 1145(a)(1), both courts and the Securities and Exchange Commission have been mindful of the 'obvious purpose of section 1145 [which] is to encourage reorganization and to relieve bankrupt entities of the strict requirements of securities laws so long as adequate disclosure is made.'" (quoting In re Amarex, Inc., 53 B.R. 12, 14, Bankr. L. Rep. (CCH) P 70834 (Bankr. W.D. Okla. 1985))).

39. H.R. Rep. No. 595, 95th Cong. 1st Sess. 226-228 (1977). See H.R. Rep. No. 595, 95th Cong. 1st Sess. 227 ("The [disclosure statement] hearing required will be one of, if not the major procedural hearing in a reorganization case." (quotations omitted)). The Bankruptcy Code (primarily §§ 1125 & 1145) substantially diminished the role of the SEC in corporate reorganization proceedings. Under the Bankruptcy Act, the SEC played a significant role in the reorganization of public companies actively reviewing disclosure and even the economic fairness of debtor's reorganization plan. See H.R. Rep. No. 595, 95th Cong. 1st Sess. 221-222 (criticizing "stilted procedures… under which… the court and the Securities and Exchange Commission examine the plan of reorganization in great detail, no matter how long that takes, and the court values the business, a time-consuming and inherently uncertain process."). Under the Bankruptcy Code, the SEC's role was limited to having a "right to appear and be heard on the whether a disclosure statement contains adequate disclosure" but not the right to appeal any such determination by the bankruptcy court. H.R. Rep. No. 595, 95th Cong. 1st Sess. 228-229; 11 U.S.C.A. § 1125(d).

40. See H.R. Rep. No. 595, 95th Cong. 1st Sess. 228 (1977) (noting that § 1145 "permits the disclosure statement to be approved without the necessity for compliance with the very strict rules of Section 5 of the Securities Act of 1933… or relevant State securities laws… [because the cost of registration is often] prohibitive in a bankruptcy reorganization."); 8 Collier, ¶ 1145.02[1][a] ("When interpreting § 1145(a)(1), both courts and the Securities and Exchange Commission have been mindful of the 'obvious purpose of section 1145 [which] is to encourage reorganization and to relieve bankrupt entities of the strict requirements of securities laws so long as adequate disclosure is made.'" (quoting Amarex, Inc., 53 B.R. at 14); Collier, ¶ 1145.01[1] ("The justification for a relaxation of securities law registration requirements in connection with chapter 11 stems in part from the protections of chapter 11 itself, as well as the perceived unfairness of fettering participants in the chapter 11 process… with the added burdens of complying with the securities law requirements."). This bankruptcy/securities law policy has deep roots in § 1145's statutory predecessors, §§ 264 and 393 of the former Bankruptcy Act of 1898, which similarly exempted securities issued under a plan of reorganization under the Bankruptcy Act to avoid burdening the reorganization process. See Collier on Bankruptcy, ¶ 12.03 & n.8 (14th Ed.) ("The purpose of § 393 is to facilitate the offer and consummation of plans, to avoid undue burden on the debtor

and to prevent unduly burdensome expense." (citing Analysis of HR 12889, 74th Cong. 2d Sess. 55 (1936); Collier, ¶ 15.05 (discussing former § 264 exemption))).

41. H.R. Rep. No. 595, 95th Cong. 1st Sess. 236-38 (1977).

42. H.R. Rep. No. 595, 95th Cong. 1st Sess. 237.

43. H.R. Rep. No. 595, 95th Cong. 1st Sess. 228 (emphasis added).

44. Outside of the Chapter 15/§ 304 context, courts have recognized that principles of international comity play a role in interpreting and applying the U.S. securities laws. See Plessey Co. plc v. General Elec. Co. plc, 628 F. Supp. 477, Fed. Sec. L. Rep. (CCH) P 92486 (D. Del. 1986) (considerations of comity and policy should play a role in the interpretation of the jurisdictional reach of the Williams Act).

45. 11 U.S.C.A. § 1501(a).

46. See Board of Directors of Multicanal, 340 B.R. 154 ("[T]he requirements of the United States securities laws may conflict with good faith efforts to restructure a foreign enterprise, leading in some cases (such as this one) to the conclusion that U.S. creditors who are not QIBs or accredited investors have to be treated differently from all others because of the requirements of our securities laws."). Many times the limitations of the § 3(a)(9) and private placement exemptions (and the time constraints inherent to financial distress that render SEC registration impractical) force foreign enterprises to treat U.S. retail investors differently under the foreign reorganization plan because U.S. securities laws restrictions preclude the foreign enterprise from offering securities to such investors. For example, in the *Multicanal* case, the APE reorganization plan offered non-U.S. bondholders and U.S. bondholders who qualified as "qualified institutional buyers" (a.k.a. "QIB") the choice of selecting new securities, a cash payment or a combination of both in exchange for their existing bonds. Multicanal S.A., 314 B.R. at 517-520. U.S. retail investors, however, were offered only the cash payment option because they could not be offered securities. The bankruptcy court determined that U.S. retail investors were discriminated against because the securities options had become more valuable than the cash option made available to them. Multicanal S.A., 314 B.R. at 517. In the *Parmalat* case, similar securities laws concerns caused Parmalat to offer new securities to QIB investors in the United States but to only offer U.S. retail investors the cash proceeds from a sale of the new securities that they would have received were it not for the U.S. securities laws restrictions. In addition, because of the same U.S. securities laws concerns, Parmalat did not even solicit votes from U.S. retail holders. Instead, their affirmative vote in support of the reorganization plan was presumed as a matter of Italian insolvency law. Even the solicitation of QIB investors involved complicated procedures, including restricting the resale of the new securities received under the plan through restrictive legends on such securities, which could render such securities less liquid than securities issued to non-U.S. creditors that contained no such legend. In both cases, the foreign enterprises' solicitation of votes to accept or reject the reorganization plan included elaborate and expensive procedures to identify the U.S. investors (i.e, the QIBs) who could actually be solicited in accordance with U.S. securities laws. See supra note 13. Application of § 1145 would have significantly simplified these solicitations and provided the foreign enterprise with the ability to treat all similarly situated creditors equally by offering them the same consideration.

47. See Multicanal, 307 B.R. at 392 (noting that "fundamental purpose of § 304… is to avoid the inconvenience and expense of a full U.S. Chapter 11 proceeding." (citing In re Treco, 240 F.3d 148, 154, 37 Bankr. Ct. Dec. (CRR) 125 (2d Cir. 2001); Cunard S.S. Co. Ltd. v. Salen Reefer Services AB, 773 F.2d 452, 455, Bankr. L. Rep. (CCH) P 70762, 1986 A.M.C. 163, 2 Fed. R. Serv. 3d 1288 (2d Cir. 1985). Cf. Gropper, Impact of the U.S. Securities Laws, p. 5 & 9 (noting in a pre-Chapter 15 article that if securities issued in a "foreign proceeding" do not qualify for a non-§ 1145 registration exemption, then the foreign enterprise "may be compelled to file a proceeding in the United States in order to avail itself of the securities law exemption in § 1145 of the Bankruptcy Code.").

48. Further, the court noted that, as a "reporting company" under the U.S. securities laws, Multicanal had made an additional disclosure that was available through the company's periodic SEC filings. Multicanal S.A., 314 B.R. at 510.

49. Board of Directors of Multicanal, 340 B.R. 154.

50. Board of Directors of Multicanal, 340 B.R. 154, n.17 (stating that authority under §§ 1507(a) and 1521(a) could be used to hold a "fairness hearing" to determine whether the § 3(a)(10) exemption should apply to securities issued in connection with a foreign reorganization proceeding). As a practical matter, the § 3(a)(10) exemption should be used only as an alternative where the § 1145 exemption has been determined to be unavailable. A request for relief under § 1145 presents the simple issue of adequacy of disclosure. By contrast, § 3(a)(10) requests impose additional procedural and substantive requirements to satisfy the statute's "fairness" condition.

51. 15 U.S.C.A. § 77c(10). For a comprehensive discussion regarding the history and jurisprudence regarding § 3(a)(10), see Board of Directors of Multicanal, 340 B.R. 154. As noted above, the introductory language to § 3(a)(10) excludes it from applying to securities exchanged "in a case under Title 11." 15 U.S.C.A. § 77c(10). Chapter 15 is, of course, a "case under title 11." Some courts have overcome this language by drawing a distinction that the securities exchanged in an ancillary proceeding are technically "exchanged under a plan" in the foreign reorganization proceeding, not in a case under Title 11. See supra note 16.

52. See Board of Directors of Multicanal, 340 B.R. 154. In addition, the foreign court overseeing the foreign proceeding can hold the necessary § 3(a)(10) hearing where all applicable procedural and substantive § 3(a)(10) requirements are followed. Board of Directors of Multicanal, 340 B.R. 154.

53. Board of Directors of Multicanal, 340 B.R. 154.

54. See Board of Directors of Multicanal, 340 B.R. 154; SEC Revised Staff Bulletin No. 3 (providing SEC guidance regarding requirements of § 3(a)(10) exemption). A court cannot be informed "after the fact" that a particular hearing that should be treated as a § 3(a)(10) fairness hearing. In Multicanal, the bankruptcy court specifically rejected the foreign enterprise's argument that the extensive trial that resulted in the court conditionally granting § 304 relief could also suffice as the § 3(a)(10) "fairness hearing" because, purely as a procedural matter, neither the court nor other parties-in-interest were given notice of the § 3(a)(10) purpose before such trial. Board of Directors of Multicanal, 340 B.R. 154.

55. Board of Directors of Multicanal, 340 B.R. 154.

56. See Board of Directors of Multicanal, 340 B.R. 154.

57. Board of Directors of Multicanal, 340 B.R. 154.

58. Board of Directors of Multicanal, 340 B.R. 154.

59. Section 1505's requirements for a Chapter 15 petition and § 1517's requirements for "recognition" both require the existence of a pending "foreign proceeding." 11 U.S.C.A. §§ 1505, 1517. Therefore it is unlikely that a foreign enterprise could bring a ripe case for ancillary relief before commencement of the foreign proceeding.

60. U.S.C.A. § 1515(a); see supra note 36. Technically the "foreign representative" is the party with statutory standing to commence a Chapter 15 case in support of a foreign enterprise's reorganization proceeding. Often times, the board of directors of the foreign enterprise serves as the foreign representative. See Multicanal S.A., 314 B.R. at 501. For purposes of this article, references to the "foreign enterprise" are also intended to mean the "foreign representative" where appropriate.

61. See H.R. Rep. No. 595, 95th Cong. 1st Sess. 236-38 (1977) (citing uncertainty regarding U.S. securities laws as rationale for enacting § 1145 exemption because "[t]his uncertainty acts as a retarding force on the flexibility of the reorganization process…. From a bankruptcy perspective, unless creditors are permitted to dispose of securities issued under the plan in a public market without filing a registration statement, the flexibility of the plan is impaired."); Cf. Board of Directors of Multicanal, 340 B.R. 154. (discussing "uncertainty" regarding ability to remove

restrictive legends to permit freely tradable unregistered securities, which created discriminatory treatment because other creditors would receive registered and freely tradable securities that would be more valuable).

62. See Multicanal S.A., 314 B.R. at 503 ("[Comity contains] no requirement that the foreign proceedings 'be identical to United States bankruptcy proceedings'" (quoting Allstate Life Ins. Co. v. Linter Group Ltd., 994 F.2d 996, 999, 24 Bankr. Ct. Dec. (CRR) 644, Fed. Sec. L. Rep. (CCH) P 97459 (2d Cir. 1993))). Moreover, Congress intended the disclosure required under § 1125 to be a flexible standard. H.R. Rep. No. 595, 95th Cong. 1st Sess. 226-27 (1977) ("[The] adequate information… standard… is flexible on a case-by-case basis…. [Section 1125] permits flexibility in the preparation and distribution of disclosure statements."); 11 U.S.C.A. § 1125(a) (providing that disclosure statement must contain information "as far as is reasonably practical in light of the nature and history of the debtor and the condition of the debtor's books and records" and directing that "in determining whether a disclosure statement provides adequate information, the court shall consider the complexity of the case, the benefit of additional information to creditors… and the cost of providing additional information.").

63. See 11 U.S.C.A. § 1125(a)(1) (defining "adequate information" to be "information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and condition of the debtor's books and records… that would enable… a hypothetical investor of the relevant class to make an informed judgment about the plan…").

64. Such notice is in addition to (but might be combined with) the notice required for the commencement of a Chapter 15 case. See 11 U.S.C.A. § 1514 (providing statutory notice requirements); Fed. R. Bankr. P. 2002(q) (providing procedural rule notice requirements).

65. See supra discussion of § 1145 legislative history.

66. These factors include:

(a) just treatment of stakeholders,

(b) protection of U.S. creditors against prejudice and inconvenience in processing their claims,

(c) prevention of fraudulent and preferential transfers, and

(d) distributions substantially in accordance with the order prescribed in the U.S. Bankruptcy Code.

11 U.S.C.A. § 1507(b). The "opportunity for a fresh start" is an additional factor, but as under former § 304, it is likely only applicable to individual bankruptcies and is not relevant to a business reorganization.

67. Multicanal S.A., 314 B.R. at 503 ("There is no requirement that the foreign proceedings be identical to United States bankruptcy proceedings. The key issue is one of due process and the public policy of the forum." (quotations and citations omitted)); Petition of Brierley, 145 B.R. 151, 166, 23 Bankr. Ct. Dec. (CRR) 429, 27 Collier Bankr. Cas. 2d (MB) 828 (Bankr. S.D. N.Y. 1992) (noting that § 304 examines whether foreign proceedings are "repugnant to American laws and policies.").

68. See 11 U.S.C.A. § 1521(a) ("*Upon recognition*… the court may… grant appropriate relief…" (emphasis added)); 11 U.S.C.A. § 1507 ("the court, *if recognition is granted*, may provide additional assistance…" (emphasis added)). However, "notice and a hearing" does not necessarily mean that a trial or an evidentiary hearing is actually required. Indeed, under § 102 of the U.S. Bankruptcy Code, a hearing is not necessary if it is not timely requested by a party in interest. See 11 U.S.C.A. § 102(1)(B)(i).

69. 11 U.S.C.A. § 1517(c) ("A petition for recognition of a foreign proceeding shall be decided upon at the earliest possible time.").

70. 11 U.S.C.A. § 1519 (authorizing courts to provide interim relief upon the filing of Chapter 15 petition if standards for an injunction are met).