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Tertiary and Other Excluded Foreign Proceedings
Under Bankruptcy Code Chapter 15

The Honorable Samuel L. Bufford

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Tertiary and Other Excluded Foreign Proceedings Under Bankruptcy Code Chapter 15

by

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Congress enacted chapter 15 of the U.S. Bankruptcy Code in 2005 to provide a statutory framework (more elaborate than Bankruptcy Code § 304 that was enacted in 1978) to coordinate the bankruptcy cases of debtors with international dimensions. Chapter 15 is the U.S. version of a model law drafted by the U.N. Commission on International Trade Law ("UNCITRAL") that has been adopted in more than fifteen countries, including such major trading countries as Japan, Canada, Mexico, United Kingdom, Australia, and Spain.

Chapter 15 provides for the filing in the United States of an ancillary case to provide assistance to a foreign insolvency proceeding, and the recognition of the foreign proceeding as a foreign main proceeding or a foreign nonmain proceeding. While the recognition of a foreign proceeding as either a main or a nonmain proceeding gives the U.S. court broad powers to grant U.S. relief related to the foreign proceeding, the recognition of the foreign proceeding as a main proceeding immediately imposes the U.S. automatic stay under § 362, authorizes the foreign representative to operate the debtor's business in the United States pursuant to § 363, and authorizes the avoid-

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5See id. § 1517.
6See id. § 1521.
7See id. § 1520(a)(1).
8See id. § 1520(a)(3).
ance of postpetition transactions under § 549.9

A "tertiary proceeding" is a foreign insolvency proceeding that fails to qualify for recognition as either a main proceeding or a nonmain proceeding under chapter 15. To qualify for such recognition under chapter 15, and the UNCITRAL Model Law on which it is based, a foreign proceeding must be either a main proceeding or a nonmain proceeding.10

The terminology of "main proceeding" and "nonmain proceeding" in chapter 15 can be misleading.11 It suggests that these terms cover all foreign proceedings. They do not. Tertiary proceedings, which may include some very important cases, are neither main nor nonmain proceedings.

To qualify for recognition as a main proceeding, a foreign proceeding must be commenced in the country where the debtor’s Center of Main Interests ("CoMI") is located.12 A proceeding commenced in a country where the debtor has an establishment (but not its CoMI) qualifies for recognition as a nonmain proceeding. If a foreign proceeding is commenced in a country where the debtor’s CoMI is not located, and where it lacks an establishment, that proceeding cannot be recognized as either a main or a nonmain proceeding.13

There appear to be six principal kinds of foreign tertiary liquidation or reorganization proceedings that do not qualify for assistance with a chapter 15 case: (1) an ancillary foreign proceeding similar to a chapter 15 case itself; (2) a foreign proceeding for a foreign bank that has a branch or agency in the United States; (3) a foreign proceeding for a foreign railroad; (4) a foreign proceeding in a country where the debtor lacks both an establishment and its CoMI; (5) a proceeding for a foreign individual debtor eligible for a case under chapter 13; and (6) a proceeding for a foreign stockbroker or commodity broker.

By adopting these exclusions, chapter 15 retreats somewhat from the U.S. courts’ former hospitality toward providing ancillary relief in connection with foreign proceedings.

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9See id. § 1520(a)(2).
10See id. § 1517; In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Inc., 374 B.R. 122 (S.D.N.Y. 2008) (affirming bankruptcy court finding that the debtor’s Cayman Islands bankruptcy case was neither a main proceeding nor a nonmain proceeding, because the debtor’s center of main interests [hereinafter CoMI] was not located in the Grand Cayman Islands and it lacked an establishment there).
11It is unfortunate that both chapter 15, and the UNCITRAL Model Law on which it is based, use the terms "main" and "nonmain," which suggest that every foreign proceeding must be one or the other. A better choice would have been to use the term "secondary" instead of "nonmain," as is done in the European Union Regulation on Insolvency Proceedings. See Council Regulation 1346/2000, May 29, 2000, on insolvency proceedings, 2000 O.J. (L160) 1-18, as amended [hereinafter EIR], art. 3(3).
13See Krys v. Comm. of Unsecured Creditors (In re SphInX, Ltd.), 371 B.R. 10 (S.D.N.Y. 2007), affirming In re SphInX, Ltd., 352 B.R. 103 (Bankr. S.D.N.Y. 2005) (presenting a case where both the bankruptcy court and the district court apparently failed to understand that a tertiary case was possible).
with foreign bankruptcy cases. Prior to the adoption of chapter 15, U.S. courts were generally receptive to cooperation with respect to all kinds of foreign proceedings, including tertiary proceedings and those now excluded from chapter 15. Section 304, the predecessor of chapter 15 that governed international cooperation from the U.S. perspective, made no distinction between (a) main proceedings, (b) nonmain proceedings and (c) tertiary proceedings, and had no exclusions. Thus, under § 304, foreign tertiary proceedings received the same treatment and cooperation as foreign main proceedings. In addition, there were no categories of foreign proceedings that were ineligible for § 304 assistance.

The failure to qualify for recognition under chapter 15 does not disqualify a foreign proceeding from all chapter 15 assistance. Only subchapter III of chapter 15 (§§ 1515-1524) deals with the recognition of a foreign proceeding. Subchapter I (§§ 1502-1508) (general provisions), subchapter IV (§§ 1525-1527) (requiring cooperation with foreign courts and foreign representatives) and subchapter V (§§ 1528-1532) (providing for the coordination of concurrent proceedings) apply to foreign tertiary proceedings. In addition, the legislative history states that foreign representatives of excluded entities may seek cooperation in nonbankruptcy courts since the limitations of § 1509 (b) and (c) do not apply.† The scope of such cooperation remains to be determined, in the absence of recognition.

It may appear that a tertiary proceeding is sufficiently unimportant that its failure to qualify for recognition under chapter 15 is a matter of little consequence. Although this may be true for some tertiary proceedings, it is clearly not true in general. Indeed, a tertiary proceeding may be the principal bankruptcy case for an important class of debtors. Furthermore, tertiary proceedings can clearly be brought in the United States as plenary proceedings under U.S. bankruptcy law.

I. U.S. CASES AS TERTIARY PROCEEDINGS

To illustrate the importance a tertiary proceeding may have, I begin by discussing U.S. chapter 7 and chapter 11 cases that must be treated abroad as tertiary proceedings because they cannot qualify as either main or nonmain proceedings for the purposes of recognition under a statute like chapter 15. This issue would arise in a country with a law like chapter 15 that is based on the UNCITRAL Model Law, with respect to the recognition of a U.S. bankruptcy case in this category. A tertiary proceeding can arise abroad that is similar to a tertiary proceeding in the United States, and that may likewise be a very important case, and may even be the debtor's only bankruptcy case.

The U.S. bankruptcy law has a very broad provision on eligibility for

bankruptcy protection. Section 109(a) provides that any person who "resides or has a domicile, place of business, or property in the United States" is eligible to file a bankruptcy case in the United States.\textsuperscript{15} These factors are disjunctive: any one factor (i.e., residence, domicile, place of business, or property) is sufficient to support a U.S. bankruptcy case.\textsuperscript{16}

None of these factors directly addresses whether a U.S. debtor's CoMI is located in the United States. Indeed, this concept did not exist in U.S. law until the adoption of chapter 15. It is likely that, if a person (including a business entity)\textsuperscript{17} has its CoMI in the United States (and thus qualifies to have a U.S. main proceeding), that person resides or has a domicile or place of business in the United States.

The converse, however, may not be true: a person with a residence, domicile or place of business in the United States may well have its CoMI in another country. If so, it does not qualify to have its main proceeding in the United States.

If such a person has a place of business in the United States, the person would likely (but not necessarily) qualify for a nonmain proceeding in the United States. To qualify for a nonmain proceeding, the place of business must be an "establishment" as defined in the Model Law: a "place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services."\textsuperscript{18} Thus the applicable definition of "establishment" is likely to be narrower than the U.S. concept of "place of business," which supports the filing of a U.S. bankruptcy case. In consequence, while some U.S. places of business will qualify the owner to commence a U.S. nonmain proceeding, some will not.

The possession of "property in the United States" is the most important § 109(a) basis for commencing a tertiary proceeding in the United States.

\textsuperscript{15}See 11 U.S.C. § 109(a) (2006). While § 109 imposes a variety of requirements with respect to filing a case under the various chapters of the bankruptcy code, such as chapter 7 or chapter 11, the only one of these requirements relating to the debtor's status as a foreign entity is limited to foreign banks and foreign insurance companies. See id. § 109(b)(3).


\textsuperscript{17}"Person" is a defined term for U.S. bankruptcy law. See 11 U.S.C. § 101(41) ("The term 'person' includes individual, partnership, and corporation, but does not include [a] governmental unit [with certain exceptions]. . .").

\textsuperscript{18}See Model Law, supra note 3, art. 2(f). Because this issue will arise in another country where the recognition of a U.S. proceeding is requested, this issue will be controlled by the NICICTRAL Model Law version of the definition of "establishment" (or the variant thereof adopted in that country), and not by the U.S. variant of the definition. The Model Law version of the definition of "establishment" adds the requirement that the non-transitory economic activity must be carried on "with human means and goods or services." See id.
Such cases are numerous. For example, several published opinions have found that this requirement may be satisfied by a single bank account in the United States.\(^{20}\)

Even minimal connections with the United States are sufficient to meet the “property in the United States” requirement of § 109(a),\(^{21}\) absent bad faith.\(^{22}\) A “dollar, a dime or a peppercorn” may provide a sufficient basis for U.S. jurisdiction for a bankruptcy case.\(^{23}\) Absent an establishment or the CoMI in the United States, such a case can only be a tertiary proceeding. Indeed, a tertiary chapter 11 case in the United States could result in the confirmation of a chapter 11 plan of reorganization.

To varying degrees, the bankruptcy laws of other countries follow U.S. practice by permitting a corporate entity to file a bankruptcy case in such a country where it has no establishment and where its CoMI is not located. Such a case is especially common where the debtor is part of a corporate group that includes one or more other members that do have their centers of main interest in that country or at least have an establishment there. However, in some cases the members of the corporate group may want to bring their principal cases in a country different from that where the centers of main interest are located or where they have establishments.

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\(^{19}\)It is important to recognize that only a small minority of bankruptcy cases in the United States result in published opinions. While there are several hundred opinions, or perhaps more than a thousand, published every year in bankruptcy cases in the United States, there are typically more than a million bankruptcy cases filed. Thus it is a rare case (less than one in a hundred) for which an opinion is published on any issue at all.

\(^{20}\)See, e.g., Tukos, 321 B.R. at 407; In re Global Ocean Carriers, Ltd., 231 B.R. 31, 39 (Bankr. Del. 2000) (finding that bank accounts totaling $480,000 and attorney retainers held in trust are sufficient under § 109(a) to support a U.S. case); Bank of Am. v. World of English, N.V., 23 B.R. 1015, 1022 (N.D. Ga. 1982) (finding that maintaining a U.S. bank account was sufficient grounds to support a U.S. bankruptcy case); In re Iglesias, 226 B.R. 721, 722-23 (Bankr. S.D. Fla. 1998) (finding a bank account containing $522 was sufficient to support a chapter 7 case for an Argentine national); In re Spanish Cay Co., 161 B.R. 715, 721-22 (Bankr. S.D. Fla. 1993) (finding marketing and advertising materials, equipment stored on a sailboat, and a bank account were sufficient to support a U.S. bankruptcy case).

\(^{21}\)Notwithstanding the broad eligibility criteria for filing a U.S. bankruptcy case, a court has broad discretion to dismiss a case that is not properly brought in the United States. See, e.g., In re Aerovias Nacionales de Colombia Avianca S.A., 303 B.R. 1, 9 (Bankr. S.D.N.Y. 2003).

\(^{22}\)See, e.g., In re Head, 223 B.R. 648 (Bankr. W.D.N.Y. 1998) (ruling that the debtor had filed the bankruptcy case in bad faith). The court's decision was based on the following factors: (1) Canadian non-bankruptcy litigation with Lloyds of London was going badly for the debtor, and (2) similarly situated United States citizens had lost similar non-bankruptcy litigation in United States circuit courts in six circuits. Lloyds is one of the most historic and prominent insurance associations in the world. Very significant amounts of its insurance were backed on an unlimited liability basis by wealthy investors (who became known as Lloyds "Names"), including a number of U.S. Names. Lloyds experienced a period of major claims, and looked to its Names to cover the losses on their particular policies. This led to significant litigation, and ultimately, the bankruptcy of some of the Names.

\(^{23}\)See, e.g., In re McCutie, 198 B.R. 428, 431-32 (Bankr. W.D.N.Y. 1996) (finding that bank account of $194 was sufficient to support U.S. jurisdiction for a bankruptcy case filed by a Canadian citizen, where the debtor had other transactions in the United States).
It is important to take note that § 109(a) is not a jurisdictional statute: it is only a rule of eligibility.24 Subject matter jurisdiction over bankruptcy cases is granted to the U.S. federal courts by statute.25 Personal jurisdiction over the debtor, in a voluntary case, arises from the voluntary filing of the bankruptcy petition itself. If the debtor does not meet the requirements of § 109(a), the court "would simply not be able to entertain the case."26

When a tertiary proceeding is filed in the United States, there may be no corresponding case in the country where the debtor’s CoMI is located, and there may also be no case in a country where the debtor maintains an establishment.27 In such a situation, the tertiary proceeding in the United States could stand alone as the sole vehicle for reorganizing or liquidating the debtor's assets.

Such a case without a main proceeding in any country can arise if the country where the debtor’s CoMI is located lacks an effective bankruptcy law and procedure.28 If the debtor needs a reorganization (rather than liquidation), for example, because it has substantial "going concern" value, such a case would have to be filed in a different country if the CoMI country has no reorganization law.

Alternatively, the CoMI country may be unsuitable for a bankruptcy case if it is likely impossible to obtain jurisdiction over the major creditors in that country. For instance, in Avianca,29 where a Colombian airline filed a chapter 11 case in the Southern District of New York, the court denied a motion to dismiss in part on the grounds that the major creditors were U.S. businesses (aircraft lessors), and it was likely that Avianca could not have obtained jurisdiction over them in a Colombian bankruptcy case.30 In contrast, the U.S. court had jurisdiction over all these U.S. creditors.

26World of English, 23 B.R. at 1020.
28For example, the United Kingdom has become the venue of choice for the reorganization of German companies, because the German bankruptcy laws provisions on reorganization are cumbersome, and the courts take several months before giving a hearing on a new bankruptcy case. In the United Kingdom, in contrast, hearings can easily take place on the day that the case is filed. See, e.g., In re Daisytek-ISA Ltd., [2003] B.C.C. 562, [2004] B.P.I.R. 30, 2003 WL 21353254 (Ch. Leeds) (UK) (on date of filing 16 bankruptcy cases in Leeds, England, court issued administration orders for 14 and found that their centers of main interest were located in the United Kingdom).
29In re Aerovias Nacionales de Colombia S.A. Avianca, 303 B.R. 1 (Bankr. S.D.N.Y. 2003). The Avianca case was probably a nonmain proceeding, and not a tertiary proceeding, under the Model Law definition, because Avianca had offices with 28 employees (out of a total of 4329 employees worldwide) in the United States, and thus apparently had an "establishment" in the United States. While Avianca also owned a U.S. subsidiary headquartered in Miami, this is irrelevant to a determination whether its own chapter 11 case would qualify as a main or nonmain proceeding. See infra, text at notes 60-62.
30See id. at 10.
Other factors may counsel against commencing a bankruptcy case in the country where a debtor’s CoMI is located. For example, the bench and the bar in the CoMI country may be unfamiliar with bankruptcy law and procedures, and thus unlikely to carry them out effectively. The procedures in that country may be too cumbersome to permit an orderly reorganization. The duration of a reorganization case in that country may typically last so long (perhaps 10 or 20 years), that it is impractical to file a bankruptcy case in that country. The courts in that country may be incompetent or corrupt. There may be political reasons for declining to file a bankruptcy case for the debtor in that country.

Perhaps the most important U.S. tertiary proceeding is Yukos Oil Co., where the bankruptcy court found that the U.S. courts had discretion to exercise jurisdiction over a chapter 11 bankruptcy case filed for one of the largest corporations in Russia, based solely on a U.S. bank account containing approximately $480,000. The court refused to dismiss the case on the basis of international comity or the Act of State doctrine.

The court did dismiss the Yukos case, however, for “cause” under § 1112(b). The court grounded its decision in the totality of the circumstances, including the following factors: (a) the reorganization of the business required the cooperation of the Russian government, which had declined to appear in the U.S. court; (b) it was not clear that a U.S. court could obtain jurisdiction over the other pertinent parties sufficient to grant much relief to Yukos; (c) Yukos was attempting to substitute U.S. law, in place of Russian law, to govern the priority for the $27.5 billion in retroactively assessed Russian tax claims that gave rise to Yukos’ financial problems; (d) the funds giving rise to U.S. jurisdiction were transferred less than a week before the bankruptcy filing to create U.S. jurisdiction for the case; and (e) the sheer size of Yukos and its impact on the Russian economy counseled that it be handled in a Russian court.

A single change in the Yukos scenario would have confirmed its status as

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31It is unlikely that the country where the debtor’s CoMI is located lacks a bankruptcy law altogether. Apparently, Ghana is the only country without a bankruptcy law at all (a law has been drafted, but not enacted by the legislature). However, many countries, especially in the developing world, have insolvency laws that provide only for the liquidation of businesses, and not for their reorganization.


33Yukos became the first fully privatized Russian oil company during 1995 and 1996. See id. at 400. At the time of the filing of its chapter 11 case in Houston, Texas, Yukos was perhaps the largest case ever filed in the United States. See id. at 399. Together with its two hundred affiliates, it had approximately 100,000 employees. See id. at 400, and it controlled twenty percent of the total oil and gas production in Russia. See id. at 411.

34See id. at 408-09.

35See id. at 408-10.

36See id. at 410-11.
a tertiary case under a foreign law similar to chapter 15.\textsuperscript{37} If that case had not been dismissed, a qualified foreign representative of the U.S. \textit{Yukos} estate would certainly have sought to take action in a foreign court on its behalf. If such a representative had sought to bring litigation in a country with a law similar to chapter 15,\textsuperscript{38} the representative would have been required to seek recognition under that country’s counterpart to §§ 1515-1517.\textsuperscript{39} It is quite clear that the \textit{Yukos} case would have been a tertiary proceeding under a foreign law like chapter 15, because the CoMI was located in Russia, and it lacked an establishment in the United States. Thus the foreign representative coming from the United States would not have been able to obtain recognition for the U.S. case as either a main or a nonmain proceeding.

II. FOREIGN PROCEEDINGS INELIGIBLE FOR CHAPTER 15 RECOGNITION

The term “foreign proceeding,” as defined in § 101(23), is very broad. It covers:

[any] 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.

This definition covers all foreign proceedings for the reorganization or liquidation of entities that are ineligible (in whole or in part) for treatment under the U.S. bankruptcy code, as well as those that are eligible under U.S. law but are excluded from chapter 15.

Section 1501(c) narrows this group by excluding foreign banks with U.S. branches or agencies; foreign railroads; individual debtors qualifying for chapter 13 cases, and stockbrokers and commodities brokers.\textsuperscript{40} Three of these

\textsuperscript{37}While the \textit{Yukos} court found it unnecessary to determine whether Yukos had a place of business in the United States, this issue arose only in the context of its discussion of the requirements of § 109. See id. at 406. Unlike a proceeding governed by the EIR, a U.S. bankruptcy court may not be required, or even authorized, to decide whether a U.S. chapter 7 or chapter 11 case is a main proceeding or a nonmain proceeding. Under § 1517, and corresponding laws in other countries that have adopted the UNICITRAL Model Law on Cross-Border Insolvency, it is the court in the recognizing country that decides whether the foreign proceeding to be recognized is either a main or a nonmain proceeding (or neither).

\textsuperscript{38}Although the \textit{Yukos} case was filed before the U.S. adoption of chapter 15, a number of other countries already had similar laws.

\textsuperscript{39}Typically it is difficult to find a law in another country that corresponds to a law in the United States in any detail. Because of its UNICITRAL provenance, the U.S. bankruptcy code chapter 15 is quite similar to laws in a number of other countries that have adopted cross-border insolvency laws based on the same UNICITRAL model.

\textsuperscript{40}See 11 U.S.C § 1501(c) (2006).
exclusions merit discussion: foreign ancillary proceedings, bankruptcies of foreign railroads, and foreign proceedings that do not qualify as either main or nonmain proceedings.

A. FOREIGN ANCILLARY PROCEEDINGS

A foreign ancillary proceeding, like a U.S. case under chapter 15, is not eligible for recognition as a foreign main or nonmain proceeding, because it is not a plenary bankruptcy case. This exclusion is not likely important, however, because there would likely be little point in the recognition of such a proceeding. In contrast, coordination of a U.S. bankruptcy case with such a foreign proceeding under §§ 1525-1527 could be very important. However, such coordination does not require recognition under chapter 15.

B. FOREIGN RAILROADS

There appears to be no good policy reason for excluding a railroad, that is the subject of a foreign proceeding, from chapter 15 assistance. A foreign proceeding for a foreign railroad may benefit from a chapter 15 case in the United States, if it has assets or litigation in the United States. The exclusion of such cases from chapter 15 is inexplicable, except on the grounds of poor drafting.

C. FOREIGN TERTIARY PROCEEDINGS

Perhaps the most important tertiary proceeding for which recognition of a foreign proceeding has been denied is the Bear Stearns High-Grade\textsuperscript{41} case. The case involved two hedge funds formed by Bear Stearns that were limited liability companies incorporated in and having registered offices in the Cayman Islands. The funds’ administrator was a Massachusetts corporation which stored its books and records in Delaware. The investment manager was a Bear Stearns affiliate, and the assets that it managed (including those managed for the funds) were located in New York. Mysteriously, the investor registers were held in Dublin, Ireland. Notably lacking was any significant connection with the Cayman Islands, apart from its registration. After suffering losses, the funds filed for winding up in the Cayman Grand Court.\textsuperscript{42}

The bankruptcy court found that the bankruptcy cases in the Cayman Islands did not qualify as main proceedings because the debtors’ CoMIs were located in the United States.\textsuperscript{43} The court further found that the Cayman Island proceedings did not qualify as nonmain proceedings, because the funds lacked establishments in the Cayman Islands on the grounds they conducted

\textsuperscript{42}See id. at 124-25.
\textsuperscript{43}See id. at 127-31.
no relevant nontransitory activities there.44 Additionally, the court found that the denial of recognition under chapter 15 did not leave the liquidators of the funds without a U.S. remedy, because § 303(b)(4) continues to authorize the filing of an involuntary U.S. case as to such debtors under chapter 7 or chapter 11.45 The district court affirmed on appeal, and found that the bankruptcy judge correctly made an independent review of the evidence as to the location of the debtor’s lack of a center of main interest or an establishment in the Cayman Islands.46

There may be good reasons, specific to the Bear Stearns High-Grade case, why it should have its own main proceeding in the United States, and not only a chapter 15 case. Nonetheless, there are other cases where this will not be true, and where cooperation with a foreign tertiary proceeding is important.

Another case that should have been treated as a tertiary proceeding is the SPfinX case.47 The bankruptcy court in SPfinX understood that the foreign proceedings did not neatly fit the definition of either main or nonmain proceedings, but reasoned that the “flexibility inherent in chapter 15” strongly suggested that the tests should not be applied mechanically to deny recognition to a foreign proceeding where the proceeding was supported by the creditors and there was no improper purpose apparent.48

The “flexible” approach adopted by the bankruptcy court in SPfinX is not supported by the statute and, if followed, could lead to lack of uniformity in application of the Model Law in other jurisdictions where it is adopted.49 The better result, where the foreign proceeding is neither a main proceeding

44See id. at 131-12.
46See Bear Stearns High-Grade, 389 B.R. 325 (S.D.N.Y. 2008).
48See id. at 117-18 (stating that “[o]verall, it was appropriate for the Bankruptcy Court to consider the factors it considered, to retain flexibility, and to reach a pragmatic resolution supported by the facts found. No authority has been cited to the contrary.”), but see Bear Stearns High-Grade, 389 B.R. at 325 (where the district court recognized its prior emphasis on “flexibility” in its SPfinX opinion (authored by the same district judge) was at odds with its opinion in Bear Stearns, and thus, it characterized any language in its SPfinX opinion concerning the nonmain determination as “dicta” since the nonmain determination was not appealed).
49See Daniel M. Gloseband, SPfinX Chapter 15 Opinion Misses the Mark, Am. Bankr. Inst. J., Jan. 2007, at 44 (criticizing the bankruptcy court’s SPfinX decision for adopting a “flexible” approach to the decision of whether to recognize a foreign proceeding instead of applying the objective test set forth in § 1517(a), including the determination in § 1517(a)(1) that the foreign proceedings must be either a foreign main proceeding or a foreign nonmain proceeding, and explaining that such an approach could lead to
nor nonmain proceeding, is to treat it as a tertiary proceeding and deny recognition.30

III. COOPERATION WITH FOREIGN COURTS AS TO TERTIARY PROCEEDINGS

If a foreign proceeding is neither a main proceeding nor a nonmain proceeding, chapter 15 clearly does not permit recognition of that proceeding. Whether U.S. law permits cooperation with an administrator in such a case apart from the recognition of a foreign proceeding under chapter 15 is a much more subtle question.

Six sections of chapter 15 contain the provisions governing cooperation with foreign courts and foreign representatives. Section 1525 mandates cooperation and direct communication between a U.S. court and a foreign court or a foreign representative.51 Section 1526 mandates cooperation and direct communication between a trustee or examiner in a U.S. case with the relevant foreign court and foreign representatives.52 Section 1527 suggests forms that such cooperation and communication may take.53 Section 1529 provides for the coordination between a plenary U.S. case and a foreign proceeding, even in the absence of a chapter 15 case.54 Section 1530 provides for coordination where there are more than one relevant foreign proceedings.55 Section 1532 provides for the coordination of payments to creditors from various related cases in various countries.56 These requirements apply to all foreign proceedings in the nature of insolvency or adjustment of debt, whether or not such proceedings qualify as main or nonmain proceedings.

The most important link in this analysis is the definition of "foreign proceeding" in § 101(23), which is adopted with minor terminological changes from the same UNCITRAL model law as chapter 15.57 This definition imposes no requirement that the proceeding at issue be either a main or a nonmain proceeding. It follows that it may be a tertiary proceeding, and that cooperation and communication with respect to a foreign tertiary proceeding is required with respect to §§ 1525, 1526, 1527, 1529, 1530 and 1531.

The second link in the analysis is the definition of a foreign representative

lack of uniformity in application of the Model Law in other jurisdictions where it is adopted, thereby threatening the very unanimity that is meant to be at the heart of the Model Law).

52See id. § 1526.
53See id. § 1527.
54See id. § 1529.
55See id. § 1530.
56See id. § 1532.
57See FOREIGN LAWS, supra note 3, art. 2(a).
in § 101(24), which provides simply that a foreign representative is a person or body (such as an accounting firm) authorized in a foreign proceeding either (a) to administer the reorganization or liquidation of the assets of the debtor, or (b) to act as a representative of such a foreign proceeding. This definition also makes no reference to qualification as a main or nonmain proceeding. Section 1525(a) mandates that a U.S. bankruptcy court (including a district court sitting in bankruptcy pursuant to the withdrawal of reference of a bankruptcy case) cooperate with such a representative, whether or not the foreign proceeding in which the representative is appointed is a main or a nonmain proceeding, on the one hand, or a tertiary proceeding, on the other.

IV. FOREIGN PROCEEDINGS FOR CORPORATE GROUPS AND RELATED ENTITIES

Another kind of proceeding, akin to a tertiary or excluded proceeding, is quite common. Most international business enterprises are organized into groups of related entities, which may be incorporated (and have their centers of main interest located) in a variety of countries. Although it is often best to reorganize or liquidate the various members of the corporate group collectively, international insolvency law (including chapter 15) does not recognize the corporate group.

A parent corporation of an international corporate group typically commences its bankruptcy case in the country where its CoMI is located. If the relevant foreign debtor is a different legal entity, its bankruptcy case abroad is not eligible for recognition as either a foreign main proceeding or a foreign nonmain proceeding. Nonetheless, the foreign case for the principal entity in a corporate group may be the most important bankruptcy case for the group.

Frequently, the bankruptcy cases for the subsidiaries are filed in the same country (and even in the same court) as the filing for the parent corporation, even though some of them have their CoMIs in another country, and lack

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59Although "debtor" is a term defined in § 101(13) as "person . . . concerning which a case under this title has been commenced," this definition does not apply to the term "debtor" as it is used in § 101(23) (defining "foreign proceeding") or § 101(24) (defining "foreign representative"). Instead, in these provisions, the definition of "debtor comes from § 1302(1) ("debtor" means an entity that is the subject of a foreign proceeding."). This interpretation does not derive from the structure of chapter 15 and of these provisions. Instead, it derives from the origin of the definitions of "foreign proceeding" and "foreign representative" in Article 2 of the UNCITRAL Model Law on Cross-Border Insolvency. In drafting chapter 15, Congress moved these definitions from chapter 15 to § 101.
60There are a number of reasons why a corporate group may decide to have a foreign affiliate. For example, Eurofood was formed to raise capital for the Parmalat corporate group, which was based in Parma, Italy. Eurofood was formed as an Irish subsidiary, with its CoMI in Dublin, Ireland, to take advantage of favorable tax provisions designed to redevelop the Dublin docks. See Samuel L. Bufford,
even an establishment in the country of the parent entity. The bankruptcy cases for subsidiaries are typically filed in the same court with the parent’s case, if possible, because it is normally much more efficient to reorganize, sell or liquidate most of a corporate group together in one court, rather than have the business solution for the enterprise spread out over many cases in many countries.

For example, the cluster of nearly a hundred cases filed in Parma, Italy for various Parmalat entities was much more important than the cases filed for related Parmalat entities in the United States or in any other country.62

V. COMMON LAW ASSISTANCE TO FOREIGN PROCEEDINGS OUTSIDE CHAPTER 15

A question remains whether U.S. courts retain a common law power, apart from chapter 15, to provide assistance to foreign proceedings that fall outside the scope of chapter 15. This question is particularly relevant where the foreign proceeding at issue is statutorily excluded from chapter 15.

Before the adoption of chapter 15, there were numerous U.S. cases that extended comity and assistance to foreign proceedings qualifying under the § 101(23) definition. For example, the Delbrueck case63 involved a dispute as to assets of the German bank Bankhaus I.D. Herstatt, K.G.a.A. that failed in 1974. The failure of the Bank of Credit and Commerce International banking empire, which was doing banking business in 72 countries (including the United States), gave rise to the U.S. BCCI case,64 where the liquidators of the branches in Paraguay, Turkey and Macau sought to collect U.S. deposits belonging to those branches.

A strict interpretation of § 1509 could deny the U.S. courts the power to entertain any matter for a foreign debtor that is excluded from chapter 15 by § 1501(c). The better view, however, is that the common law respecting the provision of judicial assistance to such entities survives apart from chapter 15, and is not governed by chapter 15.

If the common law survives respecting the provision of judicial assistance to foreign proceedings excluded from chapter 15 by § 1501(c), it is equally

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61Parmalat, S.p.A., for example, commenced a bankruptcy case in Parma, Italy, where its CoMI was located. Cases were also filed in Parma for nearly a hundred of its subsidiaries and affiliates. One of these subsidiaries was Eurofood IFSC Ltd., whose only office (as well as its CoMI), was located in Ireland. See In re Eurofood IFSC Ltd., [2004] IESC 45 (Ir.). Thus Eurofood’s Italian case was a tertiary proceeding.


64United States v. BCCI Holdings (Luxembourg), 48 F.3d 551 (D.C. Cir. 1995).
arguable that the common law continues to survive and can be used with respect to tertiary proceedings such as that involved in the Bear Stearns High-Grade case.\textsuperscript{65} Perhaps the bankruptcy court could have given assistance to the foreign proceeding in the Cayman Islands in that case, if this theory had been presented.\textsuperscript{66} The status of such a theory is uncertain at this time.

\textsuperscript{65} In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Inc., 374 B.R. 122 (S.D.N.Y. 2007).

\textsuperscript{66} See, e.g., Gabriel Moss, supra note 45, at 36 (arguing that residual common law discretion should be exercised to provide assistance in a case such as Bear Stearns High-Grade).