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Recognition of Foreign Insolvency Proceedings under Chapter 15 of the Bankruptcy Code

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Chapter 15 of the U.S. Bankruptcy Code, 11 U.S.C. §§ 1501 et seq., provides the legal framework by which U.S. bankruptcy courts recognize foreign insolvency proceedings of companies that have assets and operations in more than one country. Congress added Chapter 15 to the Bankruptcy Code with the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Like any new law, the application and limits of Chapter 15 are developing through jurisprudence. Because of the potentially broad and varied impact of Chapter 15, practitioners representing multinational clients or domestic clients with multinational vendors, customers, or borrowers should be aware of the operation of the law and its implications.

Purpose

Chapter 15 is an adoption of the Model Law on Cross-Border Insolvency (Model Law) promulgated in 1997 by the United Nations Commission on International Trade Law (UNCITRAL). The Model Law was created to be broadly applied to cross-border insolvency proceedings, and to encourage the treatment of a multinational bankruptcy as a single process in which an initial court administers the main proceeding with courts of other countries assisting in that same proceeding. This system is meant to replace the old territorialism approach in which a debtor was required to initiate a separate insolvency case in multiple countries. *See In re ABC Learning Centres Ltd.*, 728 F.3d 301, 305–06 (3d Cir. 2013) (discussing the purpose of and policy behind the Model Law).

In incorporating the Model Law into Chapter 15, Congress adopted the single-process approach to multinational insolvency cases. Chapter 15 provides an effective mechanism for dealing with cases of cross-border insolvency with the objectives of: (1) cooperation among courts of the United States, U.S. trustees, trustees, examiners, debtors, and debtors in possession and the courts and other competent authorities of foreign countries involved in cross-border insolvency cases; (2) greater legal certainty for trade and investment; (3) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested entities, including the debtor; (4) protection and maximization of the value of the debtor's assets; and (5) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment. 11 U.S.C. § 1501(a).

Basics

Chapter 15 provides the outline of how a foreign insolvency proceeding can be recognized by a U.S. bankruptcy court. A Chapter 15 case is commenced by a bankruptcy court's recognition of a foreign insolvency proceeding after the filing of a petition by the foreign representative of the debtor in the foreign proceeding. A bankruptcy court will enter an order recognizing the proceeding if the petitioner establishes the existence of a foreign insolvency proceeding and the existence and position of a foreign representative. The debtor in a foreign proceeding is not entitled to any relief, including the automatic stay, until the bankruptcy court actually recognizes the proceeding.

At the time of recognition, the bankruptcy court will also decide if the proceeding is a foreign main proceeding or a foreign nonmain proceeding. A foreign proceeding is a "main" proceeding if it is filed where the debtor has its center of main interests, such as its headquarters or its place of incorporation or primary operations. A foreign proceeding is "nonmain" proceeding if it is filed where the debtor has only an establishment or place of operation.

Once a foreign main proceeding is recognized, the automatic stay goes into effect to prevent any actions to collect domestic assets of the foreign debtor. In addition, the foreign representative can begin operating the domestic businesses of the foreign debtor and sell or dispose of the foreign debtor's U.S. assets. 11 U.S.C. § 1520. At the request of the foreign representative, the presiding bankruptcy court can also allow both the taking of extensive discovery concerning the debtor's assets, affairs, rights, obligations, or liabilities as well as the distribution of the debtor's domestic assets by the foreign representative to creditors. 11 U.S.C § 1521. Chapter 15 recognition also allows foreign representatives to utilize U.S. federal courts to bring actions, conduct discovery, and more. 11 U.S.C. § 1509(b).

On the other hand, when a foreign nonmain proceeding is recognized, any relief – including the automatic stay – must be specifically requested by the foreign representative and granted by the bankruptcy court after determining that the relief is necessary to effectuate the purpose of Chapter 15 or to protect assets of the estate or the interests of creditors.

Limits on Comity Afforded to Chapter 15 Petitioners

A primary purpose of Chapter 15 is the promotion of comity among international courts. However, U.S. courts historically have closely scrutinized proceedings and decisions of foreign courts in determining whether to extend comity. In keeping with its purpose, Chapter 15 eschews the traditional requirements for comity still applied by courts in nonbankruptcy contexts.

It is surprisingly easy to obtain the recognition of a foreign insolvency proceeding in a U.S. bankruptcy court. Essentially, all that is required is an official document issued by a foreign judicial or other authority competent to control or supervise a foreign proceeding that evidences the commencement of the foreign proceeding and the appointment of a foreign representative. 11 U.S.C. §§ 1502, 1515, 1517. The foreign debtor is not required to have assets in the United States.

Interestingly, the recognition of a noninsolvency-related foreign judgment by a U.S. district court is very different in that they must consider a number of factors regarding due process and fairness afforded the litigants in deciding whether to recognize a foreign judgment. In the seminal case on comity, Hilton v. Guyot, 159 U.S. 113 (1895), the U.S. Supreme Court held that a U.S. court should exercise comity in recognizing a foreign court's judgment where "there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and [where] there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment." Accordingly, district courts closely scrutinize underlying proceedings that produced foreign judgments in determining whether to recognize them.

No such scrutiny is applied by bankruptcy courts in recognizing foreign insolvency proceedings. In Chapter 15, the decision to recognize a foreign insolvency proceeding is not dependent on any findings about the nature of the underlying foreign proceedings. Official Comment to 11 U.S.C. § 1517.

Bankruptcy courts can refrain from recognizing proceedings or (after recognition) from taking actions in existing cases, however, if doing so will be manifestly contrary to public policy, regardless of whether the action is authorized by Chapter 15. 11 U.S.C. § 1506. Bankruptcy courts have been reluctant to find that recognition of foreign proceedings is contrary to public policy. *See In re Toft*, 453 B.R. 186, 198 (Bankr. S.D.N.Y. 2011) (noting that it was a rare occurrence where recognition of foreign proceedings was manifestly contrary to U.S. public policy but holding that, where the relief sought by the foreign representative: (i) was expressly banned under U.S. law; and (ii) could result in criminal liability or would directly compromise privacy rights subject to statutory protection, the relief sought was manifestly contrary to public policy). This reluctance may be a result of an attempt to adhere to Chapter 15's express purpose of increased cooperation with foreign courts and the promotion of efficient administration of cross-border insolvencies.

Impact on Entities in the United States

The potential impact of Chapter 15 on entities and individuals in the United States is significant. In foreign insolvency proceedings, foreign laws are applied in redefining property rights, creditors' rights, contracts, and more. Bankruptcy courts can now recognize these proceedings easily and expeditiously without analysis of the foreign laws under which the proceedings were initiated and initially administered. The recognition of these proceedings necessarily applies the foreign law and its outcome to all parties in the newly formed Chapter 15 case in the United States. Once the insolvency of the foreign entity is recognized, in most cases the foreign representative can begin: (i) operating the debtor's business operations in the United States; (ii) seeking assets and discovery from U.S. entities or multinational entities with assets in the United States; and (iii) bringing actions against domestic entities in U.S. courts. If the foreign debtor has assets in the United States, the foreign representative can even commence a case under another chapter of the Bankruptcy Code.

Chapter 15 necessarily provides for the recognition of the laws of most nations, notwithstanding how different they may be from those of the United States. Even foreign laws that provide less protection or cause different outcomes than U.S. laws are imposed upon domestic creditors and other interested parties. *See, e.g., In re ABC Learning Centres Ltd.*, 728 F.3d 301, 309–10 (3d Cir. 2013) (affirming the recognition of an Australian proceeding that allowed for concurrent receivership and liquidation pursuant to which secured creditors could immediately realize the value of their collateral and obtain a timing advantage not available under U.S. law). The provisions of Chapter 15 can also provide a way around often stringent jurisdictional requirements and foreign-judgment recognition laws applied by the U.S. district courts.

Accordingly, depending on the law of the country in which the main proceeding is commenced, domestic entities must be prepared for the impact on their rights in ways in which they would not be if U.S. law controlled. This should become a consideration for domestic and other entities with assets in the United States when extending credit, providing services, or otherwise doing business with multinational companies based abroad.

Conclusion

Chapter 15 went into effect on October 17, 2005. Although currently sparse, case law on the subject is steadily growing, which will further define the way bankruptcy courts apply Chapter 15. As the interconnectedness of the world grows, the use of Chapter 15 will undoubtedly grow as well. Although Chapter 15 can certainly be a more efficient method for multinational companies to administer cross-border insolvency cases, it can also have significant negative implications for domestic companies that may previously have been insulated from insolvency proceedings pending abroad. *This article was originally published in Business Law Today, a publication of the American Bar Association, on June 11, 2016.*

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