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NEW BANKRUPTCY CODE CHANGES CROSS-BORDER PRACTICE

The Bankruptcy Abuse, Prevention and Consumer Protection Act of 2005 (“S. 256”), which was signed into law on April 20, 2005, adds to the Bankruptcy Code a new Chapter 15 entitled “Ancillary and Other Cross Border Cases.” This chapter is essentially the codification of the model law on cross border insolvency, promulgated by the United Nations Commission on International Trade Law (“UNCITRAL”). Among the more significant provisions are the following:

FOREIGN REPRESENTATIVE

Under Chapter 15, a foreign representative, appointed and authorized in the foreign proceeding either to administer the reorganization, or to act as a representative of the foreign proceeding, is authorized to file a petition seeking recognition of the foreign proceeding.

The new law provides that the U.S. bankruptcy court should enter an order granting recognition of the foreign proceeding, after notice and a hearing, so long as certain minimal requirements are met. The requirements include provision of documentation or certification from the foreign court confirming the existence of the foreign proceeding and the authority of the foreign representative, or other proof satisfactory to the U.S. bankruptcy court. There is no need for the U.S. bankruptcy court to make findings about the nature of the foreign proceeding, such as were required by Section 304(c) under the current Bankruptcy Code. Therefore, relief is likely to be granted unless doing so “would be manifestly contrary to the public policy of the United States.”

RELIEF AVAILABLE

Once the bankruptcy court grants an order of recognition, the foreign representative automatically becomes entitled to many of the rights that are available to a debtor under Chapter 11, except with respect to certain avoidance actions. The relief provided by the order of recognition includes, among other things, an automatic stay of actions against the debtor (subject to the limitations set forth in Section 362), the power to distribute the Debtor’s assets, (so long as the court is satisfied that the interests of U.S. creditors are “sufficiently protected”), provisions for discovery, as well as such additional relief as the court may deem appropriate. In addition, the recognition order must acknowledge whether the foreign proceeding is “main” or “non-main.” If the foreign proceeding is

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“main” (meaning the principal locus of the debtor’s activities are in the foreign jurisdiction), the debtor will subject to certain other provisions of the Bankruptcy Code, such as Section 361, requiring adequate protection for the interest of secured creditors, and Section 363, regarding the use, sale or lease of the debtor’s property.

New Chapter 15 also allows the bankruptcy court to grant “additional assistance” to foreign representatives. While “additional assistance” is not defined, it is most likely intended to mimic the broad relief available under Section 304 of the current Bankruptcy Code, thus preserving the ability of courts to grant relief beyond that specifically authorized, consistent with prior case law. In fact, the section which provides for additional assistance incorporates certain of the factors which courts have previously held necessary for relief under Section 304, including just treatment of the holders of claims, protection of U.S. holders of claims against prejudice, and distributions substantially in accordance with the order of priority prescribed in the Bankruptcy Code, among others.

In addition, even before ruling on the petition for recognition, the U.S. bankruptcy court can grant provisional relief if such relief “is urgently needed to protect the assets of the debtor or the interests of the creditors.”

WHO MAY FILE FOR RECOGNITION

While the exception of certain foreign debtors otherwise ineligible for relief under Section 109 of the Code continues under Chapter 15, foreign insurance companies doing business in the U.S. will now be eligible for relief.

LIMITATION ON ACCESS TO U.S. COURTS

Chapter 15 is structured so that the recognition procedure is the only way for a foreign representative to obtain access to state or federal courts in the U.S. on behalf of the foreign debtor, except for limited purposes, such as collecting its accounts. In addition, venue is limited to the district where the debtor has its principal place of business in the U.S., if any. Otherwise, venue may be had “consistent with the interests of justice and the convenience of the parties.” Once recognition is granted, the foreign representative has standing to commence a voluntary proceeding (if the foreign proceeding is a “main proceeding”), or an involuntary case. However, it would appear that most of the powers available to a debtor will be available under Chapter 15, even in the absence of a Chapter 11 proceeding.

ENCOURAGEMENT OF INTERNATIONAL COOPERATION

Chapter 15 incorporates the UNCITRAL model law’s provisions concerning communication and cooperation between courts and representatives in order to allow courts to “cooperate to the maximum extent possible” with foreign courts and foreign representatives. Thus, the law specifically entitles U.S. bankruptcy courts to “communicate directly with, or to request information or assistance directly from, [a] foreign court ...”, and to implement such cooperation “by any

appropriate means.” In addition, the new law specifically authorizes U.S. bankruptcy courts to consider the international origin of these provisions and to interpret them in order to “promote an application of the Chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions.”

CONCLUSION

The changes contained in the new bankruptcy legislation should make cross-border filings easier to accomplish, and provide greater predictability. They also leave open the possibility for creative use of the laws of different jurisdictions in order to achieve results potentially not available under the laws of any one country. If you have any questions or need more detailed information on S256, please do not hesitate to contact us. A full list of Bryan Cave’s Bankruptcy, Restructuring and Creditors’ Rights professionals may be found at www.bryancave.com.