

Business Reorganization

The United States Bankruptcy Code - Chapter 15 Analysis

The United Nations Commission on International Trade Law (UNCITRAL) is a major United Nations organization headquartered in Vienna, Austria that has undertaken exhaustive studies and reviews in many significant areas of international commercial law. Its efforts have led to a number of international conventions and model laws, which have been widely adopted around the world, most recently, the Model Law on Cross-Border Insolvency (the “Model Law”). The Model Law has been substantively adopted as a new Chapter 15 to the U.S. Bankruptcy Code. The new Chapter 15 is the successor to Section 304 of the Bankruptcy Code but is much broader and more detailed than Section 304.

The objective of the Model Law is to establish a set of uniform principles to deal with the requirements that a foreign insolvency representative would need to meet in order to have access to the courts of other countries in cross-border cases. The Model Law is an agreed-upon international model for domestic legislation dealing with cross-border insolvencies. The official text of the Model Law has been published and widely disseminated, and is available on UNCITRAL's [web site](#), along with an explanatory and descriptive *Guide to Enactment* that provides a commentary and description of the Model Law.

The primary goals of the Model Law are to facilitate domestic recognition of foreign insolvency proceedings and to increase international cooperation in multinational cases. Foreign insolvency proceedings are divided into two categories in the Model Law: “main” proceedings and “non-main” proceedings.

A main proceeding is one that takes place in the country where the debtor has its main operations. If the foreign proceeding is recognized as a main proceeding, the Model Law provides an automatic stay of proceedings by creditors against the debtor’s assets and the suspension of the debtor’s right to transfer, encumber or otherwise dispose of its assets. The scope and terms of the stay of proceedings are subject to the normal requirements of domestic law.

The Model Law contemplates a high level of cooperation between courts in cross-border cases. Domestic courts are directed to cooperate “to the maximum extent possible” with foreign courts and foreign insolvency representatives in the Model Law (Article 26). The courts may communicate directly with each other and may request information or assistance directly from the foreign court or from the foreign insolvency representative (Article 25). Cooperation can, for example, consist of appointing someone to act on the direction of the court, communicating information by any means considered appropriate by the court and co-ordinating the administration of the debtor's assets and affairs in both jurisdictions (Article 27). The courts may also approve or implement agreements concerning the co-ordination of concurrent proceedings involving the same debtor (Article 30).

Inevitably, some concerns are expressed that entering into the Model Law is likely to be prejudicial to

individual domestic creditors. These concerns, however, are in fact addressed in the Model Law itself.

The Model Law is intended to put in place a system that will aid and assist international trade and commerce and enhance and facilitate investment and credit availability to less-developed countries. Greater certainty in matters of trade and investment will inevitably increase cross-border trade and investment and improve international commerce for the benefit of everyone who participates in it. If parties to international agreements and treaties each insisted that preference be given to their own investors or creditors over others or that their investors and creditors should not be prejudiced while those in other countries could be, there would be no international progress in the economic and commercial spheres and the international economy would go back to the “beggar my neighbour” regimes of the 1930s.

The recognition of a foreign proceeding under the Model Law therefore does not bar domestic creditors from commencing a domestic insolvency proceeding under domestic law (Article 20(4)). If a domestic proceeding is commenced after an application for recognition of the foreign proceeding, the domestic court must review the relief sought by the foreign representative and must modify that relief if it is inconsistent with the domestic proceedings (Article 29(b)(i)). As a consequence, the Model Law permits domestic insolvency proceedings to be commenced and continued and directs that relief granted to a foreign insolvency representative or a foreign insolvency administration be modified if it is inconsistent with domestic insolvency law. These measures ensure that domestic creditors will not be unfairly treated by the recognition of foreign proceedings under the Model Law because the domestic insolvency proceedings would take precedence over the recognition accorded to the foreign insolvency proceedings by the domestic court.

The Model Law on Cross-Border Insolvency is an attempt to improve the worldwide regime for trade, commerce and investment for the benefit of everyone involved in the global economy. Concerns relating to issues that are particularly local or domestic were addressed in the development of the Model Law. Consequently:

1. The Model Law contemplates that a domestic court may decline to act where doing so would be contrary to domestic public policy (Article 6).
2. The Model Law provides that it is to be interpreted with regard to its international origin and the need to promote uniformity in its application and the observance of good faith (Article 8).
3. The Model Law does not affect the ranking of claims in a proceeding under domestic law except that the claims of foreign creditors must not be ranked lower than the claims of general domestic creditors (Article 13(2)).
4. Subsequent to a foreign insolvency representative’s application for recognition, it must inform the domestic court promptly of any change in the status of the foreign proceeding or in its appointment (Article 18(8)).
5. The recognition of a foreign proceeding does not affect the rights of domestic creditors to commence proceedings under domestic insolvency law or the right to file claims in such a proceeding (Article 20(4)).
6. In granting, denying or modifying relief under the Model Law, the domestic court “must be satisfied that the interests of creditors and other interested persons including the debtor are adequately protected” (Article 22(1)).
7. The domestic court is entitled to communicate with, or request information or assistance directly from, foreign courts or foreign representatives (Article 25(2)).
8. Where a domestic proceeding and a foreign proceeding are both taking place, the domestic and foreign court are obliged to cooperate with each other. If the domestic insolvency proceeding began before an application for recognition of the foreign proceeding was filed, the relief granted to

the foreign representative must be consistent with the domestic proceeding (Article 29(a)(i)).

9. Where a domestic proceeding is commenced after an application for recognition for a foreign proceeding is filed, the relief in favour of the foreign representative must be reviewed by the domestic court and must be modified or terminated if it is inconsistent with the domestic insolvency proceeding (Article 29(b)).
10. In determining whether relief should be granted to a foreign insolvency representative from a non-main proceeding, the domestic court must be satisfied that the relief relates to assets that, under domestic law, should be administered in that foreign proceeding: Article 29(c).

The international consensus upon which the Model Law was developed was that domestic creditors would not be prejudiced by the Model Law and the structure of the Model Law itself bears this out.

Over 70 countries and international organizations participated in the development of the Model Law and, at each stage of the way, there was a consensus on each of its provisions. Consequently, the Model Law is a broad expression of international co-operation in an important commercial area. The Model Law has been passed by Japan, Mexico, Poland, Romania and Spain, among other countries, and enabling legislation has been passed in the United Kingdom. Recommendations for the adoption of the Model Law have been made in Australia, Canada and New Zealand, and a number of other countries are currently considering its adoption.

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If you would like more detailed information regarding the subjects presented in this article, or on other Business Reorganization issues, please contact [E. Bruce Leonard](#) at 416 869 5757 or bleonard@casselsbrock.com.

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