

LEGAL UPDATE

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New Twists For Cross Border Insolvency Proceedings

By: Roberta A. Colton
Email: racolton@trenam.com

Among the less controversial provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 is a new chapter of the Bankruptcy Code addressing multi-national insolvency proceedings. The new Chapter 15 incorporates the Model Law on Cross-Border Insolvency completed by the United Nations Commission on International Trade Law ("UNCITRAL") in 1997. Like the Model Law, which already has been adopted by a number of countries, Chapter 15 is intended to facilitate international cooperation in the administration of insolvency proceedings when the debtor has assets in more than one country.

Goals of Chapter 15 – The overriding goal of Chapter 15 is cooperation between U.S. Courts, trustees, examiners, and debtors on the one hand and “the courts and other competent authorities of foreign countries involved in cross-border insolvency cases” on the other hand. Such cooperation is designed to produce (i) “greater legal certainty for trade and investment” (ii) fair and efficient cross-border insolvencies; (iii) maximization of value of the debtor’s assets; and (iv) rehabilitation of the debtor so as to preserve investments and employment. With the enactment of Chapter 15, Congress has determined that international comity, or the due recognition of the legislative and judicial acts of another country, is especially important in bankruptcy. Cooperation can facilitate efficient and equitable distribution of the assets of an insolvent entity or individual.

Eligible Debtors – Debtors who are generally eligible under the Bankruptcy Code will also be eligible under Chapter 15. This would include any person or entity having property in the U.S. Although foreign banks will not be eligible to file, even if they have a branch or agency in the U.S., foreign insurance companies doing business in the U.S. may use Chapter 15. Originally excluded as potential debtors, the insurance industry lobbied hard to be included within the eligibility requirements of Chapter 15, to reflect the common practice of using ancillary proceedings in the U.S. to wind down the affairs of multi-national insurers. Insurance regulators can request the court to abstain in an appropriate case.

Commencement of a Case – A case is commenced under Chapter 15 by filing a “petition for recognition” of a foreign proceeding. The petition would be filed by a duly qualified foreign representative of the debtor’s “main” bankruptcy case, which is presumably in a foreign jurisdiction. Once the bankruptcy court recognizes the foreign proceeding and the foreign representative, the foreign representative is entitled to (i) an automatic stay to protect the debtor’s property within the territorial jurisdiction of the United States, (ii) the right to operate the debtor’s business, and (iii) the right to sell and deal with property in the same manner as a trustee or debtor in possession in the U.S. A bankruptcy court will also have the authority to grant additional appropriate relief. Such additional relief must be consistent with the principal of due deference to foreign law, but only when foreign law is generally consistent with due process rights recognized in this country.

The adoption of Chapter 15 in the U.S., along with the adoption of the Model Law by countries such as Mexico and Japan, attempts to protect domestic as well as international interests. The new law does not purport to create substantive rights, but rather procedural mechanisms for resolving disputes with international implications. For multi-national companies seeking to reorganize, Chapter 15, and the Model Law, as adopted in other countries, offer many options in terms of where to file and how to proceed. Such options should be reviewed carefully so as to maximize the value of assets and the prospects of a successful reorganization

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