

UNIVERSITY OF TORONTO GLOBAL PROFESSIONAL LL.M PROGRAM

INTRODUCTION TO CHAPTER 15 OF THE UNITED STATES BANKRUPTCY CODE

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OVERVIEW

Chapter 15 is entitled Ancillary and other Cross-Border Cases

- It is the U.S. enactment of the UNCITRAL Model Law on Cross-Border Insolvency
- It is a separate chapter of Title 11 of the United States Code, known as the Bankruptcy Code

The U.S. and 20 other countries have enacted domestic legislation that adopts the Model Law

- The legislation is not identical in each country because it was adapted for the country's legal system and, sometimes, because a country included a non-uniform provision
- The U.S. attempted to stay as close to the Model Law as possible

Chapter 15 enables representatives of an insolvency proceeding in a foreign country to access courts in the U.S. and seek assistance for the foreign proceeding

- The chapter 15 case will be ancillary to the foreign case and will not be a “full” bankruptcy case
- A chapter 15 case can only be commenced by a foreign representative of a foreign proceeding; consequently there can be no chapter 15 case unless there is an antecedent foreign proceeding
- A debtor cannot commence a chapter 15 case

A foreign main proceeding will be a “full” or “plenary” insolvency proceeding in a foreign country, similar to a liquidation case under chapter 7 or a reorganization case under chapter 11 in the U.S.

A full proceeding has attributes that are absent from a chapter 15 case, such as

- Ability of debtor or creditors to commence the proceeding (as opposed to only the foreign representative)
- Creation of an “estate” comprised of the debtor’s assets wherever located, including outside the territory of the country in which the proceeding is being conducted

- Often, appointment of a trustee or other representative to supervise or replace the debtor
- Collection and monetization of assets, including by setting aside preferential or fraudulent transfers detrimental to creditors generally
- A process for creditors to submit claims and participate in distribution of assets
- Participation of creditors through committees and by voting on reorganization proposals
- Provisions for discharge of pre-insolvency proceeding liabilities

Conversely, a chapter 15 case will be ancillary to a plenary foreign proceeding in another country and will provide assistance to or coordination with the foreign proceeding

Chapter 15, like the Model Law, invokes several key terms and concepts

- FOREIGN PROCEEDING: a reorganization or liquidation proceeding under a law relating to insolvency and subject to court supervision or a right to seek court review
- FOREIGN REPRESENTATIVE: a person or body appointed to act on behalf of the foreign proceeding

- RECOGNITION: the determination that the foreign proceeding and its foreign representative are eligible for assistance, in part because the foreign proceeding is in a country where the debtor has its COMI or an establishment
- COMI: the “center of main interests” or principal place of business of the debtor in the foreign proceeding
- ESTABLISHMENT: a permanent place of business, other than the COMI, of the debtor in the foreign proceeding

- FOREIGN MAIN PROCEEDING: a foreign proceeding taking place in the country of the debtor's COMI
- FOREIGN NONMAIN PROCEEDING: a foreign proceeding taking place where the debtor has an establishment; likely either a liquidation of local assets or an ancillary proceeding
- RELIEF: the specific assistance that is either automatic on recognition of a foreign main proceeding or within the court's discretion once recognition of any foreign proceeding has been granted

- SUFFICIENT PROTECTION: the condition that relief can be granted or continued only if the interests of parties other than the foreign representative are considered and balanced
- PUBLIC POLICY: recognition and relief cannot be granted if they are “manifestly contrary to the public policy of the United States”
- INTERPRETATION: the direction in chapter 15 that it should be interpreted in light of its international origin and with a view to being consistent with interpretation by other Model Law countries

A foreign representative of a foreign proceeding files a petition for recognition with the bankruptcy court to commence a chapter 15 case

- Recognition must be granted if it is not manifestly contrary to public policy, if the foreign proceeding is a foreign main proceeding or a foreign nonmain proceeding and if the foreign representative was duly appointed
- When recognition has been granted, the U.S. court must cooperate with the foreign representative and the foreign court to the maximum extent possible

Chapter 15 is primarily a gateway for a foreign representative to gain **access** to courts in the U.S.

- To pass through the gateway, the foreign representative must obtain recognition of the foreign proceeding
- Recognition validates the eligibility of the foreign proceeding and the foreign representative under statutory criteria
- After recognition has been granted, relief, cooperation and coordination are mostly provided by the U.S. bankruptcy courts but the foreign representative can also proceed in any court in the U.S.

Relief – or Assistance - may include:

- Protection of the debtor and its assets located in the U.S. against creditor action and litigation – the automatic stay takes effect on recognition of a foreign main proceeding
 - Pre-recognition relief can be granted if urgently needed
- Collection of information and investigation through judicially sanctioned discovery
- Sale of assets in the U.S. or coordinated sale of domestic and foreign assets to realize going concern value
- Collection of accounts and recovery of assets for distribution in the foreign proceeding

- Coordination of parallel domestic and foreign reorganization proceedings
- Enforcement of foreign reorganization plans

Relief is conditioned on (a) not being manifestly contrary to public policy and (b) providing sufficient protection to creditors and other parties, including the debtor

- U.S. avoidance law (setting aside preferential transfers, transfers intended to defraud creditors and transfers for less than fair value) cannot be used in a chapter 15 case
- Avoidance law of the country where the foreign proceeding is pending may be used in a chapter 15 case

Dan Glosband retired as an equity partner in Goodwin Procter LLP on September 30, 2014 and is currently Of Counsel to the firm. He is a founder and principal of CBInsolvency LLC, which provides expert opinion, consulting and mediation services in cross-border insolvency matters. His entire career, beginning in 1969, focused on sophisticated corporate insolvency matters and included the study and reform of international insolvency law.

He received his training as a mediator from MWI. He first worked on a significant cross-border case in 1983 and has since represented foreign representatives, debtors and counterparties in connection with cross-border insolvency matters; has provided expert testimony to courts in Bermuda, England and Canada; and has served in the leadership, scholarly and legislative development activities including as an adviser to the American Law Institute's Transnational Insolvency Project; a founding member of the International Insolvency Institute; head delegate of International Bar Association to the Working Group on Insolvency Law that produced the UNCITRAL Model Law on Cross-Border Insolvency; head delegate of International Bar Association to the Working Group that produced the UNCITRAL Legislative Guide on Insolvency Law; advisor to the United States Department of State, Office of Legal Advisor, throughout the two UNCITRAL projects and on the drafting of Chapter 15 of the Bankruptcy Code; lead draftsman (with Professor Jay Westbrook of the University of Texas Law School) of the United States adaptation of the UNCITRAL Model Law, Chapter 15 of the United States Bankruptcy Code, Cross-Border and Other Ancillary Cases and assistance to Congress in connection with its enactment; conferee of the National Bankruptcy Conference and Vice-Chair of the Committee on International Aspects (the Conference is a voluntary, non-profit, self-supporting organization of about sixty-five lawyers, law professors and bankruptcy judges who have achieved scholarly distinction in the field of bankruptcy law – its purpose is to study the operation of bankruptcy and related laws and proposals for their reform and results in frequent consultation with Congressional staff on issues pertaining to cross-border insolvency and in periodic drafting of amendments to Chapter 15); faculty for Chapter 15 portion of International Insolvency Course at St. John's Law School; and author of Chapter 15 portions of Collier on Bankruptcy (15th Edition), Collier International Business Insolvency Guide, and Collier Bankruptcy Practice Guide.