

Chapter 15: Fundamentals and Recent Case Survey

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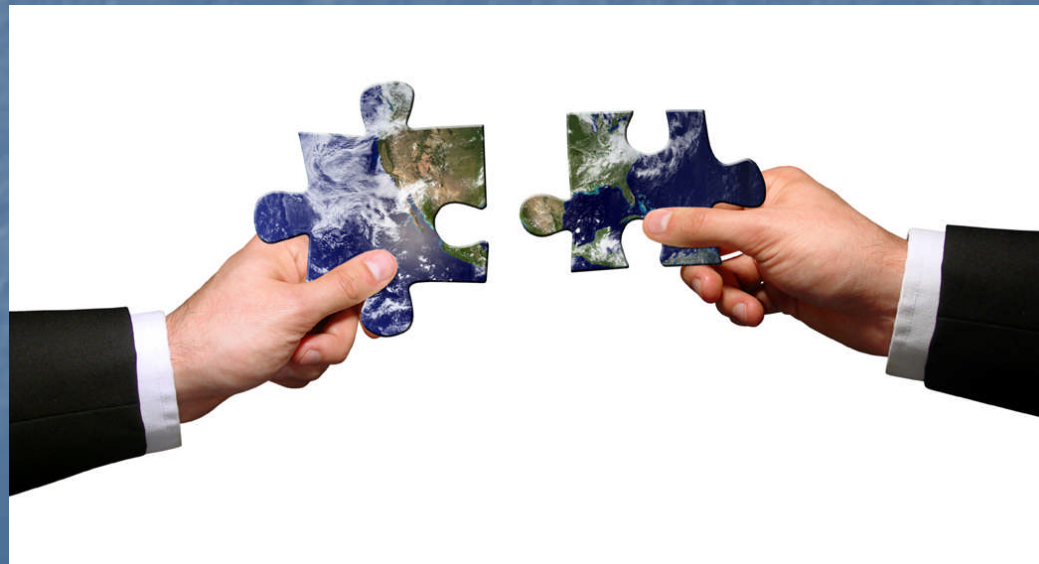
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Consequences of Global Commerce

- Transactions, goods and money pass across borders
- Companies have assets in multiple countries
- Companies have liabilities in multiple countries

Globalization of business and its effects give rise to the need to deal with insolvencies of debtors with assets and creditors around the world.



History of Chapter 15

- Section 304
 - A step toward “modified universalism” by the U.S.
- The UNCITRAL Model Law
 - Over 70 countries participated in its development
 - Chapter 15 is the U.S. enactment of the Model Law
 - Other countries that have adopted it: BVI, overseas territory of the United Kingdom of Great Britain and Northern Ireland, Columbia, Eritrea, Great Britain, Japan, Mexico, Montenegro, New Zealand, Poland, Romania, Serbia and South Africa.

Goals of Chapter 15

- Cooperation between U.S. and foreign courts
- Greater legal certainty for trade and investment
- Fairness, efficiency of administration, protection of stakeholders
- Protection and maximization of the value of a foreign debtor's assets
- Facilitation of the restructuring and reorganization of financially troubled businesses

Who Can File a Chapter 15

- A “foreign representative”
 - A “foreign representative” is a person or body authorized in a “foreign proceeding” to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of such foreign proceeding.
 - A “foreign proceeding” is a collective judicial or administrative proceeding in a foreign country under a law relating to the insolvency or adjustment of debt in which the assets and affairs of the debtor are subject to the control or supervision of a foreign court for the purpose of reorganization or liquidation.

Why File a Chapter 15

- The foreign debtor has assets in the U.S. that the foreign representative needs to gain control of
- The foreign representative needs to stop litigation or collection efforts against the foreign debtor and its assets in the U.S.
- The foreign representative needs to take discovery from persons or entities in the U.S.
- The foreign debtor has causes of action against parties in the U.S.

How to File A Chapter 15

- Choose venue under 28 U.S.C. § 1410
 - The District of the foreign debtor's principal business or assets in the U.S.;
 - The District where litigation is pending against the foreign debtor; or
 - The venue that is consistent with the interests of justice and convenience
- Foreign Representative Files A Petition
 - Official Bankruptcy Form Petition
 - File verified petition in a pleading format that recites the background of the debtor and all of the requirements for recognition
 - Attach decision commencing the foreign proceeding and appointing the foreign representative (or something that proves the commencement and appointment)
 - Statement regarding all other foreign proceedings affecting the foreign debtor
 - Rule 1007(a) statement that lists interested parties—foreign administrators, all parties to litigation in the U.S., and all parties against whom the foreign representative seeks provisional relief (that is, relief pending recognition)

Hearing and Notice

- Important to remember: there is no relief afforded until the foreign proceeding is recognized
 - Foreign representatives can seek provisional relief (like a stay of litigation or collection efforts) under section 1519
 - Use the standards for granting an injunction
- Notice of the petition and recognition hearing
 - Must serve the foreign debtor, parties in litigation with the foreign debtor in the U.S., parties against whom provisional relief is sought, other parties as directed by the court
- Hearing
 - To be decided at the “earliest possible time”

The Recognition Order

- Ask the court to allow discovery under 1521(a)(4) and specify that further motions (like rule 2004 motions) are not necessary
- Ask the Court to entrust the administration and realization of any U.S. assets to the foreign representatives (1521(a)(4)&(5)) and to entrust the distribution of those assets to the foreign representative (1521(b)).
 - The Court should be willing to do that if the foreign proceeding is similar to a U.S. bankruptcy in terms of distribution and nondiscrimination
- If you are asking for non-main recognition (or think that is all you can qualify for) ask for an injunction to stop collection and litigation against the debtor in the U.S.

Notable Differences Between Chapter 15 vs. Chapter 11 Practice

- No schedules and statement of financial affairs
- No application to employ the foreign representative's counsel in the U.S. Court
- No creditors' meeting or bar date
 - This generally appears to be handled in the foreign case under the foreign case rules

Two Types Of Recognition

- Foreign Main Proceeding
 - For a proceeding pending in the debtor's center of main interest ("COMI")
 - The statute provides a presumption that the COMI is the place of registration or habitual residence, absent evidence to the contrary
 - Factors: incorporation, registration, regulation, operations, office, assets, employees
- Foreign Non-Main Proceeding
 - For a proceeding pending in a country where the debtor has an "establishment"
 - An "establishment" is any place of operation where the debtor carries out a non-transitory economic activity.

Relief Given To A Foreign Main Proceeding

■ Automatic

- 361 and 362 apply with respect to the debtor and the property within the U.S.
- 363, 549 and 552 apply to transfers of the debtor's interest in property in the U.S.
- Unless the court orders otherwise, the foreign representative may operate the debtor's business and exercise a trustee's rights under 363 and 552
- 552 applies to property of the debtor within the U.S.

■ Discretionary

- Seems fairly broad as long as it doesn't conflict with Chapter 15
- Provide additional stay relief, injunction relief, suspension of transfers (to the extent not already provided by 362)
- Provide for the examination of witnesses, taking of evidence, delivery of information regarding the debtor
- Entrust the administration, realization and distribution of the U.S. assets to the foreign representatives
 - If the Court is comfortable that the assets should be administered in the foreign proceeding and that U.S. creditors will be sufficiently protected
- Grant any other relief available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550 and 724(a)

Relief That Can Be Given to a Foreign Non-Main Proceeding

- All Relief is Discretionary
- Similar to the discretionary relief allowed to a foreign main proceeding

Notable Cases on Recognition

- SPhinX—foreign proceeding recognized as a foreign non-main proceeding
- Bear Sterns—no recognition granted
- Basis Yield—related to evidence to be presented at recognition hearing
- Controversy exists regarding how court's are treating the statutory presumption of COMI

SPhinX

Despite the fact that the debtors were Cayman registered companies, the Bankruptcy Court held that the Cayman Islands proceedings were foreign *nonmain* proceedings. The SPhinX vehicles appealed and the district court upheld the bankruptcy court's ruling. The Court noted that based on "objective factors ascertainable to third parties," the SPhinX vehicles' COMI was actually located in the United States, thus rebutting the statutory presumption that a debtor's COMI is where it is registered.

Bear Sterns

- Cayman registered companies denied recognition
- “Recognition under section 1517 is not to be rubber stamped by the courts,” and is not based solely on where the debtor is registered if the petition is unopposed.
- Recognition as a foreign main proceeding was denied
 - Factors utilized when determining a debtor’s COMI: location of headquarters and primary assets, location of the majority of creditors, and the jurisdiction whose law would apply to most disputes.
 - Bankruptcy court held that the hedge funds’ COMI was not foreign, principle interests, assets, and management all located in the United States.
- Recognition as a foreign non-main proceeding denied
 - The bankruptcy court found that the debtors did not have an “establishment” in the Cayman Islands.
 - The debtors did not have nontransitory economic activity in the Cayman Island (Cayman law prohibits “exempt companies” from engaging in business in the Cayman Islands, except in furtherance of their business carried on outside of the Cayman Islands).
 - The Court suggested foreign representatives could obtain relief needed by filing an involuntary petition under Bankruptcy Code Section 303(b)(4)

Basis Yield

- Bankruptcy Court issued an order directing the foreign representatives to present certain evidence at the recognition hearing
- The foreign representatives filed a motion for summary judgment, in essence arguing that they could rely on the presumption of COMI
- The bankruptcy court denied the motion and directed the following evidence to be presented:
 - the jurisdictions of registration, the type of business entity, whether the debtor is registered or qualified to do business in other jurisdictions, where the debtor maintains offices, the functions performed in each office, the number, location and function of the debtor's personnel, whether any other entity exercises control over the debtor's business and the location of any such entity, the places where the investment or portfolio management for the debtor is conducted, the places where the debtor's administrative activities take place, the location of the debtor's assets, whether any assets were transferred to the Cayman Islands before or after the Cayman liquidation proceedings
- The foreign representatives have moved to have the Chapter 15 case dismissed (hearing set for April 30, 2008)

Cases on the Application of Section 108

- Condor Insurance—Bankruptcy Court applied section 108 to chapter 15 case
 - Legislative history of section 1520 indicates that Congress intended and assumed that section 108 would apply to chapter 15 cases
 - Section 1521(a)(7) allows the bankruptcy court to provide any additional relief that would be available to a trustee under the bankruptcy code where such relief is necessary to effectuate the purposes of this chapter and to protect the debtor's assets or the interest of creditors
- Bancredit—Bankruptcy Court denied application of section 108
 - The bankruptcy court held section 108 does not automatically apply because the foreign representative is not a trustee, there is no order for relief in a chapter 15 and nothing in chapter 15 expressly authorizes the relief sought.
 - With regard to the court's ability to grant the relief under section 1521, the bankruptcy court thought that the relief requested was unnecessary and procedurally inappropriate in that the parties who would be adversely affected had not been given notice.
 - Affirmed on appeal by district court

Suits to Recover Property of the Debtor—Condor Insurance

- Fraudulent Transfer limitations in Chapter 15
- Applying the law of the foreign main proceeding in a U.S. bankruptcy adversary proceeding to recover assets of the debtor that were transferred pre-petition

Q&A

Texas 26th Annual Advanced Business Bankruptcy Course