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## **CHAPTER 15 ANCILLARY AND OTHER CROSS-BORDER CASES**

Title VIII of S. 256 adds chapter 15 to the Bankruptcy Code as an entire new chapter which incorporates the Model Law on Cross-Border Insolvency completed by the United Nations Commission on International Trade Law (“UNCITRAL”) in 1997. By replacing former section 304 of the Code, *Cases ancillary to foreign proceedings*, with chapter 15 the legislation encourages cooperation between the United States and foreign countries with respect to transnational insolvency cases. Insofar as possible, chapter 15 follows the language, section numbering and general structure of the Model Law to promote uniformity in its adoption and application.

Chapter 15 is unique in that it contains a statement of its purpose, nearly replicating the language that begins the Model Law:

**§1501** The purpose of this chapter is to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency with the objectives of--

- `(1) cooperation between--
  - `(A) United States courts, United States trustees, trustees, examiners, debtors, and debtors in possession; and
  - `(B) the courts and other competent authorities of foreign countries involved in cross-border insolvency cases;
- `(2) greater legal certainty for trade and investment;
- `(3) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor;
- `(4) protection and maximization of the value of the debtor's assets; and

- (5) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

According to the Legislative Commentary which will accompany the House version of the Bill:

*Cases brought under this chapter are intended to be ancillary to cases brought in a debtor's home country, unless a full United States bankruptcy case is brought under another chapter. Even if a full case is brought, the court may decide under section 305 to stay or dismiss the United States case under the other chapter and limit the United States' role to an ancillary case under this chapter. If the full case is not dismissed, it will be subject to the provisions of this chapter governing cooperation, communication and coordination with the foreign courts and representatives.*

Debtors who would be eligible for relief under section 109 of the Code will also be eligible under chapter 15. Foreign banks will not be eligible if they have a branch or agency in the United States; however foreign insurance companies doing business in the United States will be eligible. Excluded under the initial draft, foreign insurance companies were added at the request of the insurance industry to reflect the common practice of invoking ancillary proceedings in the United States as part of the wind up of multi-national insurers. Insurance regulators can ask the United States court to abstain under Code section 305 in an appropriate case.

Chapter 15 contains several new definitions to assist in conforming it to the Model Law. As explained in the Legislative Commentary:

*"Debtor" is given a special definition for this chapter. That definition does not come from the Model Law but is necessary to eliminate the need to refer repeatedly to "the same debtor as in the foreign proceeding." With certain exceptions, the term "person" used in the Model Law has been replaced with "entity," which is defined broadly in section 101(15) to include natural persons and various legal entities, thus matching the intended breadth of the term "person" in the Model Law. The exceptions include contexts in which a natural person is intended and those in which the Model Law language already refers to both persons and entities other than persons. The definition of "trustee" for this chapter ensures that debtors in possession and debtors, as well as trustees, are included in the term.*

*The definition of "within the territorial jurisdiction of the United States" in subsection (7) is not taken from the Model Law. It has been added because the United States, like some other countries, asserts insolvency jurisdiction over property outside its territorial limits under appropriate circumstances. Thus a limiting phrase is useful where the Model Law and this chapter intend to refer only to property within the territory of the enacting state. In addition, a definition of "recognition" supplements the Model Law definitions and merely simplifies drafting of various other sections of chapter 15.*

Chapter 15 divides "incoming" foreign proceedings into foreign main proceedings, which are pending in the country where the debtor has its center of main interests, and foreign nonmain

proceedings, which are themselves ancillary proceedings. A case under chapter 15 is commenced by a petition filed by a "foreign representative" (Code section 101 (23)) of a "foreign proceeding" (Code section 101(24)), accompanied by documents evidencing the foreign proceeding and the appointment and authority of the foreign representative.<sup>1</sup> The order granting "recognition" of the foreign proceeding specifies if the foreign proceeding is main or nonmain. Pending recognition, a foreign representative may seek "provisional" or temporary relief if urgently needed.

Unlike section 304, where all relief was dependent on court approval based on satisfaction of a statutory list of criteria, chapter 15 provides that upon recognition of a foreign main proceeding, the automatic stay and selected other provisions of the Code take effect subject to the exceptions and protections already in the Code. In addition, a foreign representative of a foreign main proceeding is authorized to continue operation of a debtor's business in the ordinary course.

The recognition procedure is the sole entry point for access by a foreign representative to the State and Federal court systems in the United States (except for the limited purpose of collecting the debtor's accounts receivable). Venue is also narrowed to a single entry point where the debtor has its principal place of business; if none, where there is litigation pending against the debtor; if none, where venue will be consistent with interests of justice and the convenience of the parties, having regard to the relief sought (28. U.S.C. section 1410). If recognition is denied, the foreign representative cannot attempt to proceed in another court. If recognition is granted, the foreign representative can seek additional relief from the bankruptcy court or any other State or Federal Court, including commencing a full (as opposed to ancillary) case under the Code; if the foreign representative is acting on behalf of a foreign main proceeding, it may commence a voluntary proceeding under Code section 301 or 302; otherwise it can only commence an involuntary case under Code section 303.

Chapter 15 also codifies the Model Law's provisions for cooperation and communication among courts and representatives, for coordination of multiple proceedings and for untangling chapter 15 cases from cases which involve the same debtor and which have been commenced under other chapters. Under both the Model Law and section 1525, courts and estate representatives in the enacting country must "cooperate to the maximum extent possible" with foreign courts and foreign representatives. The law entitles courts to "communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives."

The court can implement such cooperation by "any appropriate means" including the appointment of persons to act at the direction of the court, coordination of administration and

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<sup>1</sup> DEFINITIONS- Paragraphs (23) and (24) of section 101 of title 11, United States Code, are amended to read as follows:

- '(23) 'foreign proceeding' means a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;
- '(24) 'foreign representative' means a person or body, including a person or body appointed on an interim basis, 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 the foreign proceeding;

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supervision of the debtor's assets and affairs and use of coordination agreements or protocols. Following the Model Law, chapter 15 also promotes the coordination of concurrent proceedings involving the same debtor, including both coordination between a local proceeding and a foreign proceeding and coordination when foreign representatives of more than one foreign proceeding seek recognition and relief.