Managing the Chapter 15 Cross-Border Insolvency Case

A Pocket Guide for Judges

SECOND EDITION

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U.S. Bankruptcy Court for the Southern
District of California

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Contents

Foreword

I wish to acknowledge the invaluable assistance of my student intern Hernan Correa (California Western School of Law, Class of 2013) in gathering, organizing and analyzing the many new cases decided in the chapter 15 area since publication of the first edition of this monograph.

The case law and other materials discussed are current as of December 31, 2013.

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Introduction

Increasing globalization and cross-border interdependence of business enterprises increase the likelihood that bankruptcy judges, wherever located, will see the occasional chapter 15 case filed in their jurisdictions.[1] As with all novel proceedings, that chapter 15 filing may raise unique case-management questions. This guide attempts to help judges in handling transnational bankruptcy cases.

Chapter 15 is a nearly verbatim adoption of the UNCITRAL[2] Model Law ("Model Law"), an international effort to deal with cross-border insolvency issues. The Model Law was ratified by the United Nations General Assembly in 1997.[3] As of the date of this publication, it has been adopted in 19 countries. The Model Law has not been adopted by the European Union ("EU") as an organization although several EU member states have individually done so.[4] EU countries have their own, somewhat similar, insolvency procedures called the EC Regulation,[5] which govern insolvencies among member states. However, concepts embodied in the EC Regulation—for example, "centre of main interest"—and legal

1. Chapter 15 took effect Oct. 17, 2005, and applies to all U.S. bankruptcy cases filed on or after that date. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. No. 109-8, Title VIII, §§ 801–802 and Title XV, 119 Stat. 23, 134–46. Hereinafter, all chapter and section references refer to 11 U.S.C. §§ 1501–1532 unless otherwise specified.

2. United Nations Commission on International Trade.

3. UNCITRAL Model Law on Cross-Border Insolvency: Guide to Enactment and Interpretation, enacted by G.A./Res. 68/107, U.N. Doc. A/RES/68/107 (Dec. 18, 2013); See also www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html (last visited January 31, 2014).

4. As of this writing, those states are Great Britain, Romania, Poland, Greece, and Slovenia.

5. Council Reg. (EC) No. 1346/2000 of May 29, 2000.

opinions applying the EC Regulation are helpful to understanding application of the Model Law.

The Model Law is not a law of substantive bankruptcy; rather, it is designed to provide a procedural framework into which local substantive bankruptcy law is integrated. It is a template that countries are encouraged to incorporate into their domestic bankruptcy law, making changes to the Model Law, where necessary, to accommodate the local law.

When the Model Law was adopted by the United States as chapter 15, former 11 U.S.C. § 304**,** which had been the procedural mechanism for handling ancillary proceedings under previous U.S. bankruptcy law, was expressly repealed. Although the legislative history to chapter 15 suggests some of the substantive concepts contained in case law construing former § 304 may retain their vitality, it is also clear from the directive in 11 U.S.C. § 1508[6] that judges wrestling with interpretation of chapter 15 should look outside U.S. case law not only for guidance but also to avoid conflicts and to promote a harmonious interpretation of its provisions. The appendix to this guide provides some research resources to assist in locating foreign court decisions.

Typically, chapter 15 may be invoked in one of two ways. First, the trustee of a domestic case with foreign assets may ask the bankruptcy court for authorization under § 1505 to act in a foreign country on behalf of a U.S. case. This authorization—essentially appointing the trustee, examiner**,** or debtor-in-possession as a foreign representative—is an important first step to that person obtaining recognition to act on behalf of the U.S. bankruptcy estate in the foreign country. The concepts of authorizing the requesting party to act in a specific country, and defining the scope of that

6. 11 U.S.C. § 1508 provides: "In interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions."

party's authority, are ones familiar to bankruptcy judges without reference to any other part of chapter 15. In addition, the bankruptcy judge may wish to consider imposing reporting requirements for the representative's activities as a means to control the expenses of the representative's foreign activities.

Second, and more commonly, the foreign representative[7] of an insolvency proceeding pending in another country with assets in the U.S. will ask the U.S. bankruptcy court for recognition—that is, authority—to act on behalf of that foreign proceeding to administer those U.S. assets. In this situation, the U.S. case under chapter 15 will be ancillary to a case pending elsewhere.

This guide will focus on the management of ancillary cases and will only briefly discuss questions of bankruptcy court jurisdiction in chapter 15 cases and the impact of *Stern v. Marshall* [8] on the bankruptcy court's power to issue final orders in chapter 15 cases. The guide is divided into five major components. Part I of the guide will assist in understanding the process of recognition, including how to deal with requests for interim relief while the recognition process is under way. Part II of the guide addresses the problems and considerations of operating a business in chapter 15. Parts III and IV address court-to-court communication including cross-border agreements or protocols, and claims issues. Part V discusses the bankruptcy court jurisdiction in chapter 15 cases.

The appendix to this guide contains a list of resources that may assist in providing a deeper understanding of this statute.

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7. 11 U.S.C. § 101(24) (2013).

8. *Stern v. Marshall*, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011), *reh'g denied,* 132 S. Ct. 56, 180 L. Ed. 2d 924 (2011).

I. Commencing the Chapter 15 Case

The typical chapter 15 case is commenced by a foreign representative filing a petition for recognition. "Recognition" is the entry of an order conferring status on the foreign representative to proceed before U.S. courts.[9] The process for obtaining recognition is spelled out in § 1515; the presumptions applied to a petition for recognition are contained in § 1516; and the elements of the decision to grant recognition are found in § 1517.

The foreign representative is not necessarily someone appointed by a foreign court but may be, for example, a receiver or liquidator under a collective out-of-court insolvency scheme. The proposed foreign representative will likely ask the bankruptcy judge for extraordinary interim relief immediately after filing the petition for recognition but before recognition has been granted, at a time when the judge has little information about the case. For that reason, this guide will first discuss interim relief standards, followed by the standards and process for recognition.

A. Interim Relief Before a Petition for Recognition Is Granted

1. What forms of interim relief may be provided before granting a recognition petition?

Typically, the foreign representative seeking recognition is dealing with pending litigation that threatens to seize assets and impair the debtor's value to the creditor body. If the judge is persuaded that interim relief is "urgently needed to protect the assets of the debtor or the interests of the creditors," § 1519 gives the court a toolbox of remedies, "including"[10]:

- staying execution;
- staying litigation;

9. 11 U.S.C. § 1502(6).

10. 11 U.S.C. § 1519(a).

- entrusting U.S. assets that are perishable or susceptible to devaluation to either the foreign representative or to some other person, like an examiner, to protect them;
- freezing the right to transfer or encumber the assets;
- authorizing witnesses to be examined by the foreign representative (in a manner similar to a Rule 2004 examination) to obtain evidence about the debtor's assets;
- avoiding pre-petition setoffs and post-petition transfers; and
- turnover powers.

Unless extended upon recognition under § 1521(a)(6), the interim relief granted under § 1519 terminates when the petition for recognition is granted.[11]

2. How does the foreign representative obtain interim relief?

Section 1519(e) has some troublesome language. It states that the "standards, procedures, and limitations applicable to an injunction shall apply to [the] relief under this section." Arguably, this language could be interpreted to require the foreign representative to proceed as though the representative were obtaining a Fed. R. Civ. P. 65 temporary restraining order or preliminary injunction in order to obtain *any* § 1519 interim relief. This would require a foreign representative to file an adversary proceeding.[12]

However, the legislative history to § 1519 provides that "[t]his section does not expand or reduce the scope of section 105 as determined by cases under section 105 . . . ."[13] In construing the near-

11. *Id.*

12. Fed. R. Bankr. P. 7001(7).

13. 11 U.S.C. § 105(a) states: "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

ly identical language in § 1521(e), the court in *In re Ho Seok Lee* held that an adversary proceeding was not required in order to grant injunctive relief because the legislative history to § 1521 states: "[t]his section does not expand or reduce the scope of relief currently available under sections 105 and 304" and prior case law authorized injunctive relief under § 304 without requiring an adversary proceeding.[14]

In contrast, in *In re Pro-Fit Holdings Ltd.*,[15] the court recognized that an adversary proceeding is required for *some* of the relief in § 1519. The court distinguished between injunctive and non-injunctive relief in § 1519 and found that the prerequisites in § 1519(e) apply only where injunctive relief is sought, such as staying of execution pursuant to § 1519(a)(1).[16] The court also concluded that the list of provisional relief in § 1519 is incomplete and that a number of other bankruptcy code sections may be imported on a provisional basis, including the automatic stay in § 362.[17] It held that when § 362 is imported provisionally, an adversary proceeding is never needed and satisfaction of the prerequisites for obtaining an injunction is never required.[18]

Finally, *In re Worldwide Education Services, Inc.*[19] applied § 1519(e) [Fed. R. Civ. P. 65 injunction standards] to "all relief sought pursuant to Section 1519, including imposition of the au-

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No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, *sua sponte*, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process."

14. *In re Ho Seok Lee*, 348 B.R. 799, 801-2 (Bankr. W.D. Wash. 2006) (citing H.R. Rep. No. 109-31, 109th Cong., 1st Sess., 116 (2005) and *Petition of Rukavina*, 227 B.R. 234 (Bankr. S.D.N.Y. 1998)).

15. 391 B.R. 850, 865 (Bankr. C.D. Cal. 2008).

16. *Id.* at 861.

17. I*d.* at 865.

18. *Id.*

19. 494 B.R. 494, 502 (Bankr. C.D. Cal. 2013).

tomatic stay,"[20] but said these requests for provisional relief can be treated as contested matters rather than adversary proceedings.[21]

Based on these cases, it appears that an adversary proceeding is not required to obtain non-injunctive relief under § 1519, but it may be required to obtain injunctive relief. However, a judge could instead import the automatic stay on a temporary basis, pending recognition, in lieu of granting injunctive relief pursuant to § 1519(e). If the judge requires adherence to the Fed. R. Civ. P. 65 injunction standards in order to grant *any* interim relief under § 1519, the party seeking such relief must show either: (a) irreparable injury and a likelihood of success on the merits; or (b) presence of serious questions and a balance of hardships tipping in its favor, since this is the test generally applicable to obtaining injunctive relief. As a rule, irreparable injury exists whenever local creditors are attempting to enforce claims against the foreign debtor's assets to the detriment of other creditors, or if the foreign representative is forced to participate in litigation that threatens to drain the debtor's assets.[22]

B. Filing the Petition for Recognition of a Foreign Proceeding

1. Who may file the petition for recognition?

Section 1515(a) states that a foreign representative is the party who files the petition for recognition. That party may not necessarily be someone appointed by a foreign court but may be, for example, the U.S. equivalent of a receiver or liquidator under a foreign insolvency or debt adjustment[23] law or an assignee for

20. *Id.* at 498.

21. *Id.* at 499 n. 1.

22. *See In re MMG LLC*, 256 B.R. 544, 555 (Bankr. S.D.N.Y. 2000) (construing former § 304(b) and (c)).

23. 11 U.S.C. §§ 101(23)–(24) (2013); *See* H.R. Rep. No. 109-31, 109th Cong., 1st Sess., 118 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 180 (not limited to

benefit of creditors under state law. All that is required is that the representative be appointed[24] under some form of collective proceeding[25] for benefit of creditors, which proceeding could be subject to review "by judicial or other authority competent to control or supervise the proceeding."[26] Obtaining an order from the bankruptcy court granting the petition for recognition is the precursor to any appearance by the foreign representative in other federal or state courts.[27]

2. What proof of capacity to act is required?

Sections 1515(b)(1)–(3) list, in the alternative, the requirements for filing the petition for recognition in the bankruptcy court. Basically, the requirements are some form of proof, satisfactory to the court, that there is a foreign proceeding pending and that the foreign representative was appointed to act on its behalf. Additionally, the foreign representative must submit a statement disclosing the debtor's center of main interest[28] and any other foreign pro-

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insolvency proceedings, but broadly includes all proceedings involving debtors in severe financial distress, so long as other criteria of section 101(24) is met).

24. *In re Vitro S.A.B. de CV*, 701 F.3d 1031, 1047-49 (5th Cir. 2012) *cert. dismissed*, 133 S. Ct. 1862, 185 L. Ed. 2d 862 (2013) (foreign representatives appointed by debtor, thus equivalent to debtors in possession, must have administrative power over assets but need not qualify as a chapter 11 debtor in possession).

25. *See* discussion in *In re Ashapura Minechem, Ltd.*, 480 B.R. 129, 136-137 (Bankr. S.D.N.Y. 2012).

26. 11 U.S.C. §§ 101(23)–(24), § 1502(3); *See also In re Betcorp Ltd.*, 400 B.R. 266, 294 (Bankr. D. Nev. 2009) (Australian Securities and Investment Commission is a competent authority); *Ashapura Minechem.*, 480 B.R. at 142-43 (Indian Board for Industrial and Financial Reconstruction is competent authority).

27. *But see* 11 U.S.C. § 1509(f) (provides a limited exception under which, absent a petition for recognition, the foreign representative may collect a claim which is the property of the debtor, such as an account receivable).

28. Fed. R. Bankr. P. 1004.2(a).

ceedings pending elsewhere with respect to the debtor [§ 1515(c)]. A recent Second Circuit holding suggests that the statement supporting the petition for recognition should be augmented by a representation that the foreign debtor is qualified under § 109(a) to be a debtor in a chapter 15 case.[29] Certified copies of the opening (filing) of the foreign proceeding and appointment of the foreign representative, translated into English, will suffice; however, if not available, any other form of proof acceptable to the judge may be substituted. There is no requirement that this proof be authenticated in any formal way; the judge is entitled to rely on the authenticity of documents submitted in support of the petition. *See* § 1516(b).

3. What notice of the petition for recognition is required?

Notice of the petition for recognition must be given as prescribed by Fed. R. Bankr. P. 2002(q)(1). Notice is given by the clerk or as the court otherwise directs. Notice must be given to the debtor, to others who are administering the foreign assets of the debtor (e.g., subsidiaries in other countries), entities in litigation in the U.S. with the debtor**,** and anyone against whom provisional relief is being requested under § 1519. The minimum period for notice of the hearing on the petition is 21 days. Notice is to be by mail (but see subsection 4(c) below). The notice must state whether the petition seeks recognition as a foreign main proceeding or a foreign nonmain proceeding.

As more fully discussed in section C.3 below, a foreign main proceeding is one pending in a country where the debtor has its "center of main interest" or CoMI [§ 1502(4)]. In the absence of

29. 11 U.S.C. § 109(a) limits who may be a debtor under Title 11 to "a person that resides or has a domicile, a place of business or property in the United States, or a municipality. . . ." *In re Barnet*, 737 F.3d 238, 247–48 (2d Cir. 2013), holds that § 109(a) applies to debtors in chapter 15 proceedings because § 103(a) makes all of chapter 1 applicable to chapter 15.

contrary evidence, the judge is entitled to presume that the case pending where the debtor has its registered office or the individual debtor has his habitual residence is the main case [§ 1516(b)]. A foreign nonmain proceeding is one pending in a foreign country other than where the debtor has its center of main interest but has an "establishment" [§ 1502(5)], which is a place where it conducts "nontransitory" economic activity. The term "establishment" has been interpreted to exclude locations where the only activity related to the debtor is the foreign insolvency proceeding itself,[30] as well as the so-called "letter box" company locations from the definition of nonmain cases.[31]

4. Problems or pitfalls and suggested solutions

(a) The 21 days' minimum notice period may be problematic for the foreign representative who urgently needs protection for the debtor's assets or creditors' interests. One solution is to order interim relief on a temporary basis as described in § 1519(a).

(b) Although the statute emphasizes holding a hearing on recognition at the earliest possible time, as a practical matter, if the judge has given the foreign representative sufficient interim relief pending recognition, there may not be a need to rush this process. A judge may wish to wait a bit longer to get complete information about the case and take some time to make the decision about recognition if there is no other urgent need for recognition.

(c) The presumption that mail service actually reaches the foreign parties entitled to get notice is one grounded in the belief that all countries have an efficient mail service. Sadly, that is not the case. One solution is to direct the foreign representative to provide

30. *Lavie v. Ran*, 406 B.R. 277, 285-86 (S.D. Tex. 2009), *aff'd, In re Ran*, 607 F.3d 1017 (5th Cir. 2010).

31. *See In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122 (Bankr. S.D.N.Y.), *aff'd,* 389 B.R. 325 (S.D.N.Y. 2008).

information about other complementary forms of notice likely to reach those foreign parties-in-interest, such as publication, email, facsimile, service on agents for service of process, etc., and require that notice be given in more than one form. If notice is directed to be given in more than one form, it might be helpful to avoid later confusion as to which mode of service is deemed to satisfy due process by entering an order that one form of notice—e.g., notice by publication—is presumed to be sufficient notice to foreign parties under the circumstances.

(d) Sections 1514(c)(1)–(2) require a court to notify foreign creditors of the commencement of the case and, as part of that notice, to indicate the time and place for filing proofs of claim and whether secured creditors must file proofs of claim. A judge may be asked by the foreign representative *not* to give the full notice required upon case commencement by § 1514(c)(1)–(2). Modification of that section to avoid confusion and a conflicting claims process seems to be appropriate in instances in which a bar date has already been fixed in the foreign case and notice has already been given to creditors in that case. Deferral may also be desirable because the claims process has not yet been established in the foreign jurisdiction and the foreign representative may need more time to coordinate the filing of claims as between the U.S. case and foreign case. Finally, if there is some question whether the foreign proceeding is the "main" proceeding, the judge may wish to instruct the parties to defer sending out notice of where to file claims until the judge has decided the issue.

C. Hearing the Petition for Recognition

1. Must a hearing be held on the petition for recognition?

There is no statutory requirement that an actual hearing be held on an uncontested petition for recognition. In districts that use negative notice (notice and opportunity to request a hearing), if the petition is uncontested, it is possible that an order could be

entered without a formal hearing. However, it is not suggested that recognition be granted without a formal hearing. Because the foreign representative has the burden of proof of establishing the recognition criteria (see *infra*) and because it is possible that interested parties may not have received notice in time to file written opposition, it seems better practice to require an evidentiary presentation in open court where last-minute opposition can be heard.

2. What if the petition for recognition is contested?

(a) *Form of the opposition:* It is important to remember that the foreign representative has the burden of proof on the basic § 1515(a) elements—existence of the foreign proceeding and the representative's authority to file the petition for recognition. Once either of these predicates is challenged by a party-in-interest, the contest is treated under the same rules applied to contested involuntary petitions. Fed. R. Bankr. P. 1011(b) governs the time periods for filing the objections (21 days with some exceptions). Rule 1011(d) limits the substance of that opposition to claims directed to defeating the petition—that is, claims alleging no foreign proceeding pending and/or no authority to act. Rule 1011(e) permits the judge to authorize a reply; otherwise, none is permitted. Unless the court orders otherwise, a motion for determination that the debtor's center of main interest is other than as stated in the petition for recognition must be filed no later than 7 days before the date set for the hearing on the petition.[32]

(b) *Form of the hearing:* Because opposition to a petition for recognition is treated like a Fed. R. Civ. P. 12(b) motion, it may be decided on the pleadings alone. However, if it is not, it may be treated as civil litigation with the caveat that § 1517(c) of the statute urges courts to decide these matters at the earliest possible

32. Fed. R. Bankr. P. 1004.2(b).

time. Fed. R. Bankr. P. 1018 permits the court to apply some or all of the Part VII adversary rules to the contested petition.

3. *What will be the likely subject matter of a contested recognition petition?*

Most contested recognition petitions to date have been disputes about whether the case before the court should be recognized as a case ancillary to a foreign main proceeding or a foreign nonmain proceeding (the petition for recognition should state which form of recognition the representative is requesting) or neither. These terms of art are defined in §§ 1502(4) and 1502(5) of chapter 15.

Whether the chapter 15 case is recognized as ancillary to a main proceeding or nonmain proceeding has far more importance to the direction of the chapter 15 case than merely the form of relief available under §§ 1520 and 1521. If the judge determines the chapter 15 case is ancillary to a foreign main proceeding, the decisions in that foreign main proceeding will largely control the direction of the ancillary case. The foreign main proceeding is where the decisions of whether and how to reorganize the debtor and its related entities or whether to liquidate will be made. Those decisions are entitled to deference from the U.S. bankruptcy judge.

In contrast, if the judge decides the chapter 15 case is ancillary to a foreign nonmain proceeding, the U.S. judge is determining that the foreign representative is acting on behalf of a foreign nonmain case that will be taking its instructions from a foreign main case filed in yet another jurisdiction. Decisions in the foreign nonmain case may have no more importance to the overall direction of the foreign main case than those in the U.S. chapter 15 case. Although, on occasion, a foreign court may express an opinion as to whether its proceeding is main or nonmain, the U.S. bankruptcy judge is not bound by this expression of opinion.

The distinction between the two types of proceedings—main and nonmain—turns on the *situs* of the foreign proceeding. The determination of *situs* depends on the court's determination of the

"center of main interest" or CoMI of the entity. CoMI is not defined in chapter 15. As part of the recognition process, the court must determine CoMI.

(a) *Presumptions of CoMI:* Even though CoMI is not defined in chapter 15, § 1516(c) assists a court in this determination by adopting the presumptions that the CoMI of an individual is the habitual residence of that person,[33] and the CoMI of an entity is the debtor's registered office. A "registered office" is akin to the principal place of business for the entity. After exhaustively reviewing the various circuit tests for determining principal place of business, the recent U.S. Supreme Court decision in *Hertz Corp. v. Friend*[34] defined it as the place where a corporation's officers direct, control and coordinate the corporation's activities. It is the place that courts of appeal have called the corporation's 'nerve center.'"[35] However, the *Hertz* decision is one made in the context of a diversity dispute in a domestic civil action and not a chapter 15 case and, although helpful, it may not be strictly applicable to determining CoMI in all instances.

(b) *Contesting the presumption of CoMI:* Although § 1516(c) appears absolute in its pronouncement that in the absence of contrary evidence, CoMI is presumed to be the chapter 15 debtor's registered office (if an entity) or habitual residence (if an individual), developing U.S. case law supports a more active role for the judge, even in the absence of contrary evidence. Judges have not been shy in demanding additional evidence of CoMI, even when the petition for recognition is unopposed. In *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*,[36] the

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33. *See* discussion in *In re Chiang*, 437 B.R. 397, 404 (Bankr. C.D. Cal. 2010) (habitual residence of the individual debtor was where he lived, where his children attended school, where he had assets, and where he had a passport).

34. *Hertz Corp. v. Friend,* 130 S. Ct. 1181, 1188–94 (2010).

35. *Id.* at 1192.

36. *Bear Stearns*, 374 B.R. at 129–30.

judge looked to the verified pleadings of the petitioner and determined that there were no employees, managers, operations, investor registries or any other indicia of CoMI present in the Cayman Islands**,** which the foreign representative was claiming to be the *situs* of the main case. In *In re Basis Yield Alpha Fund (Master),* the judge directed the petitioner to provide 21 categories of additional information to assist him in making the decision whether to recognize the case as a main case.[37] In other words, courts are not necessarily rubber-stamping the decision of recognition as a main case.

If the judge finds that CoMI is not located where the foreign representative claims it is, the ancillary case does not automatically revert to a nonmain proceeding. That is because a nonmain proceeding must be a case pending where the debtor has an "establishment." An establishment is defined as any place of operations where the debtor carries out nontransitory economic activity.[38] Therefore, so-called "letter box" companies**,** which do not have any actual operations**,** will not qualify as nonmain proceedings either.[39]

4. *What is the effect of determining that a chapter 15 case is ancillary to a foreign main proceeding versus a foreign nonmain proceeding?*

The primary difference in effect between a decision that the foreign proceeding is main or nonmain is the relief automatically available to the foreign representative under chapter 15. Pursuant to § 1520, upon recognition that the chapter 15 case is ancillary to a foreign main proceeding, §§ 361 and 362 automatically apply. Additionally, § 1520 permits the foreign representative to operate

37. 381 B.R. 37, 56–57 (Bankr. S.D.N.Y. 2008).

38. 11 U.S.C. § 1502(2) (2013).

39. *See Bear Stearns*, 374 B.R. at 131.

the debtor's business, subject to the provisions of §§ 363 and 552, and to any condition the court deems appropriate under § 1522(b).[40] However, it is important for the judge to remember that the additional powers accorded the foreign representative of a main proceeding are limited to property of the debtor within the territorial jurisdiction of the United States. There is no "estate" created under § 541(a) in a chapter 15 case.

If the judge determines that the foreign proceeding is nonmain, the rights provided in § 1520 are not automatically available. However, pursuant to § 1521, in the judge's discretion, some or all of these powers may be available to the foreign representative upon a showing that the relief is necessary to protect assets that should be administered in the foreign nonmain proceeding. *See* § 1521(c).

Further, regardless of whether the foreign proceeding is recognized as main or nonmain, if recognition is granted, § 1521(a) allows the court to "grant any appropriate relief" to "effectuate the purpose of [chapter 15] and to protect the assets of the debtor or the interests of the creditors."[41] Also, § 1507 permits a court to provide "additional assistance" beyond that provided for under title 11 or other laws of the United States.[42] This is a catch-all provision that incorporates the jurisprudence under former §§ 304(b) and (c).[43]

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40. 11 U.S.C. § 1522(b) states: "The court may subject relief granted under section 1519 or 1521, or the operation of the debtor's business under section 1520(a)(3), to conditions it considers appropriate, including the giving of security or the filing of a bond."

41. 11 U.S.C. § 1521(a).

42. *See In re Vitro S.A.B. de CV*, 701 F.3d 1031, 1057 (5th Cir. 2012) *cert. dismissed*, 133 S. Ct. 1862, 185 L. Ed. 2d 862 (2013).

43. *See* H.R. Rep. 109-31, 109th Cong., 1st Sess., 109 and 119 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 172 and 181.

There have been instances in which a court has determined that the foreign proceeding is neither main nor nonmain.[44] If the determination is that the foreign proceeding is neither main nor nonmain, then no recognition at all is granted.[45]

5. Interplay between "appropriate relief" under § 1521 and "additional assistance" under § 1507.

If the relief sought is not explicitly provided for in § 1521(a)(1)–(7) or (b), it may still be "appropriate relief" under § 1521(a) if the relief was available prior to chapter 15's adoption under §§ 304 or 105[46] or if it is currently available under other U.S. law.[47] Otherwise, the relief may be granted as "additional assistance" under § 1507, where comity "is the central concept to be addressed."[48] Typically, relief under § 1507 is denied where it does

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44. *See Bear Stearns*, 374 B.R. at 131–32. *See also* Jay L. Westbrook, *An Empirical Study of the Implementation in the United States of the Model Law on Cross Border Insolvency*, 87 Am. Bankr. L.J. 247, 255 (2013) (more than 92% of the cases filed as of Jan. 31, 2012, received the recognition they requested).

45. *See* Hon. Samuel L. Bufford, *Tertiary and Other Excluded Foreign Proceedings Under Bankruptcy Code Chapter 15*, 83 Am. Bankr. L.J. 165, 175 (2009) (where the foreign proceeding is neither a main nor nonmain proceeding, it is treated as a tertiary proceeding and no recognition is granted); and Gabriel Moss, *Death of the Sphinx: Chapter 15 Closes U.S. Door on Recognition of Offshore Hedge Fund Liquidations*, Insolv. Int. 2007, 20(10) 157–59 (Unless U.S. courts have residuary common-law power to deal with foreign proceedings that are neither main or nonmain proceedings, liquidators in many typical offshore operations that have assets in the U.S. will be stuck).

46. H.R. Rep. No. 109-31, 116 (§ 1521 does not expand or reduce the scope of relief currently available under sections 105 and 304).

47. *See* discussion in *In re Vitro,* 701 F.3d at 1056-1057.

48. H.R.Rep. No. 109–31, 109. The factors for additional assistance under § 1507 and those for appropriate relief under § 1521(a) overlap because they both come from repealed § 304(c); however, Congress elevated comity from a factor under § 304(c) to the introductory text of § 1507.

not meet some or all of the § 1507(b) factors[49] or where it falls within the narrow public policy exception of § 1506.[50] The public policy exception under § 1506 applies " 'where the procedural fairness of the foreign proceeding is in doubt or cannot be cured by the adoption of additional protections' or where recognition 'would impinge severely a U.S. constitutional or statutory right.' "[51]

Therefore, when granting discretionary relief the court must look first at the enumerated relief under § 1521, second, at "appropriate relief" under § 1521 and, third, at "additional assistance" under § 1507.[52] Any relief under § 1521 is subject to § 1522's sufficient protection standard and any relief granted under § 1507 is subject to the public policy exception under § 1506.

6. *What remedies are available for a foreign debtor absent recognition?*

In those instances in which the judge concludes that the foreign representative represents neither a foreign main proceeding nor a

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49. *In re Vitro,* 701 F.3d at 1044, 1060 (relief was precluded under § 1507(b)(4) because it was not comparable to relief available under the Bankruptcy Code).

50. *In re Qimonda AG Bankr. Litig.*, 462 B.R. 165, 183-85 (Bankr. E.D. Va. 2011) *aff'd on other grounds sub nom. Jaffe v. Samsung Elec. Co., Ltd.*, 737 F.3d 14 (4th Cir. 2013)(§ 1506 exception applies because promotion of technological innovation is a fundamental U.S. public policy). *See also In re Toft*, 453 B.R. 186, 196 (Bankr. S.D.N.Y. 2011) (§ 1506 exception applies where foreign court's email interception order violates U.S. privacy rights); *In re Gold & Honey, Ltd.*, 410 B.R. 357, 371–72 (Bankr. E.D.N.Y. 2009) (§ 1506 exception applies where foreign receivership violated U.S. bankruptcy court's stay order); *Contra In re Ephedra Prod. Liab. Litig.,* 349 B.R. 333, 337 (S.D.N.Y. 2006) (§ 1506 exception is not applicable where foreign proceeding precluded right to trial by jury).

51. *In re ABC Learning Centres Ltd.*, 728 F.3d 301, 309 (3rd Cir. 2013) (quoting *In re Qimonda*, 433 B.R. at 570)).

52. *See* discussion in *In re Vitro*, 701 F.3d at 1056-57.

nonmain proceeding,[53] the foreign debtor with assets in the U.S. is not without remedy. A full plenary proceeding (either a voluntary or involuntary chapter 11 or chapter 7) may still be filed if the requirements for filing a domestic case are met.

Section 303(b)(4) allows a foreign representative of an unrecognized foreign proceeding to commence a full plenary proceeding (involuntary chapter 11 or chapter 7).[54] However, § 303(b)(4) predates § 1511(b) which requires recognition of the foreign proceeding before the foreign representative files a plenary case under § 303.[55] If the court determines that § 1511(b) trumps § 303(b)(4), the judge will require recognition of the foreign proceeding before the foreign representative files the involuntary petition.[56]

Section 1509 imposes recognition under § 1517 as the exclusive door for a foreign representative's direct access with full rights to U.S. bankruptcy and non-bankruptcy courts. Yet, it also offers foreign representatives of unrecognized foreign proceedings a narrow window to U.S. courts. Upon recognition, the foreign representative will have full capacity to sue and be sued under U.S. law [§ 1509(b)(1)], may request relief in a state or federal court other than the bankruptcy court [§ 1509(b)(2)], and shall be granted comity or cooperation by such non-bankruptcy court [§ 1509(b)(3) and (c)].[57] Absent recognition, under § 1509(f), the foreign representative may only file an action in any court to "collect or recover a claim which is the property of the debtor," such as

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53. *Bear Stearns,* 374 B.R. at 132.

54. 11 U.S.C. § 303(b)(4) (2013).

55. 11 U.S.C. § 1511(b).

56. *Bear Stearns*, 374 B.R. at 132 n.15 (notes remedy is available under § 303(b)(4) while stating that "failure to repeal section 303(b)(4) . . . may be a drafting error").

57. H.R. Rep. 109-31, 109th Cong., 1st Sess., 110 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 173.

an account receivable.[58] Because this is a narrow exception to § 1509's main purpose of concentrating control of bankruptcy-related litigation in one court, the court should carefully scrutinize broad requests for relief portrayed as "a claim which is the property of the debtor."

Under § 1501, "foreign representatives of foreign proceedings which are excluded from the scope of chapter 15 may seek comity [and apply for appropriate relief] from courts other than the bankruptcy court since the limitations of sections 1509(b)(2) and (3) would not apply to them."[59] Section 1501(c) lists the types of foreign proceedings that are excluded from the scope of chapter 15. Essentially, proceedings concerning domestic banks or foreign banks with agency or branch in the U.S., domestic insurance companies, consumer debtors with income below a certain level, and brokerage businesses are excluded.[60] Therefore, a foreign representative of an unrecognized foreign proceeding concerning a brokerage business may still seek appropriate relief in a non-bankruptcy court under §§ 1509(b)(2) and (3).

In conclusion, absent recognition of the foreign proceeding, debtors may file a voluntary plenary chapter 7 or chapter 11 case if eligible. However, considering the clear language of § 1511(b) and

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58. 11 U.S.C. § 1509(f). *See In re Loy*, 380 B.R. 154, 167 (Bankr. E.D. Va. 2007) (foreign representative of unrecognized foreign proceeding successfully filed *lis pendens* over real property in the United States).

59. H.R. Rep. No. 109-31, 106.

60. 11 U.S.C. § 1501(c) states: "This chapter [15] does not apply to — (1) a proceeding concerning an entity, other than a foreign insurance company, identified by exclusion in section 109(b); (2) an individual, or to an individual and such individual's spouse, who have debts within the limits specified in section 109(e) and who are citizens of the United States or aliens lawfully admitted for permanent residence in the United States; or (3) an entity subject to a proceeding under the Securities Investor Protection Act of 1970, a stockbroker subject to subchapter III of chapter 7 of this title, or a commodity broker subject to subchapter IV of chapter 7 of this title."

its apparent conflict with § 303(b)(4) it is questionable whether a foreign representative may file an involuntary chapter 11 or chapter 7 petition absent recognition. But, the foreign representative may file a § 1509(f) action in any U.S. court to collect a claim which is the debtor's property and, if representing an excluded foreign proceeding under § 1501(c), seek appropriate relief in U.S. non-bankruptcy courts under §§ 1509(b)(2) and (3). Presumably, the bankruptcy judge may, after denying recognition to a foreign proceeding, issue an order under § 1509(d)[61] to prevent the foreign representative from obtaining relief under §§ 1509(f) and 1509(b)(2)-(3).

7. Problems or pitfalls and suggested solutions

(a) Because the statute urges expedited decision of a contested petition for recognition, it may be better practice, if possible, to treat contested petitions as summary judgment motions. Alternatively, some expedited trial procedures such as declarations of percipient witnesses (subject only to cross-examination) or time-limited examination may suffice.

(b) As noted above, if interim relief granted under § 1519 is adequate to protect the chapter 15 debtor while the recognition petition is under consideration, the judge may be able to take the time necessary to develop complete information as to CoMI.

(c) In cases in which the foreign debtor has multiple business locations and has been in foreign proceedings for some time before filing a chapter 15 case, the judge may have to decide the date for determining the CoMI—that is, whether it is the date of the original foreign filing, or the date of the recognition hearing? The *situs* of a debtor's CoMI may have changed if, for example, foreign

61. 11 U.S.C. 1509(d) states: "If the court denies recognition under this chapter, the court may issue any appropriate order necessary to prevent the foreign representative from obtaining comity or cooperation from courts in the United States."

liquidators have ceased or consolidated business operations after commencement of the foreign proceeding.

Some guidance can be found by looking at the courts' split on the issue of which date should be the applicable date for determining CoMI. *In re Betcorp Ltd*. used the time of the petition for recognition as the date for determining CoMI. [62] In contrast, *In re Millenium Global Emerging Credit Master Fund Ltd.* concluded the relevant date for determining CoMI is the date of filing the original foreign proceeding because "an entity's place of business refers to the business of the entity before it was placed in liquidation."[63] The court observed this approach prevents debtors' forum shopping.[64] *In re Kemsley* agreed that the date of commencement of the original foreign insolvency proceeding is the proper date for determining CoMI.[65] The court reasoned that the date of the original foreign filing is a "fixed and readily verifiable date"; whereas the date of filing a petition for recognition can vary greatly depending upon circumstances and the diligence of the foreign representative.[66]

In re Fairfield Sentry Ltd. attempted to harmonize the two positions, holding: "a debtor's COMI should be determined based on [the entity's] activities at or around the time the Chapter 15 petition is filed . . . . [A] court may consider the period between the commencement of the foreign insolvency proceeding and the fil-

62. 400 B.R. 266, 292 (Bankr. D. Nev. 2009).

63. 458 B.R. 63, 73 (Bankr. S.D.N.Y. 2011), *aff'd*, 474 B.R. 88 (S.D.N.Y. 2012).

64. *Millenium,* 458 B.R. at 74.

65. 489 B.R. 346, 354 (Bankr. S.D.N.Y. 2013).

66. *Id.* at 354. *See also* Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency enacted on Dec. 18, 2013, supra n. 3, p. 75 at ¶ 159 (stating that use of the date of commencement of the foreign proceedings produces a test that can be applied with certainty to all insolvency proceedings).

ing of the Chapter 15 petition to ensure that a debtor has not manipulated its COMI in bad faith."[67]

At the present time, there is a split as to the date for CoMI determination with some courts using the filing date of the foreign proceeding and others using the date of the petition for recognition in the chapter 15 case. Because these two dates may be months or years apart, the CoMI in a case where the debtor has relocated may be different depending on the date used by the court. Absent extraordinary circumstances, as recommended by the Guide to Enactment and Interpretation, the date of filing of the foreign petition should be applied as the date for determining CoMI.

(d) It is important to scrutinize proposed orders of recognition or proposed orders for interim relief for provisions you may not have anticipated. For example, § 1510 states that a foreign representative is not subject to court jurisdiction of any U.S. court for the "sole fact" that he has filed a petition for recognition under § 1515. You may, for example, see an attempt to use § 1510 to justify expansive language in an order of recognition or for interim relief exempting the foreign representative or its professionals, now and in the future, from U.S. court jurisdiction no matter what they do in the conduct of their duties.

67. 714 F.3d 127, 137 (2d Cir.2013). Note this case is different from *In re Fairfield Sentry Ltd.*, 452 B.R. 64 (Bankr. S.D.N.Y. 2011) *rev'd sub nom. In re Fairfield Sentry Ltd. Litig.*, 458 B.R. 665 (S.D.N.Y. 2011) discussed *infra.*

II. Debtor Operations in a Chapter 15 Case

A. First Day Orders and the Chapter 15 Debtor

1. *Which provisions of Bankruptcy Code chapter 3 and chapter 11 apply to the chapter 15 case?*

Although § 1520(a)(3) permits the recognized foreign representative of a foreign main case to operate the debtor's business, the operating chapter 15 debtor is not subject to the same limitations as the operating chapter 11 debtor. A number of chapter 11 provisions simply are not incorporated into chapter 15. These omissions include § 364**,** governing the debtor's obtaining of credit; § 365**,** describing the debtor's rights and obligations with respect to executory contracts and unexpired leases; and § 366**,** governing the debtor's relations with utility service providers.

Section 103(a) states "this chapter [chapter 1], sections 307, 362(o), 555 through 557, and 559 through 562" are Bankruptcy Code provisions applicable to a chapter 15 case.[68] At least one court has read § 103(a) as a complete list, thus excluding from a chapter 15 case provisions not listed in § 103(a).[69] Other courts, however, read § 103(a) as a non-exclusive list that allows judicial incorporation of additional provisions of the Bankruptcy Code into a chapter 15 case. The latter view seems more compatible with the purposes of chapter 15.

Therefore, it is suggested that a judge read § 103(a) as a non-exhaustive list of Bankruptcy Code provisions that may be applicable to a chapter 15 case.

Similarly, flexibility seems advisable when reading § 103(k),[70] which states chapter 15 §§ 1505, 1513, and 1514 apply "in all cases

68. 11 U.S.C. 103(a) (2013).

69. *In re Lee*, 472 B.R. 156, 178-82 (Bankr. D. Mass. 2012) (stating that that neither § 541 nor § 542 are applicable in chapter 15 cases since they are not listed in § 103(a)).

70. 11 U.S.C. § 103(k).

under" the Bankruptcy Code, and § 1509 applies "whether or not a case under [the Bankruptcy Code] is pending." A limited reading of § 103(k) would exclude other chapter 15 sections the court may find useful in a plenary case in at least two scenarios. First, where the foreign representative with a chapter 15 case pending files a U.S. plenary case under § 1528, conflicts may arise between both cases. Second, conflicts may arise between a U.S. plenary case and related insolvency proceedings in other countries (whether they are main, nonmain, or otherwise). In both instances, the court may find assistance in chapter 15 sections not listed in 103(k) such as §§ 1525-1527 on cooperation with foreign courts and foreign representatives, §§ 1528-1530 on coordination of concurrent proceedings, and § 1532 on adjustment of payments to creditors in concurrent proceedings.

A judge should determine, on a case-by-case basis, whether the relevant Bankruptcy Code provisions outside of the chapter 15 provisions can be coherently applied and incorporated into the chapter 15 case.[71] This coherence test should be guided by the text and purpose of the provisions themselves, case law [including that under prior § 304], and the interests of international comity.[72]

2. *Which Bankruptcy Code avoidance powers apply in the chapter 15 case?*

None of the avoidance provisions found in §§ 522, 544, 545, 547, 548, 550, or 724(a) apply in a chapter 15 case, regardless of

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71. *See In re AJW Offshore, Ltd.*, 488 B.R. 551, 556 (Bankr. E.D.N.Y. 2013)(adopting § 542(e) powers for turnover of documents since § 542 is not excepted under § 1521(a)(7), and petitioner's requested relief under § 1521 included turnover of documents). *See contra In re Atlas Shipping A/S,* 404 B.R. 726, 746 (Bankr. S.D.N.Y. 2009)(concluding that § 543's mandatory turnover requirements do not apply in chapter 15 cases because they clash with discretionary turnover provisions under § 1521).

72. *AJW Offshore*, 488 B.R. at 557.

whether the foreign case is a main or nonmain proceeding.[73] The only way in which a foreign representative can pursue these avoidance actions under U.S. law is by filing a full or plenary case under another chapter of Title 11.[74] At least three courts have found that authority exists to permit the pursuit of avoidance actions under the foreign law of the jurisdiction where the main case is pending as a component of "additional relief" under § 1521(a)(7).[75]

However, a foreign representative may be able to use § 553 to avoid pre-petition set-offs,[76] and § 549 to avoid unauthorized postpetition transfers of an interest of the debtor in property that is within the territorial jurisdiction of the United States. *See* §§ 1520(a)(2) and 1521(a)(7). It is unclear whether the § 549 avoidance power runs from the date on which the foreign proceeding was commenced, or whether it runs from the date of filing the chapter 15 ancillary petition for recognition. Arguably, it should run from the date on which the foreign proceeding was commenced since an estate would have been created under the jurisdiction of the foreign court at that time.

3. Are there any creditor protections the judge may apply either before or after recognition of the chapter 15 case?

Interim relief accorded under § 1519 or discretionary relief accorded under § 1521 may be conditioned under § 1522 to protect

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73. *See* 11 U.S.C. §§ 1520, 1521(a)(7), and 1523(a) (collectively, providing that these avoidance provisions do not apply in a chapter 15 case).

74. *See* 11 U.S.C. § 1523(a).

75. *In the Matter of Condor Ins. Ltd.*, 601 F.3d 319 (5th Cir. 2010); *see also In re Fairfield Sentry Ltd. Litig.,* 458 B.R. 665, 688, n. 13 (S.D.N.Y. 2011) (avoidance action under foreign law asserted in a Chapter 15 case may be adjudicated by bankruptcy court, as in *In re Condor*); *Atlas Shipping A/S*, 488 B.R. at 744 (legislative history does not show Congress intended to prevent a foreign representative from bringing avoidance actions based on foreign law).

76. *In re Awal Bank*, *BSC*, 455 B.R. 73, 88 (Bankr. S.D.N.Y. 2011) (incorporating § 553 into Chapter 15 case).

creditors and other interested parties. The standard for the protection is *not* the § 361 standard of adequate protection; rather § 1522 speaks in terms of "sufficient protection." The legislative history to this section is clear that Congress intended this to be a different standard**;** however, there is no definition in the statute.[77]

Most courts follow *In re Tri-Continental Exchange Ltd*.[78] in determining whether there is sufficient protection by "[balancing] the relief granted to the foreign representative and the interests of those affected by such relief, without unduly favoring one group of creditors over another."[79] *In re Lee* expanded and slightly refined the "balance of interests test" by incorporating three principles from now-repealed § 304(c): the just treatment of all holders of claims against the bankruptcy estate; the protection of U.S. claimants against prejudice and inconvenience in the processing of claims in the foreign proceeding; and the distribution of proceeds of the foreign proceeding substantially in accordance with the order prescribed by U.S. law.[80]

In sum, any relief under §§ 1519 or 1521 requires application of the sufficient protection standard of § 1522. A bankruptcy judge may find some guidance in interpretation of the term "sufficient protection" by consulting international decisions on this issue. Section 1508 suggests that a court consider the international character of chapter 15 and construe the statute consistently with those other foreign jurisdictions that have adopted chapter 15.[81]

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77. *Id.* at 115-16.

78. 349 B.R. 627 (Bankr. E.D. Cal. 2006).

79. *Id.* at 637. *See e.g. Jaffe v. Samsung Elec. Co., Ltd*., 737 F.3d 14, 29 (4th Cir. 2013); *In re Vitro S.A.B. de CV*, 701 F.3d 1031, 1060, 1067 (5th Cir. 2012), *cert. dismissed*, 133 S. Ct. 1862, 185 L. Ed. 2d 862 (2013); *In re Int'l Banking Corp. B.S.C.*, 439 B.R. 614, 626-27 (Bankr. S.D.N.Y. 2010).

80. 472 B.R. 156, 180-81 (Bankr. D. Mass. 2012) (citing *In re Atlas Shipping A/S*, 404 B.R. 726, 704 (Bankr. S.D.N.Y. 2009)).

81 *Tri-Continental*, 349 B.R. at 627.

4. Problems or pitfalls and suggested solutions

From the court's point of view, the omissions from chapter 15 of key provisions in chapter 3 governing the operation of a business create some interesting dilemmas. Time periods for assumption/rejection of executory contracts and leases do not seem to apply. Indeed, there does not seem to be any obligation on the debtor to perform the lease terms until assumption or rejection occurs. Further, a debtor might be able to obtain post-petition credit without requesting the court for authority to do so. Conversely, the debtor may discover that a utility service provider does not have an obligation to continue service as provided by § 366(a) or that the debtor does not have the benefit of a § 502(b)(6) "cap" on lease rejection damages.

Because the omitted chapter 3 provisions discussed above contain protections for the debtor as well as its creditors, the judge should raise and discuss these issues with the foreign representative and parties in interest at the earliest possible time. The foreign representative may already be subject to similar provisions under the foreign insolvency law. If not, it may be desirable to apply some chapter 3 and chapter 11 provisions to the operating chapter 15 debtor. The foreign representative may request the court to incorporate certain provisions of the Bankruptcy Code and pursuant to § 1507(a) the court could do so as "additional assistance . . . under this title or under other laws of the United States." Alternatively, if there is no request to incorporate these omitted provisions, the court has the leverage provided by § 1520(a)(3) itself**,** which grants the foreign representative power to operate the debtor's business "unless the court orders otherwise."

Although one solution is to import and apply all provisions of chapter 3 and chapter 11 into the chapter 15 case, something more selective and sensitive to the needs of the case should be considered. A cautionary tale of the unintended consequences of importing other Bankruptcy Code sections into a chapter 15 case is found

in *In re Qimonda AG Bankruptcy Litigation*.[82] There the bankruptcy court ordered that numerous chapter 3 and chapter 5 sections be applied as additional relief under § 1521(a).[83] (It is unclear whether this was a *sua sponte* action or at the request of a party.) The major assets of the foreign debtor were patents subject to cross-licensing agreements. When the foreign debtor sought to reject those agreements under applicable German insolvency law (which appears to permit the debtor to cease performance), it found itself in direct conflict with "imported" § 365(n), which permits the licensees to reject the debtor's nonperformance and continue use of the patents. The court's belated attempt to reconcile the conflict between German insolvency law and § 365(n) by modifying its discretionary order for reasons of comity satisfied neither side and spun off an appeal.[84]

Chapter 15's international character requires an approach to case problems that is more flexible and accommodating than constraining the case to the straitjacket of chapter 11's rules and time limits. The chapter 15 case is, after all, ancillary to a case pending elsewhere**,** and judges should carefully consider possible conflicts with the law of that jurisdiction before automatically imposing U.S. insolvency law.

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82 433 B.R. 547 (E.D. Va. 2010).

83. *Id.* at 553.

84. *See Jaffe v. Samsung Elec. Co., Ltd.*, 737 F.3d 14 (4th Cir. 2013). The Court of Appeals for the Fourth Circuit affirmed the bankruptcy court's application of § 365(n) in the discretionary relief order to provide U.S. licensees sufficient protection under § 1522.

B. Retention of Counsel and Other Professionals and the Chapter 15 Debtor

1. *Are counsel and other professionals in a chapter 15 case governed by the requirements of §§ 327–330?*

Chapter 15 is silent on what standards apply to the employment of counsel and other professionals in a chapter 15 case.

2. *Problems or pitfalls and suggested solutions*

Because the statute is derived from and based on the UNCITRAL Model Law, it is likely that the U.S. requirements of disinterestedness and absence of adverse interest for chapter 11 debtor's counsel and professionals were simply not considered standards universally applicable to other countries. Further, a chapter 15 case is a case ancillary to a case pending in a foreign jurisdiction. As such, there is no chapter 15 corollary to § 541(a) defining the estate created upon filing a voluntary or involuntary case under §§ 301, 302, or 303. Since there is no estate created in a chapter 15 case, arguably, professionals are not being paid from an estate to which they could be adverse. Finally, since the chapter 15 case is one ancillary to a case pending elsewhere, so long as the employment of counsel is acceptable to the administrator of the foreign case, it should not be of concern to the U.S. court. Employment of professionals and regulation of their fees is not the problem of the U.S. court but rather of the foreign court, although, of course, professionals are still subject to the duties of counsel appearing in a federal court.

If, despite the above considerations (or because it is a requirement of a cross-border agreement**,** discussed *infra* at III.B), a judge believes it necessary to enter orders authorizing employment, it is unlikely that the court or the U.S. trustee will be satisfied with excusing counsel and other professionals from demonstrating they do not hold adverse interests and are disinterested, from keeping detailed time records**,** and from seeking court approval for pay-

ment of fees. It is suggested that the court discuss its expectations of compliance with §§ 327–330, obtain acknowledgment of those compliance obligations from the affected professionals and enter a court order "importing" application of these sections as a condition of permitting business operations under § 1520(a)(3).

III. Court-to-Court Communication

A. Duty of Cooperation

1. Should I make calls to or answer calls from a foreign judge?

Section 1525 mandates that a bankruptcy judge cooperate with any foreign court or foreign representative "to the maximum extent possible." Direct communication is authorized but it is not mandated. However, establishing communication in cross-border cases is encouraged as a means to obtain a better understanding of the applicable foreign law and any differences from U.S. law that might lead to litigation.

One cannot assume that court-to-court communication will be welcomed by a foreign court. If the UNCITRAL Model Law has not been adopted by the foreign state, the foreign court may lack a framework that permits the foreign judge to talk with the U.S. court. Further, local ethical restrictions may prohibit communication between judges**,** and language barriers and time zone differences may make direct communication impossible.

Conversely, the judge may get a surprise phone call or even a visit from a foreign judge about the pending chapter 15 case. While the judge's first impulse is to be courteous and cooperative, any extensive discussion about the case with that foreign judge should be deferred until parties in interest have been given notice of the fact the judge will be having this conversation or meeting.

2. How should communication with a foreign court be established?

Communication between foreign judges may be indirect or direct. Examples of indirect communication would be an exchange of copies of foreign orders, judgments, opinions, transcripts of hearings, declarations of parties, and the like. It may also be communication through intermediaries, such as between the foreign representatives themselves. Examples of direct communication would be by way of telephone or video conference. There is no proof that one form of communication is more effective than another. The type of communication used may, in large part, be influenced by language, time zone, legal system, technology availability, and other factors. In some instances, simply communicating your ideas in a simple opinion or an in-court statement of which a transcript is made and then directing the foreign representative to deliver this to the foreign judge will suffice.

3. What subject matter may be covered in communications with a foreign court?

Obviously the subject matter of court-to-court communications will vary enormously based on the nature of the case, the jurisdiction(s) in which it is pending, the laws of the jurisdiction(s) in which it is pending, and, in many instances, the agreements of the cross-border case representatives. (Cross-border agreements, sometimes called protocols, will be discussed *infra*.) Before engaging in court-to-court communication, the initiating judge must consider a number of questions:

- What will be the subject of the communication? Some advance agreement as to the topics to be discussed during court-to-court communication is likely essential to avoid misunderstandings.
- Who is to receive notice of the communication?
- Who may and who will participate in the communication? Will the communications be limited to the judges only or

include the parties' representatives? Will parties' representatives be allowed to speak or merely monitor the judges' exchange?

- In what language will the communication be conducted? If English is not the shared language of the courts, what provisions for simultaneous translation will be made?
- Will the parties be required to file written statements of position or documents in advance of the communication? If so, will they be required to file in each jurisdiction? When? Must the documents be translated?
- What record will be made of the communication?
- If the communication is direct, what form will it take? Videoconferencing is the preferred method, but not all U.S. courts or foreign courts have access to it. Further, there may be considerations of time zone differences that make such joint hearings inconvenient.
- Is the court-to-court communication to be an extraordinary event in the case or used on a routine basis to sort out both procedural and substantive matters as they arise?

It is important to remember that, however the foregoing questions or other questions that arise are decided, court-to-court communication is not intended to constrain the decision-making authority of the participant judges. While deferring to a foreign judge may be appropriate or desirable in some instances, court-to-court communication should not be viewed as altering a judge's independence, jurisdiction**,** or sovereignty.

B. Cross-Border Agreements

Many of the issues raised above may be resolved by means of a cross-border agreement (sometimes called a "protocol") that has been negotiated between and among the insolvency representatives or practitioners in the multiple insolvency proceedings, the debtor-in-possession (if retained), and, in some instances, major

secured creditors and official creditors' committees. Protocols were originally developed in cross-border cases in which each court had a plenary case (e.g., a U.S. chapter 11 case and a Canadian C.C.A.A. proceeding) over which each court had full jurisdiction. In those instances, harmonization was necessary to avoid potential conflicts and to promote efficient cross-border administration of the multiple insolvency proceedings. The scope and importance of cross-border agreements in a chapter 15 case may be somewhat diminished if the U.S. court is merely being requested to provide ancillary assistance to a main proceeding located in the foreign jurisdiction. Cross-border agreements are not entered into between courts, although many courts encourage their adoption and in some instances approve the agreement in order to bind participating parties.

1. *When should a cross-border agreement be considered?*

When there are multiple foreign insolvency proceedings, a complex debtor structure (such as a corporate parent with numerous subsidiaries in different locations), some similarity in insolvency laws**,** and the possibility of conflicting rulings on substantive issues, the court should urge the parties to negotiate a cross-border agreement. Of course, timing is critical. In many instances, cross-border agreements are negotiated in advance of the chapter 15 filing to prevent disputes from arising upon filing.

2. *What are typical provisions a judge might see in a cross-border agreement?*

Cross-border agreements vary widely, depending upon the nature of the cases and the similarity of the legal systems in the various jurisdictions participating in the case. A typical cross-border agreement might address the following topics:

- allocation of responsibility between the courts for administration of the case;

- coordination of asset recovery or asset disposition for benefit of creditors;
- submission and treatment of claims;
- framework for future communication between the courts;
- coordination of reorganization plans;
- allocation of responsibility between courts for resolution of substantive law issues;
- agreement between the insolvency representatives as to limitations on their actions without approval of other courts or insolvency representatives;
- provisions for amendment of the cross-border agreement or for dispute resolution in the event of differences in interpretation; and
- legal effect of the cross-border agreement, including whether court approval or creditor approval is required for the agreement to be effective.

An exhaustive discussion of cross-border agreements, including sample provisions and an analysis of agreements adopted in a number of cross-border insolvency cases, can be found in the draft UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation.[85]

IV. Claims

A. May a Creditor File a Claim in More Than One of the Cases in a Cross-Border Proceeding?

Nothing prevents a creditor from filing a claim in more than one of the insolvency proceedings for the same debtor.

85. http://www.uncitral.org/pdf/english/texts/insolven/ Practice_Guide_Ebook_eng.pdf. (last visited Jan. 31, 2014).

B. May a Creditor Receive Distributions on a Claim Filed in More Than One Case in a Cross-Border Proceeding?

Yes, a creditor may receive distributions from the multiple cases pending as to the same debtor; however, no claimant may receive more than 100 percent of its claim. Further, until all claimants of the same rank receive the same percentage received by the multiple-filing claimant, that claimant may not receive a distribution. Section 1532 restricts distribution and enforces parity among claimants of the same class.

C. Problems or Pitfalls and Suggested Solutions

The claims area is one fraught with ambiguity and unanswered questions. Some that might occur are:

1. *Must a multiple-filing claimant net out its claim to reflect the distribution in another case?*

Section 1532 adopts the "hotchpot rule" which was embodied in now-repealed § 508(a). There is some support for viewing a claim as a "right to payment," which remains the same in each proceeding regardless of distributions from other cases. It seems the preferred view is that before distribution in the current case, the claim is not netted out or reduced by prior distributions in other cases involving the same debtor. In other words, the claim remains the same face amount in each bankruptcy case, regardless of prior distributions. However, no claimant receives an aggregate distribution of more than 100 percent of its claim.

2. *Is a priority claim from another country entitled to priority in a chapter 15 case when U.S. law does not entitle that claim to priority?*

No, priority status is determined by local law. The only protection for the foreign claimant having priority under foreign law is that a claim from that foreign creditor may not be treated worse than a general unsecured creditor in the chapter 15 case solely on

the basis of nationality (§ 1513(b)(1)). Of course, this does not affect the foreign creditor having superior rights to U.S. property pursuant to U.S. law (e.g., a security interest in tangibles.)

3. Is it likely that the chapter 15 judge must decide claims issues?

Claims issues may not arise at all unless the foreign representative decides, upon obtaining recognition, to file a parallel chapter 11 case. In most instances where there is no parallel chapter 11 case, cross-border agreements will address the claims filing and distribution issues. However, in the event of a full-fledged chapter 11 case being filed by the chapter 15 case foreign representative, the judge should be aware that former § 508(a), which was the basis for § 1532, neither restricts distribution nor enforces parity in chapter 11 cases, thus further complicating cases having multiple proceedings.

V. Jurisdictional Issues

The Bankruptcy Reform Act of 2005 added 28 U.S.C. § 157(b)(2)(P), which provides that "core" proceedings include: "[R]ecognition of foreign proceedings and other matters under chapter 15 of title 11." This provision is significant because, in core proceedings, bankruptcy judges are statutorily authorized to enter final orders subject to appeal to the district court.[86] In contrast, bankruptcy judges have no statutory authority to enter final orders in non-core proceedings. Bankruptcy judges may resolve non-core matters on an interlocutory basis, but they must submit proposed findings of fact and conclusions of law to the district court for de novo review.[87]

Bankruptcy judges could construe 28 U.S.C. § 157(b)(2)(P) broadly to mean that recognition of the foreign proceeding, and all

86. 28 U.S.C. §§ 157(b)(1) and 158(a) (2013).

87. 28 U.S.C. § 157(c)(1). *See also* Fed. R. Bankr. P. 9033.

other matters in chapter 15 cases, are core proceedings in which bankruptcy courts are statutorily authorized to enter final orders. However, this broad reading is not supported by a careful review of the statute's language, and it has been rejected by at least two courts. [88] Rather, 28 U.S.C. § 157(b)(2)(P) should be read to provide that, in addition to recognition of the foreign proceeding, requests for other relief covered *under* the provisions of chapter 15 are also core.[89] Such examples would include requests for pre-recognition relief under § 1519, a request for a stay of execution under § 1521(a)(2), or a request for coordination with respect to the foreign proceeding under § 1529.[90]

However, bankruptcy judges should not treat all adversary proceedings filed in a pending chapter 15 cases as core matters merely because they are filed in a chapter 15 case. The adversary proceedings must seek relief that is covered *under* chapter 15 to fall within 28 U.S.C. § 157(b)(2)(P).[91] Adversary proceedings may also be core matters under other subsections of 28 U.S.C. § 157(b)(2). If none of the subsections of 28 U.S.C. § 157(b)(2) apply, then the adversary proceeding is probably non-core, and the bankruptcy judge may not enter a final order.[92]

As always, bankruptcy judges should begin their jurisdictional analysis by examining their subject matter jurisdiction to hear a matter under 28 U.S.C. §§ 1334(a) and (b). If a matter is merely "related to" a chapter 15 case, the court may lack subject matter jurisdiction over the dispute. This concern was expressed in *Fairfield Sentry* where the district court questioned, but did not decide, whether adversary proceedings filed in consolidated chapter 15

88. *In re Fairfield Sentry Ltd.*, 458 B.R. 665, 675-76 (S.D.N.Y. 2011); *In re British Am. Ins. Co. Ltd.*, 488 B.R. 205, 236 n.31 (Bankr. S.D. Fla. 2013).

89. *British Am. Ins.*, 488 at n. 31.

90. *Id.* at n. 31.

91. *Id.*

92. 11 U.S.C. § 157(c)(1).

cases were even "related to" the consolidated chapter 15 cases.[93]

Unfortunately, the district court in *Fairfield Sentry* improperly collapsed the distinct concepts of federal subject matter jurisdiction over bankruptcy cases under 28 U.S.C. § 1334, and a bankruptcy court's core jurisdiction in 28 U.S.C. § 157(b) to enter final orders, so the analysis is very difficult to understand. The *Fairfield Sentry* decision is of note mainly because the district court raised the issue of whether "related to" subject matter jurisdiction over the claims was lacking — a question that bankruptcy judges should always ask.

Finally, bankruptcy judges must consider the Supreme Court's holding in *Stern v. Marshall*,[94] and its impact on a bankruptcy court's authority to issue *final orders* in chapter 15 cases. In *Stern v. Marshall*, the Supreme Court held that the bankruptcy court (an Article I court), lacked the constitutional authority to enter a final judgment on a state law counterclaim that is not necessarily and fully resolved in the process of ruling on a creditor's proof of claim.[95] The Supreme Court majority opinion took pains to state: "We do not think the removal of [state law] counterclaims . . . from core bankruptcy jurisdiction meaningfully changes the division of labor in the current statute . . . the question presented here is a 'narrow' one."[96]

Although *Stern v. Marshall* had nothing to do with chapter 15, its rationale undercuts the authority of bankruptcy judges to enter

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93. *Fairfield Sentry,* 458 B.R. at 689. The adversary proceedings asserted claims under state law and foreign avoidance law to recover assets *outside* the United States. The district court determined that the relief was not available under chapter 15; nor did it fall within the scope of any other statutory provisions in title 11. *Id.* at 686–87. The court questioned whether the relief was even "related to" the chapter 15 cases at all, and remanded the case to the bankruptcy court. *Id.* at 689.

94. 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011), *reh'g denied*, 132 S. Ct. 56, 180 L. Ed. 2d 924 (2011).

95. *Id.* at 2620.

96. *Id.*

final orders in *all* statutorily core matters that are merely "related to" bankruptcy cases.[97] Essentially, the Supreme Court has created a new third category of matters: those that are designated as statutorily core under 28 U.S.C. § 157(b)(2), but are not constitutionally appropriate for final adjudication by bankruptcy judges as Article I judges. Thus, in the chapter 15 context, bankruptcy judges must consider: (1) whether a matter "arises under," "arises in" or is "related to" the chapter 15 case; (2) if merely "related to" the chapter 15 case, whether the matter is statutorily core pursuant to 28 U.S.C. § 157(b)(2)(P) such that the authority of bankruptcy judges to enter a final order is constitutionally suspect; and (3) if constitutionally suspect, whether the bankruptcy judge has any power to adjudicate the dispute.[98]

The court in *British American* discussed *Stern v. Marshall* in the context of chapter 15, explaining:

> After the Supreme Court issued its opinion in *Stern v. Marshall*, some courts expressed concern as to how the bankruptcy courts should address a proceeding that is statutorily defined as core but that involves a matter in which the bankruptcy court may not enter a final order, absent consent of the parties, as such order would exceed the bankruptcy court's constitutional power. 28 U.S.C. § 157(c)(1) and the related Fed. R. Bankr. P. 9033 deal only with non-core matters, not matters

97. *Id.* at 2608 (stating: "Although we conclude that § 157(b)(2)(C) permits the Bankruptcy Court to enter final judgment on Vickie's [state law] counterclaim, Article III of the Constitution does not.")

98. Importantly, *Stern v. Marshall* is not a case about subject matter jurisdiction. *See* 131 S. Ct. at 2607 ("Section 157 allocates the authority to enter final judgment between the bankruptcy court and the district court . . . . That allocation does not implicate subject matter jurisdiction"). Therefore, in addressing the jurisdictional issues, bankruptcy judges should clarify that they are discussing the allocation of jurisdiction in § 157—not subject matter jurisdiction—to avoid the confusion in the district court's opinion in *Fairfield Sentry*, discussed *supra*.

> specifically defined by Congress as core. And so the question arose whether the bankruptcy court was powerless to issue proposed findings of fact and conclusion of law in proceedings that while labeled core are nonetheless [constitutionally] beyond the ability of the bankruptcy court to enter final orders. The better reasoned opinions reach the conclusion that the bankruptcy court may submit proposed findings of fact and conclusions of law in such cases [by express or implied consent].[99]

The impact of *Stern v. Marshall*, including the issue of consent, is the subject of considerable disagreement among the bankruptcy courts and appellate courts. These issues are currently pending before the U.S. Supreme Court.[100] Pending clarification by the Supreme Court, bankruptcy judges must look to the views of their circuit to determine the scope of *Stern v. Marshall* and what happens in this new third category of constitutionally suspect core cases.

Conclusion

The purpose of the foregoing guide is to give judges unfamiliar with chapter 15 cases a quick understanding of the case-management issues that may arise and possible solutions. It is not meant to substitute for carefully parsing the statute itself and the

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99. *In re British Am. Ins. Co. Ltd.*, 488 B.R. 205, 236 n.31 (Bankr. S.D. Fla. 2013) (citing with approval *In re Bellingham Ins. Agency, Inc.,* 702 F.3d 553 (9th Cir. 2012)). In *Bellingham*, the Ninth Circuit concluded that a party may consent to the bankruptcy court's entry of a final order or judgment in this new third category of constitutionally suspect core cases, by failing to object in a timely matter. 702 F.3d at 566-70.

100. *See Exec. Benefits Ins. Agency v. Arkison*, 133 S. Ct. 2880 (2013) (granting the petition for writ of certiorari of *Bellingham v. Ins. Agency, Inc.,* 702 F.3d 553 (9th Cir. 2012)).

treatises that have been written to further explain the nuances of the statute and developing case law. The appendix to this guide contains a non-exhaustive list of resources where additional information and guidance may be found.

Appendix : Selected Additional Resources

American Law Institute, Principles of Cooperation Among the NAFTA Countries: Transnational Insolvency: Cooperation Among the NAFTA Countries (2003).

American Law Institute & The International Insolvency Institute, Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases, available at http://www.ali.org/doc/Guidelines.pdf (December 31, 2013).

Andre J. Berends, *The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview,* 6 Tul. J. Int'l & Comp. L. 309 (1998).

Samuel L. Bufford, United States International Insolvency Law 2008–2009 (2009).

Samuel L. Bufford, *Tertiary and Other Excluded Foreign Proceedings Under Bankruptcy Code Chapter 15*, 83 Am. Bankr. L.J. 165 (2009).

Case Law on UNCITRAL Texts (CLOUT), available at http://www.uncitral.org/uncitral/en/case_law.html (December 31, 2013).

Leif M. Clark & Daniel M. Glosband, Collier Monograph: Ancillary and Other Cross-Border Insolvency Cases Under Chapter 15 of the Bankruptcy Code (2008).

European Union Insolvency Regulation, Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, available at http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:160:0001:0018:en:PDF (December 31, 2013).

1 W.H. Manz, Bankruptcy Reform: The Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 105–18 (2006).

Paul Lee, *Ancillary Proceeding Under Section 304 and Proposed Chapter 15 of the Bankruptcy Code,* 76 Am. Bankr. L.J. 115 (2002).

Steven Meyerowitz, *Two and One-Half Years and Counting: The Rapidly Maturing Jurisprudence of Chapter 15 of the Bankruptcy Code,* Pratt's Journal of Bankruptcy Law (2008).

Gabriel Moss, *Death of the Sphinx -- Chapter 15 Closes U.S. Door on Recognition of Offshore Hedge Fund Liquidations*, 20 Insolvency Intelligence 157 Sweet & Maxwell, Dec. 2007.

UNCITRAL Model Law on Cross-Border Insolvency and Guide to Enactment, available at www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf (last visited December 31, 2013).

UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, available at http://www.uncitral.org/pdf/english/texts/insolven/Practice_Guide_english.pdf (last visited December 31, 2013).

Jay L. Westbrook, *Locating the Eye of the Financial Storm,* 32 Brook. J. Int'l L. 1019 (2007).

Jay L. Westbrook, *An Empirical Study of the Implementation in the United States of the Model Law on Cross Border Insolvency*, 87 Am. Bankr. L. J. 247 (2013).

Omar J. Alaniz, *A Survey of Cases Interpreting the Stern Decision*, Bankruptcy & Insolvency Litigation Committee of the American Bar Association, available at http://apps.americanbar.org/litigation.html.

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