

# UNDERSTANDING CHAPTER 15 OF THE UNITED STATES BANKRUPTCY CODE: EVERYTHING YOU NEED TO KNOW ABOUT CROSS-BORDER INSOLVENCY LEGISLATION IN THE UNITED STATES

Aaron L. Hammer\*  
Matthew E. McClintock\*\*

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\* Aaron L. Hammer, Esq. is a partner in the Bankruptcy, Reorganization, and Creditors' Rights Practice Group and leads its Reorganization and Corporate Bankruptcy Division. With experience representing debtors, creditors' committees, financial institutions, bondholders, hedge funds, asset purchasers and landlords in all facets of domestic and cross-border insolvency matters, Mr. Hammer is an accomplished financial restructuring and bankruptcy attorney in the broadest sense. He is a trusted advisor to Fortune 500 companies on their insolvency matters and widely recognized as a leading expert in multi-national restructuring proceedings.

When not counseling clients, Mr. Hammer is an active member of the turnaround and restructuring community, and recently was featured with other industry experts as a panelist in FINANCIER WORLDWIDE's Roundtable on trends in the U.S. bankruptcy market. He is a contributing author of *Cross-Border Debt Restructurings: Innovative Approaches for Creditors, Corporates and Sovereigns*, EUROMONEY (2005), a leading treatise on the subject of cross-border insolvencies and workouts, and has authored dozens of other publications on bankruptcy and insolvency law. Mr. Hammer graduated *magna cum laude* from Northwestern University School of Law in 1997 where he then taught several advanced bankruptcy classes as an Adjunct Professor. He has lectured extensively on those subjects around the world, including at the University of Chicago and The Canadian Institute, and is a member of the Turnaround Management Association (2008 Steering Committee, Chicago Midwest chapter), American Bankruptcy Institute and INSOL International.

Mr. Hammer can be reached at the following address: Freeborn & Peters LLP, 311 South Wacker Drive, Suite 3000, Chicago, IL 60606; Tel: 312.360.6000.

\*\* Matthew E. McClintock, Esq. is an associate in the Bankruptcy and Restructuring Department of Bell, Boyd, & Lloyd, L.L.P. He represents secured and unsecured creditors, debtors, trustees, committees, equity security holders and other parties in all aspects of bankruptcy and restructuring matters. Mr. McClintock has worked on a number of cross-border insolvency matters, including several matters under section 304 of the Bankruptcy Code (the predecessor Chapter 15). In addition to being a member of the Turnaround Management Association and the American Bankruptcy Institute, he is a member of the American, Illinois, and Chicago bar associations and is a licensed real estate broker. Mr. McClintock received his Juris Doctor from Cornell University Law School where he was a note editor of the Cornell International Law Journal. He received his Bachelor of Arts degree from the University of Illinois in Urbana-Champaign. Mr. McClintock can be reached at the following address: Bell, Boyd & Lloyd LLP, Suite 3100, 70 West Madison Street, Chicago, IL 60602; Tel: 312.372.1121.

## I. INTRODUCTION

ECONOMIC globalization and integration over the last decade has vastly increased the number of companies that operate, own assets, or otherwise conduct business in multiple countries. While this integration has created great wealth, it has also had a profound impact in the context of business failure. Where ten years ago, insolvencies and reorganizations with significant international connections were relatively rare, today, it is increasingly unusual to find a major case without at least some international aspects.

Nowhere have these trends had a more profound impact than in North America where the United States, Mexico, and Canada comprise one of the closest and most extensive trading blocks in the world. Total trade between the three nations was approximately \$865 billion in 2006,<sup>1</sup> and many multinational corporations have operations in all three countries. As is the case worldwide, this increasing interdependence has also resulted in a sharp spike in the number of insolvencies with significant consequences in some or all of the three nations.

In order to proactively address this rapid proliferation of “cross-border insolvencies,” insolvency organizations and the international community generally undertook a number of efforts to enhance international cooperation and coordination. Probably most notable among these efforts has been the promulgation of a Model Law on Cross-Border Insolvency (the Model Law) by the United Nations Commission on International Trade Law (UNCITRAL) in 1997.

The United States, Mexico, and Canada have all been relatively quick to adopt some form of the Model Law. Mexico was the first to act, adopting the Model Law in 2000 without significant revisions, but limiting its applicability to proceedings in other jurisdictions that have also adopted the Model Law.<sup>2</sup> The United States followed suit five years later when chapter 15 of title 11 of the United States Code (Bankruptcy Code) became effective on October 17, 2005.<sup>3</sup> Chapter 15 adopts the provisions of the Model Law without material revisions.<sup>4</sup> Finally, in Canada, Bill C-12, which similarly incorporates many key elements of the Model Law, re-

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1. See International Trade Administration, Department of Commerce, NAFTA – A Success For Trade (October 2007), [http://export.gov/fta/NAFTA/NAFTA\\_Success.pdf](http://export.gov/fta/NAFTA/NAFTA_Success.pdf).
  2. As discussed below, this reciprocity limitation is fairly significant limitation given that only approximately fourteen nations and jurisdictions have adopted the Model Law to date.
  3. Certain consumer-related provisions of Chapter 15 actually became effective on April 20, 2005, when Chapter 15 was enacted.
  4. Although Chapter 15 closely tracks the language of the Model Law, it contains some “adaptations designed to mesh [the Model Law] with United States law.” In re Tri-Cont’l Exch. Ltd., 349 B.R. 627, 632 (Bankr. E.D. Cal. 2006). As one example, the term “adequately protected” in the Model Law was replaced with “sufficiently protected” in Chapter 15 to avoid confusion with the term “adequate protection”—a defined term of art under the Bankruptcy Code. *Id.* at 636 (citing H.R. Rep. No. 109-31, at 115 n.11 (2005)).

ceived Royal Assent on December 12, 2007, but has yet to be proclaimed into force.<sup>5</sup>

Although adoption of the Model Law will undoubtedly facilitate the administration of cross-border insolvencies, the pace at which multinational insolvencies are increasing makes it imperative that North American insolvency professionals have a firm grasp of Canadian, Mexican, and United States law. In order to help facilitate a partial understanding, this article provides a brief overview of chapter 15 of the Bankruptcy Code (Chapter 15), including: (i) a brief discussion of the underpinnings of Chapter 15, the new cross-border insolvency statute in the United States, including the UNCITRAL Model Law upon which it is based and the EU Regulation on Insolvency Proceedings 2000 which inspired the Model Law; (ii) an overview of Chapter 15 itself, including discussion of recent decisions in the United States and elsewhere that are beginning to shape our understanding of its provisions; and (iii) a discussion of the impact of Chapter 15 to date and potential future developments in cross-border insolvencies.

## II. THE UNDERPINNINGS OF CHAPTER 15 OF THE BANKRUPTCY CODE—THE MODEL LAW AND THE EU REGULATION

As indicated above, the rapid increase in cross-border insolvencies over the last decade spawned multiple efforts by insolvency organizations and the international community to devise better legal frameworks for addressing them. Chief among these efforts has been the promulgation of the UNCITRAL Model Law in 1997 and the entry into force of the EU Regulation on Insolvency Proceedings 2000 (EU Regulation) on May 31, 2002.

Gaining an understanding of the interrelationship between these statutes is far more than an academic exercise. Chapter 15 largely parallels the Model Law, which was largely inspired by the EU Regulation; therefore, understanding how the predecessor statutes have been interpreted will help predict how Chapter 15 might evolve. Moreover, Chapter 15 instructs U.S. courts that, to the extent possible, they should harmonize their rulings with relevant prior decisions of foreign courts. This mandate is contained in section 1508 of the Bankruptcy Code, which provides that “[i]n 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.”<sup>6</sup> Similarly, the House Report issued in connection with Chapter 15 states that courts should refer to foreign decisions reported in the UNCITRAL case law on uniform texts in order to help achieve uniformity of

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5. Most expect the new rules to take effect in mid to late 2008, although at this time nobody knows for sure if and when the new rules will become law.

6. 11 U.S.C. § 1508 (2005).

interpretation.<sup>7</sup>

#### A. THE UNCITRAL MODEL LAW

The Model Law was adopted by UNCITRAL on May 30, 1997, and by the General Assembly of the United Nations on December 15, 1997. Although the Model Law is not a treaty—it is merely a model statute that can be adopted by countries or territories interested in harmonizing and modernizing their cross-border insolvency regimes—to date it has been adopted by fourteen nations or territories, including: the British Virgin Islands, Columbia, New Zealand, Eritrea, Great Britain, Japan, Mexico, Montenegro, Poland, Romania, South Africa, and the United States.<sup>8</sup>

The Model Law strives to harmonize existing cross-border insolvency regimes (which will presumably result in increased legal certainty for trade and investment, an express objective of the Model Law) and is designed to enhance international cooperation and efficiency with respect to the administration of cross-border insolvencies.<sup>9</sup> The stated objectives of such cooperation include the preservation of value for all parties in interest in cross-border insolvency cases and the rescue of troubled businesses so as to protect investment and preserve employment.<sup>10</sup>

In order to make it easier for individual countries to adopt the Model Law, the drafters tried to ensure that it can be adopted without requiring material changes to the domestic insolvency laws of the adopting country.<sup>11</sup> For example, insolvency laws in a number of countries provide for the subordination of foreign claims, whether secured or unsecured, to the

7. See H.R. Rep. No. 109-31, at 109-10.

8. More specifically, legislation based on the Model Law has been adopted by at least the following nations and jurisdictions: Colombia (2006); the British Virgin Islands, New Zealand (2006); Eritrea, Japan (2000); Great Britain (2006), Mexico (2000), Poland (2003), Romania (2003), Montenegro (2002), Serbia (2004); South Africa (2000), overseas territory of the United Kingdom of Great Britain and Northern Ireland (2005), and the United States of America (2005). As set forth above, Canada is set to adopt its own version of the Model Law when Bill C-12 is proclaimed into force. Several other nations, including significantly Australia and New Zealand, are expected to adopt the Model Law in the near future. Many other countries are also at different stages of considering doing so.

9. Because adoption of the Model Law will increase certainty for trade and investment, large global institutions such as the IMF, the World Bank, the G22, and the Asian Development Bank openly support widespread adoption of the Model Law. See Kathy Stones, *The Interpretation of COMI Under the UNCITRAL Model Law on Cross-Border Insolvency*, INSOL WORLD at 41 (Fourth Quarter, 2006) [hereinafter *Interpretation of COMI*].

10. See UNCITRAL Model Law on Cross-Border Insolvency, Preamble (1997), available at <http://www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf> [hereinafter Model Law].

11. See, e.g., James H.M. Sprayregen and Gordon W. Johnson, New Chapter in U.S. Cross-Border Insolvency Cooperation 4 (Jan. 19, 2006) (unpublished manuscript) (stating that “[r]ecognizing the practical difficulties of harmonizing substantive law in any country, the Model Law ‘does not adopt substantive rules of bankruptcy law or change domestic law except as necessary to permit results that are fair and sensible from a worldwide perspective.’” (quoting Jay Lawrence Westbrook, *Chapter 15 At Last*, 79 AM. BANKR. L.J. 713, 721 (2005)) [hereinafter New Chapter].

claims of identically situated domestic claimants—a policy that is contrary to the accepted notion that equally situated creditors should be treated equally. Instead of attempting to remedy this perceived unfair treatment, however, the Model Law simply requires that foreign creditors be treated at least as well as unsecured domestic creditors.<sup>12</sup>

Such efforts to facilitate adoption of the Model Law have resulted in a number of countries adopting it without material revisions, including the United States. But not all adopting countries have done so. For example, several countries, such as Mexico and South Africa, have followed the text of the Model Law closely, but limited its applicability to proceedings in other jurisdictions that have also adopted the Model Law.<sup>13</sup> Other countries, such as Japan, have adopted the Model Law in spirit but have not closely followed its text.<sup>14</sup> Although limitations will slow the harmonization of cross-border insolvency regimes, the increasing adoption of the Model Law represents a welcome step forward.

## B. THE EU REGULATION

The EU Regulation entered into force on May 31, 2002. Unlike the Model Law, the EU Regulation was never intended to apply to nations outside of the EU. Probably as a direct result of this limited geographic scope, it is significantly more comprehensive than the Model Law. For example, the EU Regulation addresses choice of law issues and a number of other issues not addressed by the Model Law.<sup>15</sup>

Like the Model Law, the general goal of the EU Regulation is to make the administration of cross-border insolvencies more efficient. The EU Regulation provides for the automatic recognition of cross-border insolvency proceedings within the EU, and establishes rules governing when courts have jurisdiction to open insolvency proceedings. The EU Regulation also addresses choice of law issues related to cross-border insolvencies (provisions that help to reduce forum shopping and that are largely missing from the Model Law).

The limited scope of the EU Regulation does not limit its significance to Europe. For one thing, because the Model Law has yet to gain global acceptance, the EU Regulation continues to be the widest reaching multinational insolvency regime in the world. In addition, the EU Regula-

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12. Model Law, *supra* note 10, art. 13(2).

13. Although most nations that have adopted the Model Law, including the United States, have not required reciprocity, the British Virgin Islands, Mexico, and Romania “will not extend assistance unless the request comes from a country which has itself adopted the Model Law or similar provisions.” *Interpretation of COMI, supra* note 9, at n.3.

14. New Chapter, *supra* note 11, at 3.

15. *See, e.g., Interpretation of COMI, supra* note 9, at 41 (“Although the Model Law is more limited in its aims than the [EU Regulation] as it only seeks to promote recognition and assistance between different jurisdictions, rather than determine (as the [EU Regulation] does) which country’s insolvency law will prevail, it has a wider geographical reach and potentially applies worldwide.”)

tion is relevant for purposes of understanding Chapter 15 because it inspired the Model Law.

Although the Model Law came into force prior to the EU Regulation (in 1997 as opposed to 2000), the EU Regulation was drafted first, and the Model Law copied many of the EU Regulation's most important concepts. As a result, these same concepts are now part of Chapter 15, including important concepts discussed below such as the "center of main interests" test for determining whether a foreign proceeding should be recognized as a "foreign main proceeding" or a "foreign nonmain proceeding."

In light of Chapter 15's mandate that U.S. courts look to case law interpreting identical provisions under both the Model Law and the EU Regulation, the slightly more mature body of case law interpreting the EU Regulation provides an excellent means of predicting how identical provisions contained in the Model Law and Chapter 15 may be interpreted. This is particularly true given that, as discussed in greater detail below, early cases interpreting Chapter 15 have made a significant effort to consider foreign case law, including cases interpreting similar concepts under the EU Regulation. Given the clear mandate of section 1508 of the Bankruptcy Code, this trend is likely to continue even as U.S. jurisprudence on Chapter 15 becomes more developed.

### III. UNDERSTANDING CHAPTER 15 OF THE BANKRUPTCY CODE—A "MODEL LAW" FOR CROSS-BORDER INSOLVENCIES IN THE UNITED STATES

Chapter 15 of the Bankruptcy Code became effective on October 17, 2005, as part of a wider set of reforms known as the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). Like the Model Law that it closely parallels, Chapter 15 is intended to promote the international harmonization of insolvency regimes in order to further legal certainty, provide for fair and efficient administration of cross-border insolvencies, protect and maximize recoveries for the benefit of all interested parties, and facilitate the reorganization of troubled companies.

Prior to the enactment of Chapter 15, cross-border insolvencies in the United States were governed by section 304 of the Bankruptcy Code, a relatively brief section that provided for the recognition by U.S. courts of certain foreign proceedings and set forth several principles to guide courts in the administration of such proceedings.<sup>16</sup> In contrast to section

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16. Section 304 of the Bankruptcy Code had a number of significant limitations that have been at least partially remedied by the adoption of Chapter 15. For example, foreign representatives were only able to commence limited purpose bankruptcy cases and they were not authorized to operate the debtor's business or sell its assets. See Griffiths & Smith, *Transatlantic Insolvency Jurisdiction – The Interplay Between Chapter 15 of US Bankruptcy Code and the EU Insolvency Regulation*, 21(8) J. INT'L BANKING L. & REG. 435, 435-436 (2006) (discussing perceived deficiencies in section 304 that have been fully or partially remedied by the adoption of Chapter 15) [hereinafter *Transatlantic Insolvency*].

304 (which was eliminated as part of BAPCPA), Chapter 15 sets forth a comprehensive framework for addressing cross-border insolvency cases, including providing for the recognition of a wider variety of foreign proceedings, allowing representatives of foreign insolvency proceedings to have direct access to the U.S. court system, and allowing for the commencement of full-blown bankruptcy cases under other chapters of the Bankruptcy Code in certain circumstances (discussed in greater detail below). Despite the more comprehensive nature of Chapter 15, however, it maintains “and in some respects enhances” the flexibility that was granted to United States courts under section 304.<sup>17</sup>

#### A. PURPOSE OF CHAPTER 15

The general purpose of Chapter 15 is to provide a more efficient and effective means of administering cross-border insolvencies. To accomplish this goal, Chapter 15 attempts to reconcile the right of U.S. courts to administer assets within their jurisdiction with principles of comity and the fact that foreign courts obviously have an identical right to administer assets within their jurisdiction. This general goal of coordinating cross-border insolvencies and avoiding wasteful and duplicative proceedings is realized through five objectives specified in the statute:

- (1) cooperation between—
  - (A) courts of the United States, 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.<sup>18</sup>

Although cooperation between U.S. courts and foreign courts and representatives is one of the stated objectives of Chapter 15, it is also one of the primary means by which Chapter 15 attempts to achieve its other goals. Accordingly, and as discussed below, not only does Chapter 15 set up a framework for such cooperation, it specifically directs it—stating that U.S. courts should “cooperate to the maximum extent possible with a foreign court or a foreign representative, either directly or through the trustee.”<sup>19</sup>

Consistent with the flexibility and discretion granted throughout Chapter 15, U.S. courts are given broad discretion in determining how to best

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17. *In re SPhinX, Ltd.*, 351 B.R. 103, 112 (Bankr. S.D.N.Y. 2006).

18. 11 U.S.C. § 1501(a) (2005).

19. *Id.* § 1525(a).

achieve coordination (i.e., cooperation) among proceedings. But the statute does provide for a number of possible methods of cooperation including: the appointment of a trustee or examiner to communicate directly with the foreign court or foreign representative; the direct exchange of information with the foreign court; and increased coordination of the administration of the debtor's assets (including coordination with respect to concurrent proceedings).<sup>20</sup> Although not required, Chapter 15 also contemplates that in some cases (e.g. complex concurrent proceedings) it may be useful to approve and implement a formal protocol or agreement governing such coordination.<sup>21</sup>

#### B. SCOPE OF APPLICATION OF CHAPTER 15

Chapter 15 applies in situations where:

- (1) assistance is sought in the United States by a foreign court or a foreign representative in connection with a foreign proceeding;
- (2) assistance is sought in a foreign country in connection with a case under [the Bankruptcy Code];
- (3) a foreign proceeding and . . . [a United States proceeding under the Bankruptcy Code] . . . with respect to the same debtor are pending concurrently; or
- (4) creditors or other interested persons in a foreign country have an interest in requesting the commencement of, or participating in, a case or proceeding under [the Bankruptcy Code].<sup>22</sup>

For purposes of determining whether Chapter 15 is applicable in a particular instance, and in order to understand many other provisions of Chapter 15, it is important to be comfortable with the terms "foreign proceeding" and "foreign representative," both of which are defined in section 101 of the Bankruptcy Code. A "foreign proceeding" is defined as 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.<sup>23</sup>

A foreign representative is defined as "a person or body, including a person or body appointed on an interim basis, authorized in a foreign

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20. *See generally id.* §§ 1525-27 (addressing cooperation between U.S. courts and foreign courts and foreign representatives).

21. *See id.* § 1527(4) (providing that cooperation may be implemented by any means including the "approval or implementation of agreements concerning the coordination of proceedings").

22. *Id.* § 1501(b).

23. *Id.* § 101(23). The requirement that the proceeding be a "collective" one is "intended to limit the application of Chapter 15 to proceedings that benefit the creditors as a whole, and to exclude proceedings that are for the benefit of a single creditor." *Transatlantic Insolvency, supra* note 16, at 436. Although the definition of "foreign proceedings" is also limited to proceedings that are "supervised" by a court, commentators expect this provision to be interpreted fairly broadly to allow recognition of proceedings such as UK creditors' voluntary liquidations. *Id.*



proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding."<sup>24</sup>

Although these terms—and thus the scope of proceedings eligible for recognition under Chapter 15—are fairly broad, Chapter 15 does specifically list a number of types of proceedings that are not entitled to recognition. For example, with the exception of proceedings involving foreign insurance companies, Chapter 15 does not apply to proceedings involving entities identified by exclusion in section 109(b) of the Bankruptcy Code, including railroads, domestic insurance companies, and banks.<sup>25</sup> Similarly, proceedings involving entities subject to proceedings under the Securities Investor Protection Act of 1970 are not subject to Chapter 15, nor are proceedings involving stockbrokers or commodity brokers.<sup>26</sup>

Finally, although Chapter 15 significantly streamlines the process of obtaining recognition of an eligible foreign proceeding (as discussed in greater detail below), it does grant U.S. courts the right to abstain from exercising jurisdiction over a foreign proceeding in certain circumstances.<sup>27</sup>

### C. PROCEDURE FOR OBTAINING RECOGNITION OF A FOREIGN PROCEEDING—RIGHT OF DIRECT ACCESS

Chapter 15 significantly streamlines the process for obtaining judicial recognition in the United States of foreign proceedings. For one thing, Chapter 15 provides for direct access to the U.S. court system, authorizing foreign representatives to initiate Chapter 15 proceedings by filing “petition[s] for recognition” directly with U.S. courts.<sup>28</sup>

In addition to this right of direct access, the provisions governing the requirements of the Chapter 15 petition itself and the authentication of supporting documents are also relatively liberal. With respect to supporting documentation, for example, Chapter 15 provides that the petition for recognition must be accompanied by either:

- (1) a certified copy of the decision commencing such foreign proceeding and appointing the foreign representative;
- (2) a certificate from the foreign court affirming the existence of such foreign proceeding and of the appointment of the foreign representative; or
- (3) in the absence of . . . [such certificates] . . . , any other evidence acceptable to the court of the existence of such foreign proceeding

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24. 11 U.S.C. § 101(24).

25. *Id.* § 1501(c)(1).

26. *Id.* § 1501(c)(3).

27. For example, section 1506 provides that “[n]othing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States.” More broadly, section 305 of the Bankruptcy Code provides that the courts may dismiss or suspend all proceedings in a Chapter 15 case if it is determined that such a dismissal or suspension would best serve the purposes of Chapter 15. *Id.* § 305(a)(2)(B).

28. *Id.* § 1509.

and of the appointment of the foreign representative.<sup>29</sup>

A statement identifying all foreign proceedings involving the debtor which are known to the foreign representative must also accompany the petition for recognition.<sup>30</sup> This statement, along with the petition for recognition itself and the supporting documentation described above, must be translated into English.<sup>31</sup>

In order to ensure compliance with these requirements, counsel for a petitioning debtor will typically file a number of pleadings in the first day or two following the filing of a voluntary Chapter 15 petition. Standard pleadings that are typically filed in the first few days of a Chapter 15 proceeding include, significantly:

- (1) Voluntary petition under Chapter 15 (this is a standard bankruptcy form that is used to commence voluntary petitions under other chapters of the Bankruptcy Code as well).
- (2) Statement of foreign representative including brief description of the debtor and the foreign proceeding (identifying when and where the foreign proceeding was initiated and the statutory basis for the same), requesting recognition and stating that the foreign representative is the duly authorized representative of the foreign proceeding, listing any other foreign proceedings which the debtor is subject to, and requesting recognition as a "main" or "nonmain" proceeding (the distinction between "main" and "nonmain" proceedings is discussed below).<sup>32</sup> The certified copy of the decision commencing the foreign proceeding and the certificate from the foreign court required by section 1515(b) of the Bankruptcy Code are usually attached to this statement as exhibits.
- (3) Statement/List required by Bankruptcy Rule 1007(a)(4) listing, among other things, all duly appointed administrators in any proceedings involving the debtor, litigation parties in the United States, and all parties against whom provisional relief is sought.
- (4) Statement setting forth in greater detail the reasons for the application, detailing the history and status of the foreign proceeding, and discussing applicable law in the foreign forum.
- (5) Memorandum of law in support of petition for recognition.
- (6) Proposed order recognizing foreign proceeding.

Schedules listing the debtor's assets and liabilities and additional pleadings and/or orders from the foreign proceeding (such as an application for interim relief) are frequently filed as well depending on the facts of the case. Overall, however, the documentation required to commence a Chapter 15 proceeding is not particularly onerous. The recognition process is also simplified by the fact that in the absence of evidence to the

29. *Id.* § 1515(b)(1)-(3).

30. *Id.* § 1515(c).

31. *Id.* § 1515(d).

32. Where there is any doubt about whether a foreign proceeding will be recognized as a "main" or "nonmain" proceeding, petitioners frequently request recognition as a main proceeding, but include a prayer in the alternative seeking recognition as a nonmain proceeding in the event of an adverse ruling.

contrary, the court is entitled to presume that all documentation submitted in connection with the petition is authentic.<sup>33</sup>

If the required documentation is properly attached to the petition, Chapter 15 further provides that a hearing on the petition should be held as quickly as possible so that a recognition decision can be rendered “at the earliest possible time.”<sup>34</sup> If the petition is granted, the foreign proceeding will be recognized as either a “foreign main proceeding” or a “foreign nonmain proceeding” (each of which is discussed in greater detail below).<sup>35</sup>

#### D. INTERIM RELIEF WHILE RECOGNITION IS PENDING

While a petition for recognition is pending, Chapter 15 grants the courts broad discretion to grant interim relief where it “is urgently needed to protect the assets of the debtor or the interests of the creditors.”<sup>36</sup> Relief under section 1519 is subject to the “standards, procedures, and limitations applicable to an injunction,”<sup>37</sup> presumably meaning that courts will balance the relative harms among the effected parties when determining whether interim relief should be granted. Such interim relief may include, but is not limited to:

- (2) Granting a stay of execution against the debtor’s assets.
- (3) Suspending the right to transfer, encumber or otherwise dispose of assets of the debtor.
- (4) Providing for the examination of witnesses concerning the debtor’s assets, affairs, rights, obligations or liabilities.
- (5) Entrusting the administration of all or part of the debtor’s U.S. assets to the foreign representative or another person authorized by the court (in order to protect and preserve assets that are susceptible to devaluation or otherwise in jeopardy). . . .
- (7) Additional relief the court deems appropriate (other than relief relating to avoidance actions).<sup>38</sup>

Although Chapter 15 grants fairly broad discretion to the courts to fashion appropriate interim relief while an application for recognition is pending, it does provide that any interim relief granted must not interfere with the administration of a “foreign main proceeding” (defined below), and further provides that the courts must not enjoin police or regulatory acts of governmental units (including criminal proceedings).<sup>39</sup> Interim relief granted pursuant to section 1519 of the Bankruptcy Code is also limited in duration—any such relief terminates upon recognition of the

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33. 11 U.S.C. § 1516(b).

34. *Id.* § 1517(c).

35. *Id.* § 1517(b).

36. *Id.* § 1519(a).

37. *Id.* § 1519(e).

38. *See id.* § 1521(a)(2), (5), (3), (4), (7).

39. *See id.* § 1519(c), (d).

foreign proceeding unless extended by the court.<sup>40</sup>

#### E. RELIEF AVAILABLE UPON RECOGNITION

When a court recognizes a foreign proceeding pursuant to Chapter 15, the foreign representative immediately becomes eligible: (i) to sue and be sued in the United States; (ii) to apply directly to a court in the United States for relief from that court (such as a court where assets of the foreign debtor are being administered); and (iii) for “comity or cooperation” from the U.S. court.<sup>41</sup> Moreover, upon recognition, the foreign representative is authorized to commence an involuntary bankruptcy petition against another entity.<sup>42</sup>

Recognition also results in significant additional relief, although the form of this relief depends, at least in part, on whether the foreign proceeding is recognized as a “foreign main proceeding” or “foreign nonmain proceeding,” terms of art that are defined in section 1502 of the Bankruptcy Code. A foreign main proceeding is defined as a proceeding in a country where the debtor has its center of main interests.<sup>43</sup> A foreign nonmain proceeding, on the other hand, is defined as any foreign proceeding that is not a main proceeding and that is pending in a country where the debtor has an establishment – which is basically a location where the debtor conducts regular business operations.<sup>44</sup>

The distinction between recognition as a foreign main proceeding or a foreign nonmain proceeding is significant because, as discussed in greater detail below, it determines whether certain relief will be available to the debtor as a matter of right or whether such relief is only available from a court on a discretionary basis.<sup>45</sup>

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40. *See id.* § 1519(b) (providing that interim relief under section 1519 of the Bankruptcy Code terminates unless extended pursuant to section 1521(a)(6)).

41. *See id.* § 1509(b).

42. *Id.* § 1511(a)(1). If the proceeding is recognized as a “foreign main proceeding,” the foreign representative can also commence a voluntary bankruptcy proceeding. *Id.* § 1511 (a)(2).

43. *Id.* § 1502(4).

44. *Id.* § 1502(5). The term “establishment” is defined “any place of operations where the debtor carries out a nontransitory economic activity.” *Id.* § 1502(2).

45. Although the distinction between foreign main proceedings and foreign nonmain proceedings appears to be fairly important—especially because a debtor in a main proceeding would be automatically assured of fundamental protections like the automatic stay, while a debtor in a nonmain proceeding would be subjected to the discretion of the court—some courts suggest that, in light of the considerable discretion afforded to the courts in nonmain proceedings, the distinction is not as significant as it would appear. *See, e.g., SPhinX*, 351 B.R. at 122 (stating that “except for the applicability of the automatic stay, the potential relief available to the . . . [debtors] . . . under chapter 15 in almost all respects does not depend on whether the Cayman Islands proceedings are recognized as ‘main’ or ‘nonmain’”).

1. *Relief Available as a Matter of Right Where a Proceeding is Recognized as a Foreign Main Proceeding*

If a proceeding is recognized as a foreign main proceeding, certain provisions of the Bankruptcy Code, including section 362 (which provides for a broad automatic stay of creditor action against the debtor and the debtor's interests to afford the debtor an opportunity to reorganize), apply automatically without further order of the court.<sup>46</sup> Relief that is automatically granted to a debtor upon recognition of a foreign main proceeding most significantly includes:

- (A) Applying the automatic stay to property of the debtor located within the territorial jurisdiction of the United States.
- (B) Authorizing foreign representatives to use, sell, or lease property of the debtor located within the territorial jurisdiction of the United States.
- (C) Allowing foreign representatives to operate the debtor's business and exercise the powers of a trustee.

In addition, if a foreign proceeding is recognized as a foreign main proceeding, the foreign representative is authorized to commence a voluntary bankruptcy case for the debtor under another chapter of the Bankruptcy Code (for example, a reorganization proceeding under chapter eleven of the Bankruptcy Code). Although such cases are limited in scope to assets located within the territorial jurisdiction of the United States, commencing such a case can have several important advantages. For one thing, filing a chapter eleven petition would allow the foreign representative to pursue avoidance actions, including preference and fraudulent transfer actions – a powerful tool that is potentially only available in connection with main proceedings.

It is also important to note that in addition to the automatic relief granted in “main” proceedings, and the opportunity to file bankruptcy cases under other chapters of the Bankruptcy Code, debtors in main proceedings are entitled to the same discretionary relief as debtors in nonmain proceedings.

2. *Discretionary Relief Available In Both Foreign Main Proceedings and Foreign Nonmain Proceedings*

Where a proceeding is recognized as a foreign nonmain proceeding, relief is only available on a discretionary basis, rather than as a matter of right as it is in main proceedings, and foreign representatives in nonmain proceedings are not entitled to commence bankruptcy cases under other chapters of the Bankruptcy Code. Nonetheless, even in nonmain proceedings, courts have significant discretion to grant “any appropriate relief” in furtherance of Chapter 15, which could approximate the relief

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46. See 11 U.S.C. § 1520 (2005) (stating the effects of recognition of a foreign main proceeding).

granted as a matter of right to a debtor in a main proceeding.<sup>47</sup> Discretionary relief available to debtors in nonmain proceedings includes, but is not limited to:

- (1) Staying the commencement or continuation of individual actions or proceedings related to the debtor's assets, rights, obligations or liabilities.
- (2) Staying execution against the debtor's assets.
- (3) Suspending or terminating the right to transfer, encumber, or otherwise dispose of assets of the debtor.
- (4) Providing for the examination of witnesses, taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations and liabilities.
- (5) Entrusting the administration or realization of all or part of the debtor's U.S. assets to the foreign representative.
- (6) Extending any interim relief previously granted.
- (7) Additional relief the court deems appropriate (other than relief relating to avoidance actions).<sup>48</sup>

Just as with interim relief granted pursuant to section 1519, relief granted in nonmain proceedings pursuant to section 1521 cannot enjoin police or regulatory acts of governmental units (including criminal proceedings), and the courts must ensure that the relief granted relates to assets that under U.S. law, should be administered in the foreign proceeding.<sup>49</sup>

### 3. *Determining Whether a Proceeding Constitutes a Foreign Main Proceeding or a Foreign Nonmain Proceeding*

Because almost all foreign debtors would like to have their foreign proceedings recognized as foreign main proceedings in order to benefit from the automatic stay and other relief under the Bankruptcy Code as a matter of right, it is important to understand how courts determine whether a proceeding is main or nonmain.

As set forth above, Chapter 15 attempts to facilitate this determination by defining the term foreign main proceeding as a proceeding pending in a country where the debtor has its "center of main interests" (COMI). Although Chapter 15 does not define the term COMI, nor is the term defined in either the EU Regulation or the Model Law, it provides for a rebuttable presumption that the location of the debtor's registered office is the center of its main interests.<sup>50</sup>

Although the COMI concept is still in its infancy in the United States, several recent decisions have begun to shape our understanding of how U.S. courts may interpret the provision. These decisions have made it

47. See, e.g., *SPhinX*, 351 B.R. at 122.

48. 11 U.S.C. § 1521(a)(1)-(7) (2005).

49. See *id.* § 1521(c)-(d).

50. Section 1516(c) of the Bankruptcy Code provides that "[i]n the absence of evidence to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the center of the debtor's main interests." *Id.* § 1516(c).

abundantly clear that courts in the United States will consider decisions of foreign courts interpreting similar statutes in accordance with the dictate of section 1508 of the Bankruptcy Code,<sup>51</sup> and several trends have begun to emerge.

4. *In Most Cases, Courts Will Defer to the Location of the Debtor's Registered Office and/or the Location Where It Regularly Administers Its Business as Its COMI*

As set forth above, section 1516(c) of the Bankruptcy Code provides that in the absence of evidence to the contrary, the location of a debtor's registered office is the center of its main interests. Based on several recent decisions, it appears that courts will give substantial deference to this presumption, and in doing so will also look at where the debtor regularly administers its business.

For example, in *Tri-Continental Exchange*, the Bankruptcy Court for the Eastern District of California had to decide whether joint liquidations of debtor insurance companies under the laws of St. Vincent and the Grenadines (SVG) should be recognized as foreign main or nonmain proceedings within the meaning of Chapter 15.<sup>52</sup> Although the debtor insurance companies were organized under the laws of SVG and maintained their registered office there, the debtors had been in the business of selling fraudulent insurance policies, primarily to purchasers in the United States and Canada. Accordingly, most of the creditors or defrauded policy holders were located in the United States.

The SVG liquidators filed a Chapter 15 petition seeking recognition of the joint liquidations as foreign main proceedings. A creditor objected, arguing that the debtors' COMI was really in the United States (where the scam was largely perpetrated and where most of the debtors' creditors were located), and that the SVG liquidations should at best be recognized as foreign nonmain proceedings.

The court, beginning its analysis by addressing the burden of proof, held that even if a debtor's registered office is located in the same country where its insolvency proceeding is pending, the foreign representative nonetheless bears the burden of proof as to the debtor's COMI if some evidence is introduced indicating that the debtor's COMI might be elsewhere.<sup>53</sup>

In trying to determine where the debtors' COMI was properly located, the court relied on a number of sources including: (i) Chapter 15 itself and the presumption set forth in section 1516(c); (ii) the Guide to Enact-

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51. As indicated above, consistent with the general goal of promoting legal certainty for trade and investment, Chapter 15 makes it clear that U.S. courts should consider foreign rulings interpreting similar statutes (such as the EU Regulation and other foreign statutes based upon the Model Law) when attempting to interpret Chapter 15, and should attempt to interpret the provisions of Chapter 15 consistent with those decisions.

52. *Tri-Continental Exchange*, 349 B.R. 627.

53. *Id.* at 635.

ment of the Model Law; and (iii) the EU Regulation and cases and regulations interpreting it. In particular, the court placed considerable weight on the fact that “the regulation adopting the EU Convention” describes a debtor’s COMI as “the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.”<sup>54</sup>

The court ultimately held that because the debtors “conducted regular business operations at their registered offices in . . . [SVG] . . . in a manner that equates with a ‘principal place of business’ under concepts of United States law” the debtors’ COMI was in SVG even though the scam was primarily perpetrated in the United States.<sup>55</sup> Accordingly, the court recognized the SVG proceedings as foreign main proceedings under Chapter 15.

A similar holding was reached in a recent case interpreting the COMI concept under the EU Regulation. In *Eurofood IFSCA Ltd.*, the European Court of Justice held that the mere fact that some of the debtor’s economic choices took place in a country separate from the debtor’s registered office, did not rebut the presumption that a debtor’s COMI is typically located in the country where it has its registered office.<sup>56</sup> This apparent willingness by courts in both the United States and elsewhere to place significant weight on the presumption that a debtor’s principal place of business is in the country where its registered office is located and/or where it conducts the administration of its business should provide for “greater certainty and efficiency in United States recognition proceedings.”<sup>57</sup>

5. *If a Debtor Has Few Contacts With the Nation Where Its Liquidation Proceeding Is Filed and Its Chapter 15 Petition Appears to Have Been Filed for Improper Reasons, Courts Will Either Refuse to Grant Recognition or Strictly Limit the Available Relief*

Although it appears that the location of a debtor’s registered office and the location where it regularly conducts its business will carry great weight in determining a debtor’s COMI under Chapter 15, it is also clear that the courts do not intend to simply “rubber stamp” all foreign proceedings as foreign main proceedings. In particular, in another recent decision, Judge Robert Drain of the Bankruptcy Court for the Southern District of New York denied a Chapter 15 petition seeking recognition of a Cayman Islands proceeding as a main proceeding where he found that the primary purpose of the petition was an improper litigation strategy.<sup>58</sup>

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54. *Id.* at 634-635 (citing Council Regulation (EC) No. 1346/2000, ¶13, 2000 O.J. (L 160/1) [hereinafter Council Regulation]).

55. *Tri-Continental Exchange*, 349 B.R. at 629.

56. Case 341/04, *In re Eurofood IFSCA Ltd.*, 2006 E.C.R. I-3813, ¶1.

57. Daniel Guyder et al., *In Interpreting Chapter 15, U.S. Courts Eye Foreign Rulings*, DAILY BANK. REV. (DOW JONES), Oct. 11, 2006, at 11-12.

58. *See SPhinX*, 351 B.R. at 122.



The *SPhinX* case involved a fairly unique mix of circumstances, however. For one thing, the debtors' only real connection to the Cayman Islands, where the foreign proceeding was pending, was that they were organized and maintained a corresponding registered office there. Additionally, creditors were located elsewhere (largely in the United States), the debtors had few insignificant assets in the Cayman Islands, the debtors' business was not operated from the Caymans, and the debtors had no employees there. On top of these facts, the court readily observed that the Chapter 15 proceeding was filed in order to defeat a settlement by subverting a consideration on the merits. Accordingly, Judge Drain refused to grant recognition of the proceedings as main proceedings, instead recognizing them as nonmain proceedings.<sup>59</sup>

6. *Courts Will Also Deny Recognition (or at Least Deny Recognition as a Main Proceeding) Where a Debtor Has Extremely Minimal Contacts With the Nation Where Its Liquidation is Filed*

The impact of the *SPhinX* decision on the issue of COMI has been heavily debated. Some commentators have argued that the court did not go far enough, and that given the debtor's lack of contacts, the case should not have even been recognized as a "nonmain" proceeding. Others assert that by moving away from the registered office presumption, the court opened the door to added subjectivity in the COMI analysis.<sup>60</sup> The decision also engendered significant uncertainty about how other petitioning debtors, who are organized in foreign jurisdictions for tax purposes or other reasons but largely do business elsewhere, will be treated.

This question was answered to some degree by another recent decision from the Bankruptcy Court for the Southern District of New York<sup>61</sup> The High-Grade Structured Credit Strategies Fund and a smaller Bear Stearns Fund (collectively, the Funds) had initiated liquidation proceedings in the Cayman Islands. They subsequently filed Chapter 15 petitions for recognition seeking to prevent creditors in the United States and other parties from attempting to attach or seize their U.S. assets.<sup>62</sup>

As in the *SPhinX* case, the Funds were organized in the Cayman Islands and had their registered offices there, but otherwise had little or no contacts with the Caymans. The funds were administered by a Massachu-

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59. In making this decision, the court once again looked to foreign law, again considering the definition of COMI and discussing recent case law under the EU Regulation (in particular, the *Eurofood* decision discussed above). This continued reliance by U.S. courts on foreign precedent to interpret Chapter 15 underscores the importance of keeping abreast of important developments relating to the Model Law and the EU Regulation.

60. See Daniel M. Glosband, *SPhinX Chapter 15 Opinion Misses the Mark*, AM. BANKR. INST. J. 44, 85 (Dec./Jan. 2007).

61. *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd.*, 374 B.R. 122 (Bankr. S.D.N.Y. 2007).

62. See Patrick Fitzgerald, *Ailing Bear Stearns Hedge Funds File for Chapter 15 Protection*, DAILY BANK. REV. (DOW JONES), Aug. 2, 2007, at 5.

setts corporation, there were no employees or managers in the Caymans, the investor registry was maintained and located in Ireland, and the accounts receivable were located throughout Europe and the United States. In fact, the Funds' books and records were maintained in Delaware, the investment manager was located in New York, and prior to the commencement of the foreign proceeding, all of the Funds' assets were located in the United States.<sup>63</sup>

Probably in light of these facts and the *SPhinX* decision, the liquidators of the Funds sought relief in the alternative. Although they sought recognition of the Cayman liquidation as a foreign main proceeding, they also sought recognition as a nonmain proceeding, but solely in the event that the court found recognition as a foreign main proceeding was not appropriate.

Unlike in *SPhinX*, nobody objected to the debtors' request to have their foreign proceeding recognized as a foreign main proceeding. Nonetheless, the court determined that it had an independent duty to determine whether recognition as a main or nonmain proceeding was appropriate, even in the absence of objections.<sup>64</sup> Based on the Funds' very limited connections with the Caymans, the court concluded that the Funds' COMI was actually in the United States, and thus determined that recognition as a main proceeding was not appropriate.<sup>65</sup>

The court then went on to consider whether it should grant recognition as a nonmain proceeding which, as set forth above, requires a finding that the petitioning debtor has an establishment (a place where the debtor conducts a nontransitory economic activity) in the nation where its foreign proceeding is pending. Finding that the Funds really conducted no business in the Caymans, the court also refused to grant recognition as a nonmain proceeding.<sup>66</sup>

Based on these decisions, it is apparent that while U.S. courts will give substantial deference to the presumption that a debtor's COMI is in the nation where its registered office is, they will not "rubber stamp" a recognition petition where the petitioning debtor actually has few, if any, ties to the nation where its foreign proceeding is pending. In fact, assuming that other courts follow the *Bear Stearns* decision, petitioning debtors will

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63. See *Bear Stearns*, 374 B.R. at 130.

64. The court's decision that it had an independent duty to examine the issue in the absence of objections is very significant and represents a departure from the *SPhinX* decision. In *SPhinX*, the court noted in dicta that if no other parties had objected, it would have granted recognition as a main proceeding since no other proceedings were pending. The *Bear Stearns* court expressly rejected this approach, holding that it had an independent duty to investigate the issue. See *id.*; see also *Cross Border Insolvency: Bankruptcy Court Denies Chapter 15 Recognition to Bear Stearns' Offshore Hedge Funds*, 1 BLOOMBERG L. REP. (Issue no. 20) 1, 1 (2007).

65. See *Bear Stearns*, 374 B.R. at 130.

66. Helping the court reach this decision was the fact that Cayman law contains a prohibition on "exempted companies" (such as the Funds) doing business in the Cayman Islands that is not "in furtherance of their business otherwise carried on outside of the Cayman Islands." *Id.*

have to be prepared for the issue to be scrutinized even in the absence of objections.

While this would initially seem to be an issue that would arise frequently, the fact is that in the vast majority of Chapter 15 cases, determining whether recognition as a foreign main or nonmain proceeding is appropriate is fairly easy and is usually uncontested. As a reference, Exhibit I contains a chart setting forth a non-exclusive list of Chapter 15 cases filed to date, along with case numbers and a very brief disposition summary. As is evident from the chart, the recognition issue is usually not contested, and in the absence of unusual facts or opposition, courts routinely enter proposed orders prepared by counsel recognizing foreign proceedings as main proceedings.

#### IV. THE EXPERIENCE THUS FAR AND EXPECTATIONS FOR THE FUTURE – POSITIVE DEVELOPMENTS AND POTENTIAL IMPROVEMENTS

Chapter 15 undoubtedly represents a marked improvement over section 304 of the Bankruptcy Code, and the administration of cross-border insolvencies should continue to become more efficient as more and more countries move to adopt the Model Law and as case law in the United States and elsewhere becomes more developed (and ideally more uniform). On the whole, Chapter 15 appears to be slowly accomplishing its goals of harmonizing and modernizing cross-border insolvency legislation in the United States, streamlining the administration of cross-border proceedings, and reducing inefficiencies, including unnecessary duplicative proceedings in multiple nations with respect to the same debtor. The apparent willingness of U.S. courts to follow the mandate of Chapter 15 and, to the extent possible, harmonize their holdings with the earlier holdings of foreign courts interpreting identical provisions under the Model Law and the EU Regulation, is certainly a welcome step. Additional harmonization will only increase legal certainty for trade and investment, a primary objective of Chapter 15.

Despite these strides, there are certainly areas where both Chapter 15 and the Model Law could be improved, and there is still significant uncertainty with respect to how U.S. courts will interpret certain provisions of Chapter 15, provisions that have yet to be tested in the two years since it was enacted. For example, commentators have argued that the jurisdictional threshold for foreign debtors to commence full-blown bankruptcy cases under other chapters of the Bankruptcy Code remains too low, and that the result is often duplicative proceedings in the United States and other countries with respect to the same debtor.<sup>67</sup> Although Chapter 15 does address this issue by urging courts to engage in greater cooperation, a better solution might be to attempt to avoid such duplication in the first place.

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67. See, e.g., *Transatlantic Insolvency*, *supra* note 16, at 438-39.

Similarly, because there has been relatively little case law interpreting Chapter 15 to date, there are many provisions that still need to be tested in the courts, and concepts will need to be developed to provide greater certainty to debtors that are considering whether to seek Chapter 15 relief. For example, U.S. courts have yet to seriously address whether a foreign proceeding is so manifestly contrary to public policy that recognition under Chapter 15 should not be granted.<sup>68</sup> This could arise in any number of circumstances. For example, if a debtor with significant contacts in the United States files for bankruptcy in a jurisdiction where it has its registered office (but that it otherwise has only a tenuous connection to) in order to avoid a restriction under the Bankruptcy Code (for example, in order to be able to implement a key employee retention plan—something that Congress clearly intended to scale back on as part of BAPCPA), would a U.S. court recognize the proceeding as a main proceeding or would it withhold recognition on public policy grounds?<sup>69</sup>

Even with respect to the COMI concept described above, there is certainly room for improvement. Although this concept is not defined in Chapter 15 (other than to provide that a debtor's COMI is presumed to be the place of its registered office in the absence of evidence to the contrary), it should become more developed as jurisprudence in the United States develops. Nevertheless, it will certainly engender a level of uncertainty for the foreseeable future. But efforts are underway that could ultimately resolve the issue. For example, although COMI is already defined more clearly in the EU Regulation,<sup>70</sup> there have been efforts in Europe to promote an even more stringent definition of COMI as:

the place of the registered office, or, if shown to be in a different member state, the place where the debtor conducts the administration of his interest on a regular basis and which is therefore ascertainable by third parties, except for cases where the debtor is part of a group of companies or legal persons that operate as an economic unit.<sup>71</sup>

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68. As set forth above, section 1506 provides that “[n]othing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States.” 11 U.S.C. § 1506 (2005).

69. One decision in the Ephedra Products Liability Litigation Chapter 15 cases shed some light on this subject and indicated that U.S. courts will take a relatively narrow view of what is manifestly contrary to public policy. Creditors in that case argued that recognition was not appropriate because a Canadian claims resolution process that required mandatory mediation deprived them of their right to a jury trial. Holding that manifestly contrary to public policy was only intended to be invoked under exceptional circumstances and with respect to matters of fundamental importance, the court approved the procedures. *See In re Ephedra Prod. Liab. Litig.*, 349 B.R. 333 (S.D.N.Y. 2006).

70. As set forth above, the EU Convention describes a debtor's COMI as “the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.” Council Regulation, *supra* note 54, ¶13.

71. *See* Simon Appell & Simon Foster, *COMI – Through the Fog and Into the Mist*, *INSOL WORLD* at 47 (Fourth Quarter, 2006) (discussing proposed reform to the EU Regulation drafted by Christopher Paulus and Gabriel Moss following Paulus’

While such a definition, or any definition for that matter, is probably unlikely to be incorporated into the Model Law or Chapter 15 in the near term, it is certainly an issue that will be considered as courts around the world struggle to reconcile their understanding of the concept.

Finally, forum shopping is another issue that is addressed in the EU Regulation to a greater degree than in Chapter 15. As discussed above, the EU Regulation addresses choice of law issues in an effort to determine where a proceeding should be properly filed in the EU. Although it attempts to limit duplicative main proceedings, the Model Law (and consequently Chapter 15) really does not address this issue. For example, because section 109 of the Bankruptcy Code authorizes bankruptcy filings by debtors with property in the United States without specifying a threshold amount needed to justify a filing, foreign debtors looking to get the protections of the Bankruptcy Code can sometimes file for chapter eleven protection directly and bypass the Chapter 15 process altogether.<sup>72</sup> This strategy is often instituted even where the bankruptcy filing at issue might really be more proper in another country where the debtor has most of its assets or its main operations.

## V. CONCLUSION

Over two years have passed since the Model Law became effective in the United States with the addition of Chapter 15 in the Bankruptcy Code. During this time, U.S. courts have administered a modest number of Chapter 15 proceedings and resolved an equally modest number of disputes arising under this new legislation. The past few years also have been marked by a relatively robust global economy with abundant sources of liquidity and, thus, fewer cross-border restructuring and bankruptcy opportunities than originally anticipated. As the global winds of economic change begin to blow, we should expect multi-national debtors to increasingly rely on Chapter 15 as their preferred means to administer assets and liabilities in the United States. The scope, rights and powers of debtors, foreign representatives, and other parties-in-interest under Chapter 15 will increasingly conflict and become ripe for further commentary and judicial guidance on this exciting area of legal jurisprudence.

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comments that UK courts are “stealing” cross-border insolvency cases by adopting an inordinately broad interpretation of COMI under the EU Regulation).

72. For example, filings have been based upon relatively minimal amounts of property in the United States, such as “retainers paid by the debtor to US lawyers and held in client accounts in the United States,” “the debtor’s advertising and marketing material in the United States, together with \$100 in a bank account . . . [was deemed] . . . sufficient to establish jurisdiction,” and “original books and records (such as statutory books) situated in the United States.” *Transatlantic Insolvency*, *supra* note 16, at 438.

**EXHIBIT I**  
(Non-Exclusive List of Chapter 15 Cases Filed to Date)

<b>CASE NAME</b>	<b>CASE NUMBER</b>	<b>DISTRICT</b>	<b>COMMENT</b>
Tri-Continental Exchange Ltd. et al.	Joint Case No. 06-22652, Klein, J.	Bankr. E.D. Cal.	Debtors were insurance companies organized under the laws of St. Vincent and the Grenadines (SVG). SVG insolvency proceeding was recognized as "foreign main proceeding" over objection of creditor. See discussion <i>supra</i> Part III.E.4.
In re Daewoo Corp.	Case No. 06-12242	Bankr. S.D.N.Y.	Granting recognition of a proceeding pending under the Republic of Korea's Act on Rehabilitation and Bankruptcy of Debtors as a "foreign main proceeding" and granting related relief.
Thornycroft (1862) Limited, et al.	Joint Case No. 06-12548, Gerber, J.	Bankr. S.D.N.Y.	Granting recognition of a proceeding pending under the UK Insolvency Act of 1986 as a "foreign main proceeding" and granting related relief.
SPhinX, Ltd., et al.	Joint Case No. 06-11760, Drain, J.	Bankr. S.D.N.Y.	Holding that proceedings under the laws of the Cayman islands were "foreign nonmain proceedings" and limiting relief to the turnover of certain documents.
Gordian Runoff (UK) Limited (f/ k/a/ GIO (UK) Limited)	Case No. 06-11563, Drain, J.	Bankr. S.D.N.Y.	Granting recognition of a proceeding pending under section 425 of the Companies Act 1985 of England and Wales as a "foreign main proceeding" and granting related relief.
Hatteras Reinsurance Ltd.	Case No. 06-11304, Peck, J.	Bankr. S.D.N.Y.	Granting recognition of proceedings pending under the Bermuda Companies Act 1981 and the Bermuda Insurance Act 1978 as "foreign main proceedings" and granting related relief.
9165-7999 Quebec, Inc., a/ k/a Les Productions Sky High Vikings, Inc., a/k/a Sky High Vikings Productions, Inc.	Case No. 06-07875, Doyle, J.	Bankr. N.D. Ill.	Granting recognition of a proceeding pending in Quebec, Canada as a "foreign main proceeding" and granting related relief.
La Mutuelle du Mans Assurance IARD UK Branch MMA	Case No. 05-60100, Lifland, J	Bankr. S.D.N.Y.	Granting recognition of a proceeding pending in the United Kingdom as a "foreign main proceeding" and granting related relief.

CASE NAME	CASE NUMBER	DISTRICT	COMMENT
Trade and Commerce Bank (in Liquidation)	Case No. 05-60279, Bernstein, J.	Bankr. S.D.N.Y.	Granting recognition of a proceeding pending in the Grand Court of the Cayman Islands as a "foreign main proceeding" and granting related relief.
MuscleTech Research and Development Inc., et al.	Joint Case No. 06-10092, Peck, J.	Bankr. S.D.N.Y.	Reference withdrawn.
Lion City Run-off Private Limited	Case No. 06-10461, Bernstein, J.	Bankr. S.D.N.Y.	Granting recognition of a proceeding pending under section 425 of the Companies Act 1985 of England and Wales and section 210 of the Companies Act, chapter 50, of Singapore as a "foreign main proceeding" and granting related relief.
S.N.C. Summersun et cie	Case No. 06-10955, Bernstein, J.	Bankr. S.D.N.Y.	Granting recognition of a proceeding pending in the Commercial Court in Antibes, France as a "foreign main proceeding," and scheduling a hearing on whether the court should grant recognition of an order of the Commercial Court extending the foreign proceeding to another entity.
TriGem Computer, Inc.	Case No. 05-50052, Donovan, J.	Bankr. C.D. Cal.	Granting recognition of a proceeding pending in the Republic of Korea as a "foreign main proceeding" and granting related relief.
Moulin Global Eyecare Holdings, Ltd.	Case No. 06-30018, Carlson, J.	Bankr. N.D. Cal.	Overruling objections and granting recognition of: (i) a Hong Kong proceeding as a "foreign main proceeding" and (ii) a Bermuda proceeding as a "foreign nonmain proceeding" and granting related relief. Interestingly, the debtor had requested relief in the alternative, asking that one of the foreign proceedings (either the Hong Kong or Bermuda proceeding) be recognized as a "main" proceeding.
Boe Hydix Technology Co., Ltd.	Case No. 06-52334, Efremsky, J.	Bankr. N.D. Cal.	Petition for recognition pending, objection filed.
<i>In re Ian Gregory Thow</i>	Case No. 05-30432, Brandt, J.	Bankr. W.D. Wash.	Granting recognition of a proceeding pending in Victoria, British Columbia, Canada as a "foreign main proceeding" and granting related relief.

CASE NAME	CASE NUMBER	DISTRICT	COMMENT
Young Chang Co., Ltd.	Case No. 06-40043, Snyder, J.	Bankr. W.D. Wash.	Granting recognition of a proceeding pending in the Republic of Korea as a "foreign main proceeding" and granting related relief.
Ephedra Products Liability Litigation	Case No. 04-MD-1598, Rakoff, J.	S.D.N.Y.	Recognizing and enforcing Canadian court's claims resolution procedure, which provided for mandatory mediation and holding that procedure was not "manifestly contrary" to United States public policy within the meaning of 11 U.S.C. § 1506.
Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.	Case No. 07-12384, Lifland, J.	Bankr. S.D.N.Y.	Discussed <i>supra</i> – court denied recognition of liquidation in the Cayman Islands as both a main and nonmain proceeding.
Bear Stearns High-Grade Structured Credit Strategies Enhanced Leverage Master Fund, Ltd.	Case No 07-12384, Lifland, J.	Bankr. S.D.N.Y.	Discussed <i>supra</i> – court denied recognition of liquidation in the Cayman Islands as both a main and nonmain proceeding.
Hollinger Inc. (and jointly-administered affiliated debtors)	Case No. 07-11029, Walsh, J.	Bankr. D. Del.	Granting provisional relief (temporary restraining order) and ultimately granting recognition of Canadian proceedings as foreign main proceedings.
Bancafe International Bank, Ltd.	Case No. 06-16712, Mark, J.	Bankr. S.D. Fla.	Granting recognition of a Barbados proceeding as a foreign main proceeding.
Amerindo Internet Growth Fund, Ltd.	Case No. 07-10327, Drain, J.	Bankr. S.D.N.Y.	Granting recognition of a proceeding in the Cayman Islands as a foreign main proceeding.