Chapter 10

Chapter 15 as a Strategic Alternative for Administration of U.S. Assets in Cross-Border Insolvencies

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Scope

The number of companies which operate, own assets, or otherwise conduct business in multiple countries continues to increase year after year. The U.S. Bankruptcy Code was amended in 2005 to include new Chapter 15 to address the rising number of cross-border insolvencies. Professionals representing clients in these matters continue, however, to demonstrate a propensity to rely on other insolvency processes such as Chapter 11, Chapter 7, or state law assignments to reorganize or liquidate the U.S. assets of multinational businesses.

This chapter explains how, under the right circumstances, Chapter 15 can provide all of the benefits of these other processes while avoiding their tremendous cost and many of their administrative burdens, in particular, how targeted objectives in cross-border insolvencies—such as asset sales—can be achieved through simplified processes under Chapter 15 at significant cost savings to the debtor and its creditors. Additionally, Chapter 15 often can provide for certain tactical advantages in cross-border matters. For example, limiting relief otherwise available under Bankruptcy Code § 365 with respect to executory contracts or binding parties subject to the jurisdiction of U.S. courts to broad third-party releases approved by foreign courts. Through examination of several recent case studies, this chapter explores

how insolvency professionals could benefit from taking a fresh look at the flexibility and efficiencies offered by Chapter 15 of the U.S. Bankruptcy Code in cross-border restructurings and liquidations.

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§ 10:1 Overview of Chapter 15 and its origin

Chapter 15 of the Bankruptcy Code was enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). It replaced existing section 304 of the Bankruptcy Code. Section 304 empowered U.S. courts to open an "ancillary" proceeding to representatives of foreign debtors and grant various broad forms of relief over U.S. operations and assets.[1] Section 304 ancillary proceedings, however, did not expressly authorize foreign representatives to operate the debtor's business or sell its assets.[2]

Chapter 15 was designed to improve upon section 304 by providing a framework to coordinate the administration of cross-border insolvencies across multiple jurisdictions in a more flexible and efficient manner.[3] In furtherance of that goal, Chapter 15 seeks to foster five specific objectives:

[Section 10:1]

[1]See *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 333, Bankr. L. Rep. (CCH) P 81258 (S.D. N.Y. 2008) (stating that "all relief under section 304 was discretionary and based on subjective, comity-influenced factors").

[2]Lynn P. Harrison 3rd and Jerrold L. Bregman, Chapter 15 of the U.S. Bankruptcy Code: A Hands-On Guide to the New World Order of Ancillary and Cross-Border Cases, 14 J. Bankr. L. & Prac. 5, Art. 1 (Oct. 2005).

[3]Chapter 15 was also created with the presumption that it would closely track the provisions of the UNCITRAL Model Law adopted in 1997, the EU Regulation on Insolvency Proceedings and case law of foreign courts. While this history is beyond the scope of this chapter, an extensive discussion can be found in Aaron L. Hammer and Matthew E. McClintock, Understanding Chapter 15 of the United States Bankruptcy Code: Everything You Need to Know About Cross-Border Insolvency Legislation In the United States, Law and Business Review of the Americas (Spring 2008).