

Germany Calling: Tips for German Practitioners

Dr. Christof Schiller – Moderator
Wellensiek; Heidelberg

Dr. Eberhard Braun
Schultze & Braun GmbH; Achern

James L. Garrity Jr.
Shearman & Sterling LLP; New York

Dr. Martin Prager
Pluta Rechtsanwalts GmbH; Munich

Deborah D. Williamson
Cox Smith Matthews Incorporated; San Antonio

**Reasonable Expectations:
Recognition in the United States of International
Arbitration
Agreements and Awards**

By:
Leslie Sara Hyman
Cox Smith Matthews Incorporated
210.554.5294
lshyman@coxsmith.com

**The American Bankruptcy Institute 2007
International Insolvency Symposium**

October 26, 2007

COX SMITH MATTHEWS INCORPORATED
WWW.COXSMITH.COM

111 CONGRESS, SUITE 2800
AUSTIN, TEXAS 78701
TEL: 512.703.6300
FAX: 512.703.6399

1201 ELM STREET, SUITE 3300
DALLAS, TEXAS 75270
TEL: 214.698.7800
FAX: 214.698.7899

1400 N. MCCOLL ROAD, SUITE 204
MCALLEN, TEXAS 78501
TEL: 956.984.7400
FAX: 956.984.7499

112 EAST PECAN STREET, SUITE 1800
SAN ANTONIO, TEXAS 78205
TEL: 210.554.5500
FAX: 210.226.8395

Recognition in the United States of International Arbitration Agreements and Awards

When parties to an international business relationship enter into an arbitration agreement, they probably expect that a court, when faced with litigation in contravention of the arbitration agreement, will enforce the agreement. The parties also likely assume that any ruling or award issued by the arbitral tribunal will be both recognized and enforced. In the United States, these expectations are usually well-founded. United States statutory and case law generally provide that international disputes that fall within the parties' arbitration agreement will be compelled to arbitration and that the resulting award will be enforced.

Policy

There was a time when courts in the United States were skeptical of arbitration. That time has now passed and United States' federal policy now strongly favors arbitration and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983). Many states within the United States have acknowledged this policy and applied it to their state laws. *See, e.g., Sanderson Farms, Inc. v. Gatlin*, 848 So.2d 828, 835 (Miss. 2003); *Saint Agnes Medical Center v. PacifiCare of California*, 82 P.3d 727, 732 (Cal. 2003); *Matter of Smith Barney Shearson Inc. v. Sacharow*, 689 N.E.2d 884, 889-90 (Mass. 1997); *Prudential Securities Inc. v. Marshall*, 909 S.W.2d 896, 898 (Tex. 1995).

The policy in favor of arbitration is "even stronger in the context of international business transactions." *David L. Threlkeld & Co., Inc. v. Metallgesellschaft Ltd. (London)*, 923 F.2d 245, 248 (2d Cir. 1991); *Jain v. de Mere*, 51 F.3d 686, 688-89 (7th Cir. 1995). This reflects the recognition that "[e]nforcement of international arbitral agreements promotes the smooth flow of international transactions by removing the threats and uncertainty of time-consuming and expensive litigation." *Jain*, 51 F.3d at 688-89. These interests are considered so important that they often outweigh domestic concerns. For example, when the United States Supreme Court considered whether the domestic policy concerns reflected in the United States' antitrust laws should trump parties' arbitration agreements, the Court concluded that the domestic concerns were not of paramount importance. In concluding that the parties' agreement to arbitrate governs such a dispute, the Supreme Court held that "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985).

Thus, as a matter of policy, the courts within the United States are predisposed to enforce arbitration agreements and the awards that are issued in arbitrations.

Statutory Framework

The United States statutes also favor international arbitration. The governing law is found in Title 9 of the United States Code, which is known as the Federal Arbitration Act (the "FAA"). 9 U.S.C. §§ 1, et seq. The law consists of three chapters. Chapter 1 is the original enactment of the FAA. Chapter 2 embodies the United States' adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. 6997, 330 U.N.T.S. 38, (Dec. 29, 1970). Chapter 3 embodies the United States' adoption of the Inter-American Convention on International Commercial Arbitration, done January 30, 1975, O.A.S.T.S. No. 42, reprinted in 9 U.S.C. § 301 (Supp. 1994). Each of the chapters provide for enforcement of arbitration agreements and confirmation of arbitration awards falling within their coverage.

Chapter 1 of the FAA

The original adoption of the FAA was designed "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). To that end, Chapter 1 of the FAA provides that a written agreement in a "contract evidencing a transaction involving commerce" to resolve by arbitration disputes arising out of that contract or transaction, or the refusal to perform any part of the contract, "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "Commerce" includes "commerce among the several States or with foreign nations." 9 U.S.C. § 1. Disputes between a United States citizen or entity and a foreign person or entity are thus among those governed by Chapter 1 of the FAA. *See, e.g., David L. Threlkeld & Co., Inc. v. Metallgesellschaft Ltd. (London)*, 923 F.2d 245, 248 (2d Cir. 1991)(applying the FAA and compelling arbitration in a dispute between a Vermont corporation and a London based limited-liability company incorporated under the laws of the United Kingdom).

Sections 3 and 4 of the FAA permit a party to an arbitration agreement to stay any court proceedings covered by the arbitration agreement or to request that a court compel arbitration. Under section 3, when a proceeding that is referable to arbitration pursuant to a written agreement is brought in a court, and a party to the suit makes a request, the court shall "stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration." 9 U.S.C. § 3.

Section 4 covers those situations in which a party to a written arbitration agreement fails, neglects, or refuses to arbitrate. In such a situation, any other party to the arbitration agreement is permitted to petition a federal court "for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4. The statute provides for a specific procedure for hearing such a petition. First, the party refusing or failing to arbitrate must be given five days' notice of the petition. After the notice period, the court hears the parties' arguments. If the court determines that the

parties do not dispute the making of the arbitration agreement or the failure to comply with the agreement, the court orders the parties to proceed to arbitration in accordance with the terms of the agreement. If, on the other hand, a party disputes the making of the arbitration agreement or denies that it failed, neglected, or refused to perform the agreement, the court must hold a summary trial. Generally, this summary trial will be to the court alone, but if the party alleged to be in default timely demands a jury, then it is entitled to have a jury hear the summary trial. If the court or jury finds that there is no written agreement to arbitrate or no failure to arbitrate, the statute provides that the proceeding shall be dismissed. If the court or jury finds a written arbitration agreement and a failure to arbitrate, the court orders the parties to proceed with the arbitration. In either case, a court only has the power to order arbitration in the judicial district in which it sits. If the parties' contract specifies a locale for arbitration other than that district, the court may only stay or dismiss the action. *Texaco, Inc. v. American Trading Transp. Co.*, 644 F.2d 1152, 1154 (5th Cir. 1981); *Oil Basins Ltd. v. Broken Hill Proprietary Co. Ltd.*, 613 F. Supp. 483, 486 (D.C.N.Y. 1985).

Section 4 of the FAA applies only to cases that could have been brought under the original jurisdiction of the federal courts. 9 U.S.C. § 4; *Rio Grande Underwriters, Inc. v. Pitts Farms, Inc.*, 276 F.3d 683, 685 (5th Cir. 2001) ("A party may obtain relief in federal court under the FAA only when the underlying civil action would otherwise be subject to the court's federal question or diversity jurisdiction."). For cases between United States persons or companies and foreign companies in which the amount controversy exceeds \$75,000, the United States federal courts have diversity jurisdiction. 28 U.S.C. § 1332(a)(2) (providing for diversity jurisdiction over cases between "citizens of a State and citizens or subjects of a foreign state"). The same is true if there are citizens of different states of the United States on both sides of the dispute and a foreign citizen or company also is a defendant. 28 U.S.C. § 1332(a)(3); see *Goar v. Compania Peruana de Vapores*, 688 F.2d 417, 420 n.6 (5th Cir. 1982) (recognizing that diversity jurisdiction exists pursuant to 28 U.S.C. § 1332(a)(3) "when a citizen of one of the United States sues a citizen of a different state and a foreign citizen or subject in the same action"); *Hunter v. Shell Oil Co.*, 198 F.2d 485, 488 (5th Cir. 1952) ("This court has approved the well established doctrine that federal courts have jurisdiction of suits brought, as here, by a citizen of one state against a citizen of another state and an alien, as joint defendants.").

Chapter 2 of the FAA

In 1970, the United States became a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), 21 U.S.T. 2517, T.I.A.S. 6997, 330 U.N.T.S. 38, (Dec. 29, 1970). The Convention was implemented in the United States by amendments that added Chapter 2 to the FAA. 9 U.S.C. § 201, et seq. "Chapter 2, by implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, was designed to increase the ability of district courts to compel arbitration in international commercial cases, and § 208 reflects that policy." *Jain v. de Mere*, 51 F.3d 686, 690 (7th Cir. 1995).

The Convention applies to:

the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

Convention, Article 1; *see also Jain v. de Mere*, 51 F.3d 686, 689 (7th Cir. 1995) (applying the Convention to a dispute between a citizen of India and a citizen of France). The Convention does not itself define what awards are considered non-domestic. *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932 (2d Cir. 1983). It is possible that this omission was intentional. The Second Circuit Court of Appeals has stated that "[t]he definition appears to have been left out deliberately in order to cover as wide a variety of eligible awards as possible, while permitting the enforcing authority to supply its own definition of 'nondomestic' in conformity with its own national law." *Id.* In the United States, non-domestic has been defined such that the Convention applies to disputes between United States citizens only if "that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states." 9 U.S.C. § 202.

To the extent that Chapter 1 is not in conflict with Chapter 2 or the Convention as ratified, Chapter 1 also applies to proceedings brought under the Convention. 9 U.S.C. § 208. Unlike Chapter 1, which permits the United States federal courts to hear motions to compel arbitration only if a separate jurisdiction basis exists – such as federal question or diversity jurisdiction – Chapter 2 provides the United States federal courts with original jurisdiction to hear proceedings under the Convention without the need for any other jurisdictional basis. 9 U.S.C. § 203. In cases falling within the Convention, a court may compel arbitration to be held in the court's district or "in accordance with the agreement at any place therein provided for, whether that place is within or without the United States." 9 U.S.C. § 206. This is a broader power than that available under Chapter 1 of the FAA, which only permits a federal trial court to compel arbitration in the court's district. At least two federal courts have used section 208 to hold that while a federal court may not refer a case to arbitration without specifying the place where the arbitration is to occur, when an arbitration agreement covered by the Convention is silent as to location, the court may apply section 4 and order the arbitration to proceed in the court's district. *Jain v. de Mere*, 51 F.3d 686, 689-90 (7th Cir. 1995); *Oil Basins Ltd. v. Broken Hill Proprietary Co. Ltd.*, 613 F. Supp. 483, 486 (S.D.N.Y. 1985).

While the United States' enactment of the Convention provides the federal courts with subject matter jurisdiction over covered disputes, United States courts are also required to have personal jurisdiction over the parties before them. Thus, a United States court may refuse to enforce an arbitration award against a party that lacks sufficient contacts with the United States to permit the constitutional exercise of personal jurisdiction. *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1121 (9th Cir. 2002) ("We hold that neither the Convention nor its implementing legislation removed

the district courts' obligation to find jurisdiction over the defendant in suits to confirm arbitration awards."); *Transatlantic Bulk Shipping Ltd. v. Saudi Chartering S.A.*, 622 F. Supp. 25 (S.D.N.Y. 1985).

Section 207 permits federal courts to confirm awards falling under the Convention. A court is required to confirm such an award "unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." 9 U.S.C. § 207. There is some dispute amongst the United States Federal Courts as to whether it is easier to get an arbitration award enforced under the Convention than under Chapter 1 of the FAA. *See, e.g., Lander Co., Inc. v. MMP Investments, Inc.*, 107 F.3d 476, 480 (7th Cir. 1997) (recognizing that it may be easier to have arbitration award enforced under the Convention); *M & C Corp. v. Erwin Behr GmbH & Co., KG*, 87 F.3d 844, 850-51 (6th Cir. 1996) (holding that because manifest disregard of the law is an implied ground for vacating an award under the FAA, but possibly not available under the New York Convention, it is harder to preclude enforcement of an award under the Convention). This dispute may be irrelevant when both Chapter 1 of the FAA and the Convention apply because in such circumstances, the parties may proceed under either chapter. *Lander Co., Inc. v. MMP Investments, Inc.*, 107 F.3d 476, 481 (7th Cir. 1997) (holding that "there is 'no reason to assume that Congress did not intend to provide overlapping coverage between the Convention and the Federal Arbitration Act.'") (quoting *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 934 (2d Cir. 1983)).

Chapter 3 of the FAA

The United States also is a signatory to the Inter-American Convention on International Commercial Arbitration, done January 30, 1975, O.A.S.T.S. No. 42, reprinted in 9 U.S.C. § 301 (Supp. 1994) (the "Inter-American Convention"), which was likewise implemented in the United States by amendments to the FAA, this time creating Chapter 3. 9 U.S.C. § 301, et seq. Sections 202, 203, 204, 205, and 207 apply to disputes governed by Chapter 3. 9 U.S.C. § 302. Chapter 3 provides that a court with jurisdiction may enforce an arbitration agreement governed by Chapter 3 "at any place therein provided for, whether that place is within or without the United States." 9 U.S.C. § 303. Section 304 provides that decisions or awards made in a foreign State shall be recognized and enforced "on the basis of reciprocity" as long as the foreign State has ratified or acceded to the Inter-American Convention.

When an arbitration agreement meets the requirements of both the Convention and the Inter-American Convention, the determination of which convention to apply is

made as follows:

- (1)** If a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Inter-American Convention and are member States of the Organization of American States, the Inter-American Convention shall apply.

(2) In all other cases the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall apply.

9 U.S.C. § 305. As with disputes governed by Chapter 2, Chapter 3 provides that Chapter 1 applies to actions and proceedings brought under Chapter 3 to the extent that Chapter 1 is not in conflict with Chapter 3 or the Inter-American Convention as ratified by the United States. 9 U.S.C. § 307.

Conclusion

The United States policy and statutes promote arbitration for wholly domestic disputes, disputes between a United States' citizen and a foreign citizen, and even between two foreign citizens. Whether an international dispute or foreign arbitration award falls within Chapter 1 of the FAA, the Convention, or the Inter-American Convention, assuming the United States federal courts have jurisdiction, the courts are likely to enforce arbitration agreements and the resulting arbitration awards.

Introduction to Chapter 15

The American Bankruptcy Institute 2007

International Insolvency Symposium

James L. Garrity, Jr.

October 26, 2007

Table of Contents

<u>Title</u>	<u>Page</u>
Background.....	1
Purpose of Chapter 15 (§ 1501).....	2
Repeal of Section 304.....	3
Who May File (§ 1509).....	4
Venue (28 U.S.C. § 1410).....	6
Application for Recognition (§ 1515).....	7
Recognition of Foreign Proceeding (§ 1517).....	9
Provisional Relief (§ 1519).....	11
Automatic Relief (§ 1520).....	14
Discretionary Relief (§ 1521).....	17
Additional Assistance (§ 1507).....	19
Protection of Creditors (§ 1522).....	21
Notice to Foreign Creditors (§ 1514).....	22
Single Point of Entry for Foreign Representative (§ 1509).....	23
Commencement of Plenary Case (§ 1511).....	25
Cooperation (§§ 1525-1527).....	28
Authorization to Act in Foreign Country (§ 1505).....	30

16

These materials were gathered for instructional purposes and do not represent the official position of Shearman & Sterling LLP or any of its partners, counsel, associates, or employees, including the presenters, nor do they constitute legal advice applicable to any specific matter.

In addition, any forms or documents included in these materials should not be considered as models for any particular matter, nor should they be relied on as being applicable to any specific legal matter.

Background

- Enacted through Bankruptcy Abuse, Prevention and Consumer Protection Act of 2005
 - Effective October 17, 2005
- Incorporated Model Law on Cross-Border Insolvency formulated by the United Nations Commission on International Trade Law (UNCITRAL)
 - Model Law promotes “universalistic” approach that enhances predictability in era of increasing cross-border insolvency proceedings
 - Versions of the Model Law have been adopted by the United Kingdom, Japan, Mexico, Poland, South Africa, Romania, Montenegro, British Virgin Islands and Eritrea
 - Other countries considering adopting principles of the Model Law include Australia, Canada and New Zealand

Purpose of Chapter 15 (§ 1501)

- Stated purpose of Chapter 15 is to incorporate the Model Law into the Bankruptcy Code to provide effective mechanisms for addressing cross-border insolvency
 - Increase cooperation between U.S. and foreign courts
 - Greater legal certainty for trade and investment
 - Fair and efficient administration of cross-border insolvencies that protects the interests of all stakeholders
 - Protect and maximize value of debtor's assets
 - Rescue troubled businesses to preserve value and employment

Repeal of Section 304

- Chapter 15 replaces former Section 304 of the Bankruptcy Code, which provided for recognition of foreign proceedings upon satisfaction of certain substantive criteria
 - Chapter 15 provides greater certainty of outcome than Section 304
 - Section 304 factors preserved in Chapter 15 through requirements for “additional assistance.” See Slide 19

Who May File (§ 1509)

- A foreign representative may commence a case under Chapter 15 by filing a petition for recognition of a foreign proceeding
 - “Foreign representative” is defined as “a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of such foreign proceeding”
 - “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”
 - “Collective” proceeding requirement excludes actions that benefit a single creditor (i.e., appointment of receiver under debenture)
 - Definitions expanded to include “interim” proceedings to accommodate insolvency regimes that employ a two-stage process for case commencement

Who May File (§ 1509) (cont'd)

- Chapter 15 is available only to those entities that may be debtors under the Bankruptcy Code, with the exception of foreign insurance companies not engaged in U.S. business
 - I.e., a foreign bank, savings bank, cooperative bank, savings and loan association, building and loan association or credit union that has a branch or agency in the U.S. may not receive Chapter 15 relief
 - Entities subject to proceeding under Securities Investor Protection Act of 1970 (SIPA), a stockbroker or a commodity broker also ineligible for relief
 - Ensures that U.S. assets of entity subject to non-Bankruptcy Code U.S. insolvency regulations will not be subject of ancillary proceeding
 - Legislatively resolves issues raised by *In re Agency for Deposit Ins., Rehab., Bankr. and Liquidation of Banks*, as Bankr. Adm'r of Jugobanka, A.D., Beograd, No. 02-B-12930 (CB) (Bankr. S.D.N.Y. filed Aug. 18, 2003), *rev'd and remanded*, 10 B.R. 793 (S.D.N.Y. 2004) (foreign bank eligible for Section 304 relief despite Section 109 constraints).

Venue (28 U.S.C. § 1410)

- Case under Chapter 15 may be commenced in the district court:
 - (1) In which debtor has its principal place of business or principal assets in the U.S.;
 - (2) If debtor does not have place of business or assets in U.S., in which an action or proceeding is pending against the debtor; or
 - (3) In cases other than those specified in (1) and (2), in which venue will be consistent with the interests of justice and convenience of the parties, having regard to relief sought by foreign representative

Application for Recognition (§ 1515)

- To seek Chapter 15 relief, foreign representative files with the court a petition for recognition of a foreign proceeding
- Petition for recognition must include the following:
 - Certified copy of decision (translated into English) commencing the foreign proceeding and appointing the foreign representative; or
 - Certificate (translated into English) from the foreign court affirming existence of the foreign proceeding and the appointment of the foreign representative; or
 - Any other evidence acceptable to the U.S. court of the existence of the foreign proceeding and the appointment of the foreign representative
- U.S. court may presume authenticity of documents submitted in support of petition (§ 1516)

Application for Recognition (§ 1515) (cont'd)

- Petition also must include a statement identifying all foreign proceedings with respect to the debtor that are known to the foreign representative
- Foreign representative has ongoing responsibility to file with court notice of change of status concerning
 - substantial change in status of foreign proceeding
 - any other foreign proceeding regarding debtor known to foreign representative (§ 1518)

Recognition of Foreign Proceeding (§ 1517)

- Petition for recognition shall be “decided upon at the earliest possible time”
 - Provisional relief may be sought pending recognition
- Court must enter an order recognizing a foreign proceeding if the petition for recognition meets the requirements of Section 1515 and the foreign proceeding is either a “foreign main proceeding” or a “foreign nonmain proceeding”
 - “Foreign main proceeding” is defined as “a foreign proceeding pending in the country where the debtor has the center of its main interests”
 - Rebuttable presumption that the debtor’s registered office is the center of main interests (§ 1516)

Recognition of Foreign Proceeding (§ 1517) (cont'd)

- “Foreign nonmain proceeding” is defined as “a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment”
 - “Establishment” is defined as “any place of operations where the debtor carries out a nontransitory economic activity”
- By omission, a foreign proceeding that is premised only on the presence of assets in a foreign country is not eligible for recognition
- Unlike Section 304, the recognition of a foreign proceeding under Chapter 15 is based on objective criteria and is not discretionary

Provisional Relief (§ 1519)

- Petition only is an application for recognition
 - Foreign proceeding is not recognized until court order is entered
- Foreign representative may request provisional relief pending court's ruling on petition for recognition
 - To obtain provisional relief, foreign representative must demonstrate that relief is urgently needed to protect the debtor's assets or creditors' interests
 - Interests of creditors and other interested parties must be sufficiently protected
 - Provisional relief is conceptually similar to preliminary injunction under Section 304

Provisional Relief (§ 1519) (cont'd)

- Provisional relief may include:
 - Stay of execution against the debtor's assets;
 - Entrusting the administration or realization of all or part of the debtor's property located in the U.S. to the foreign representative;
 - Limited to assets that are perishable, susceptible to devaluation or otherwise in jeopardy
 - Suspending the right to transfer, encumber or dispose of the debtor's property;
 - Providing for the examination of witnesses, the taking of evidence or delivery of information concerning the debtor; and
 - Granting any additional relief that may be available to a trustee (subject to certain exceptions, such as avoidance powers)

Provisional Relief (§ 1519) (cont'd)

- Same standard applied to granting of provisional relief as to granting of injunctive relief:
 - In Second Circuit, foreign representative must establish (a) debtor's interests will be harmed irreparably absent injunction, and (b) either (i) the foreign representative is likely to succeed on the merits of the litigation or (ii) sufficiently serious questions going to the merits of the case make them fair grounds for litigation and the balance of hardships tips decidedly toward the petitioner
 - See *Roso-Lino Beverage Distrib., Inc. v. Coca-Cola Bottle Co. of New York, Inc.*, 749 F.2d 124 (2d Cir. 1984); *In re R.H. Macy & Co., Inc.*, 263 B.R. 583, 588 (Bankr. S.D.N.Y 1999) (standard for injunctive relief)
 - Injunctive relief standard was applied previously in Section 304 context

Automatic Relief (§ 1520)

- Upon the recognition of a foreign main proceeding, the following relief is granted automatically:
 - The automatic stay provisions of Section 362 (enjoining actions against the debtor or its property in respect of prepetition claims) and the adequate protection provisions of Section 361 (protecting creditors' interest in collateral securing their claims) apply to the debtor and its property within the U.S.;
 - Automatic stay does not affect right to commence proceeding in foreign country to preserve a claim against the debtor
 - Sections 363 (providing for, among other things, the use and sale of property outside the ordinary course of business), 549 (governing the avoidance of postpetition transfers) and 552 (postpetition effect of security interests), apply to transfers of interests in the debtor's property within the U.S.;

Automatic Relief (§ 1520) (cont'd)

- Previously, the only explicit means for a foreign representative to sell assets were through a Chapter 11 plan
- Foreign representative may operate the debtor's business and enjoy the powers of a trustee (subject to court's power to limit such remedies and creditors' right to adequate protection), except for the right to commence avoidance actions
- Limitation of relief to U.S. territorial jurisdiction gives deference to foreign proceeding
- Granting of automatic relief in foreign main proceedings is changed from Section 304, which did not provide for specific relief upon recognition

Automatic Relief (§ 1520) (cont'd)

- Automatic relief is not granted upon recognition of foreign nonmain proceedings
 - Greater deference given to proceeding pending in debtor's principal place of business
 - Foreign representatives of foreign nonmain proceedings may seek discretionary and additional relief
- Section 1506 allows the court to refuse to take action “manifestly” contrary to U.S. public policy
 - “Manifestly” qualification ensures narrow reading of Section 1506
 - See *In re Ephedra Prod. Liab. Litig.*, 2006 WL 2338092 (S.D.N.Y. Aug 11, 2006) (Canadian court order approved in foreign main proceeding over objection that lack of jury trial contravenes U.S. public policy).

Discretionary Relief (§ 1521)

- At the request of the foreign representative (regardless of whether in a foreign main or nonmain proceeding), the court may grant discretionary relief to effectuate the purposes of Chapter 15 and to protect the debtor's assets or the creditors' interests, including:
 - A stay of actions against debtor's property, or
 - Any provisional relief available under Section 1519 (provisional relief), including the continuation of any relief previously granted on a provisional basis. See Slide 12
 - Avoidance powers may not be granted

Discretionary Relief (§ 1521) (cont'd)

- In determining whether to grant discretionary relief, the court generally employs the same standard used to determine whether to grant injunctive relief. See slide 13
- When granting discretionary relief to a representative of a foreign nonmain proceeding, the court must be satisfied that the relief relates to assets that are properly administered or concerns information required in the foreign nonmain proceeding
 - Relief should not exceed scope of foreign nonmain proceeding

Additional Assistance (§ 1507)

- Upon recognition of a foreign proceeding, the court may grant additional assistance to a foreign representative
- In determining whether to provide additional assistance, the court must consider whether such assistance, consistent with the principles of comity,¹ reasonably will assure:
 - Just treatment of all holders of claims and interests;
 - Protection of U.S. claim holders against prejudice and inconvenience in the foreign proceeding;
 - Prevention of preferential or fraudulent dispositions of the debtor's property; and
 - Distribution of proceeds of the debtor's property substantially in accordance with the Bankruptcy Code

1 The Supreme Court has defined comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895)

Additional Assistance (§ 1507) (cont'd)

- Factors are substantially the same as those contained in former Section 304
 - Section 1507 distinguishes comity as overarching factor through which other factors are assessed
 - Reflects legislative position on longstanding Section 304 debate over comity's supremacy among factors
- Additional assistance provides court with flexibility to fashion relief particular to debtor's circumstances

Protection of Creditors (§ 1522)

- The court may grant provisional and discretionary relief only if the interests of creditors and other interested parties are “sufficiently protected”
 - Ensures balance between interests of foreign representative and those of creditors
- The court may subject granting of provisional and discretionary relief to appropriate conditions, including providing security or filing a bond

Notice to Foreign Creditors (§ 1514)

- Notice to foreign creditors of commencement of case must:
 - Indicate time period and place for filing proofs of claim;
 - Indicate whether secured creditors must file proofs of claim; and
 - Contain any other information otherwise required to be included in notification to creditors
- Rules concerning notices to or filing of proofs of claim by foreign creditors provide for additional time reasonable under the circumstances

Single Point of Entry for Foreign Representative (§ 1509)

- Chapter 15 is “single point of entry” for foreign representative to U.S. courts
 - If recognition is denied, the foreign representative cannot seek relief from U.S. courts except to collect on a claim
 - See *United States v. J. A. Jones Constr. Group, LLC*, 333 B.R. 637 (E.D.N.Y. Nov. 29, 2005) (district court lacks authority to consider request for stay filed by Canadian interim receiver absent Chapter 15 filing)
 - Distinguishable from Section 304, which was not exclusive means of obtaining comity
 - See *Cunard S.S. Co. v. Salen Reefer Serv., A.B.*, 773 F.2d 452 (2d Cir. 1985) (Section 304 not exclusive remedy for recognition of foreign insolvency proceeding)
- Upon grant of recognition:
 - Foreign representative may sue and be sued in U.S. courts;
 - Foreign representative may apply directly to U.S. courts for relief; and

Single Point of Entry for Foreign Representative (§ 1509) (cont'd)

- U.S. courts shall grant comity or cooperation to the foreign representative
 - Request for comity or cooperation by a foreign representative in a U.S. court (other than the court that granted recognition) must be accompanied by a certified copy of order granting recognition
- If recognition of the foreign proceeding is denied, court may issue any order necessary to prevent foreign representative from obtaining comity or cooperation from U.S. courts
 - Failure of foreign representative to commence a case under Chapter 15 or to obtain recognition, however, does not affect foreign representative's right to sue in U.S. court to collect or recover a claim that is property of the foreign debtor
- Filing of petition under Chapter 15 does not subject foreign representative to jurisdiction of U.S. court for any other purpose (§ 1510)

Commencement of Plenary Case (§ 1511)

- Upon recognition, foreign representative may commence
 - An involuntary case under Section 303; or
 - If the foreign proceeding is a foreign main proceeding, a voluntary case under Sections 301 or 302
 - “Upon recognition” requirement is consistent with “single point of entry” for foreign representative
- Majority of relief available in plenary proceedings also is available under Chapter 15
 - Reduces need for filing plenary proceeding
- Recognition of foreign main proceeding creates rebuttable presumption of insolvency (§ 1531)

Commencement of Plenary Case (§ 1511) (cont'd)

- For a foreign representative to appear in an existing plenary proceeding and seek coordination, cooperation or Section 305 relief, foreign proceeding first must be granted recognition under Chapter 15
 - Section 305 amended to provide that plenary case may be dismissed upon recognition of a foreign proceeding
- After recognition of foreign main proceeding, a plenary case only may be commenced if the debtor has assets in the U.S. (§ 1528)
 - Scope of plenary case is restricted to assets of the debtor that are within the territorial jurisdiction of the U.S.

Commencement of Plenary Case (§ 1511) (cont'd)

- Assets outside of U.S. but within jurisdiction of U.S. court under Section 541(a) of the Bankruptcy Code and 28 U.S.C § 1334(e) may be reached to the extent (i) necessary to implement cooperation and coordination with foreign court and foreign representative and (ii) that such assets are not subject to jurisdiction and control of a recognized foreign proceeding (§ 1528)
- Availability and effects of U.S. plenary proceeding are limited in deference to foreign proceeding pending in debtor's center of main interests

Cooperation (§§ 1525-1527)

- U.S. court required to cooperate “to the maximum extent possible” with foreign court or foreign representative, either directly or through the trustee
 - U.S. court entitled to communicate directly with or to request information from foreign court or foreign representative, subject to rights of parties-in-interest to notice and a hearing
 - Codifies existing practice of entering into cross-border protocols
 - See Maxwell Commc’n Corp. v. Societe Generale (In re Maxwell Commc’n Corp.), 93 F. 3d 1036 (2d Cir. 1996); In Fed. Mogul Global Inc., T&N Ltd., et al. (protocols)
- Trustee or other person (including an examiner) also required to cooperate with foreign court or foreign representative

Cooperation (§§ 1525-1527) (cont'd)

- Forms of cooperation may include:
 - Appointment of examiner or other person or body to act at direction of court;
 - Communication of information;
 - Coordination of administration of debtor's assets and affairs;
 - Approval or implementation of agreements concerning coordination of proceedings (protocols); or
 - Coordination of concurrent proceedings concerning the debtor
- Chapter 15 also requires the reconciliation of relief granted in two or more proceedings pending in the U.S. regarding a debtor (§ 1530)

Authorization to Act in Foreign Country (§ 1505)

- Trustee or other entity (including an examiner) may be authorized by U.S. court to act in a foreign country on behalf of estate
 - Entity authorized to act under Section 1505 may act in any way permitted by applicable foreign law
 - Requirement that U.S. court authorize action ensures that court has knowledge of activities that could be expensive and assures foreign court that debtor is acting under judicial supervision
- First day order may seek authority to act under Section 1505