

**BASICS OF CHAPTER 15 – ANCILLARY AND
CROSS-BORDER BANKRUPTCY**

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Chapter 15 of the United States Bankruptcy Code (“the Code”) is based upon the Model Law on Cross-Border Insolvency promulgated by UNCITRAL (the UN Commission for International Trade Law). As part of the 2005 Amendments to the Code, chapter 15 replaced section 304 ancillary proceedings in the Code. (Assuming a proper jurisdictional basis, foreign debtors may still be the subject of cases under other chapters (i.e., Chapter 11 and Chapter 7) of the Code.) Chapter 15 is designed in part to protect assets located in the United States belonging to a debtor which files an insolvency type case in another country. It may prevent the dismemberment of the estate and promotes equality of treatment of creditors wherever located. Chapter 15 filings have included Schefenacker, the SPhinX Funds, and most recently the Bear Stearns Funds and Basis. The latter two cases have generated significant litigation relating to the issue of whether to recognize the prior foreign proceeding. There is a chapter 15 website that is a significant research tool located at <http://www.chapter15.com>. The following is a basic summary of the Code sections.

Section 1501. This section is a policy statement. The purposes of chapter 15 include cooperation between the courts of the United States and courts and other competent authorities of foreign countries involved in cross-border insolvency cases, greater legal certainty for trade and investment, and fair and efficient administration of cross-border insolvencies to protect the interests of all interested parties, including creditors and the debtor. It is also designed for maximization of value, and facilitation of the rescue of financially troubled companies, thereby protecting investment and employees. Chapter 15 applies where assistance is sought in the U.S. by a foreign court or a foreign representative in connection with a foreign proceeding. It applies where assistance is sought in a foreign country in connection with a case under the Code, where there are cases pending under both the Code and a foreign proceeding, or creditors in another country have an interest in requesting commencement of a case under the Code.

Section 1502. This is a definitions section which includes the terms debtor, foreign court, foreign main proceeding, foreign nonmain proceeding, trustee, recognition, and within the territorial limits of the United States. Foreign representatives are often administrators, liquidators or provisional liquidators under the law and practice of the foreign country. In most countries there is no debtor-in-possession such as exists in chapter 11 of the Code. Management has been displaced. However, a debtor-in-possession should qualify as a “foreign representative.”

Section 1503. If a part of chapter 15 conflicts with the obligations of the U.S. arising out of treaties or agreements with other countries, the requirements of those treaties and agreements prevail.

Section 1504. A case is commenced by filing a petition for recognition under section 1515.

Section 1505. A trustee or other entity such as an examiner, may be authorized by the court to act in a foreign country for an estate created under section 541 of the Code, in any way permitted by the applicable foreign law.

Section 1506. The court can refuse to take an action governed by chapter 15 if the action would be manifestly contrary to U.S. public policy. As stated in the legislative history, “The word ‘manifestly’ in international usage restricts the public policy exception to the most fundamental policies of the United States.” *H.R. Rep. 109-31, Pt. 1, 109th Cong., 1st Sess. 109 (2005).*

Section 1507. If recognition is granted, the court may provide the foreign representative with additional assistance under the Code or other U.S. law if, consistent with principles of comity or interest in property, the additional assistance will reasonably assure (a) just treatment of all holders of claims or interests in property, (b) protection of U.S. creditors against prejudice and inconvenience in the processing of claim in the foreign proceeding, (c) prevention of preferential or fraudulent transfers of debtor's property, (d) distributions substantially in accordance with the Code, and (e) if appropriate, the opportunity for a fresh start for an individual. This section largely tracks former section 304(c) of the Code and supplements the relief that is provided under sections 1519-1521 of Chapter 15.

Section 1508. Chapter 15 should be interpreted with consideration of its international origin and to promote consistency with similar statutes enacted in foreign jurisdictions.

Section 1509. Provides that a foreign representative may commence a case under section 1504 by filing a petition for recognition under section 1515. If the court grants recognition under section 1517, the foreign representative may sue or be sued, may apply directly for appropriate relief in U.S. courts, and shall be granted comity or cooperation by U.S. courts. If recognition is denied under chapter 15, then comity may be denied by appropriate order. Even if recognition is not granted, the foreign representative retains its rights, if any, to sue in a U.S. court to collect or recover a claim which is the debtor's property. Recognition is not required before the filing of a *lis pendens*. *In re Loy*, 380 B.R. 54 (Bankr. E.D. Va 2007).

Section 1510. The mere filing of a petition under section 1515 does not subject the foreign representative to the jurisdiction of any U.S. court for any other purpose.

Section 1511. Upon recognition, a foreign representative may commence an involuntary case under section 303, or a voluntary case under section 301 or 302, if the foreign proceeding is a foreign main proceeding.

Section 1512. Upon recognition, the foreign representative is permitted to participate as a party in interest in a case (i.e., a case under another chapter of the Code) concerning the debtor under the Code.

Section 1513. Foreign creditors have the same rights as U.S. creditors to participate in a case. The section deals in part with the rights of priority claims.

Section 1514. Provides that notice given to creditors must include foreign creditors and describes technical requirements for notice to foreign creditors of commencement of the case.

Section 1515. A petition for recognition shall be accompanied by either (a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative, (b) a certificate from the foreign court affirming the existence of the foreign proceeding and the appointment of the foreign representative, or (c) any other evidence acceptable to the U.S. court establishing (b) above. In addition, the petition must identify all known foreign proceedings relating to the debtor. All documents must be translated into English.

Section 1516. Entitles the court to presume the accuracy of the foreign court's statements contained in the certificate submitted under section 1515, the authenticity of documents, and that the debtor's registered office is the center of its main interests. This presumption may be rebutted as occurred in *SPhinX*, 351 B.R. 103 (Bankr. S.D.N.Y. 2006) *aff'd* 2007 U.S. Dist LEXIS 48962 (S.D.N.Y. July 3, 2007).

Section 1517. After notice and a hearing, the court may enter an order recognizing the foreign proceeding if (a) the foreign proceeding is a "foreign main proceeding" (one that is pending in the country

where the debtor has the center of its main interests (“COMI”) or a “foreign nonmain proceeding” (one that is pending in a country where the debtor carries out nontransitory economic activity – see 1502 definitions), (b) the person filing the petition fits the definition of a “foreign representative”, and (c) the petition satisfies the requirements of section 1515. A court considering whether to recognize the foreign proceeding, is not bound by the parties’ failure to object, and may consider all relevant facts, including those not yet presented. *In re Basis Field Alpha Fund*, 381 B.R. 37 (Bankr. S.D.N.Y. 2008).

Section 1518. The foreign representative is required to file a notice of any change in status concerning any foreign proceeding regarding the debtor and the foreign representative’s appointment.

Section 1519. From the time of filing of the petition until the court rules on recognition, the foreign representative may seek, if urgently needed, and the court may grant, provisional relief including (a) a stay of execution against the debtor’s assets, (b) entrusting the administration or realization of the debtor’s assets located within the U.S. to the foreign representative or another person authorized by the court; this is to preserve or protect the value of assets (c) any relief authorized under section 1521.

Section 1520. Upon obtaining an order of recognition of a foreign main proceeding, sections 361 (adequate protection) and 362 (automatic stay) apply with respect to the debtor and property of the debtor that is within United States. Sections 363, 549 and 552 of the Code apply to transfers of the debtor of property within the U.S. A foreign representative may operate the debtor’s business and exercise the rights of a trustee under sections 363 and 550. If the court determines that it is not a foreign main proceeding, such as in *SPhinX*, 351 B.R. 103 (Bankr. S.D.N.Y. 2006) *aff’d* 2007 U.S. Dist LEXIS 48962 (S.D.N.Y. July 3, 2007), then there is no automatic stay, although additional relief may be granted under sections 1507 and 1519 of the Code.

Section 1521. Whether or not the foreign proceeding is main or nonmain, upon recognition, the court may grant additional relief, including (a) a stay against commencement or continuation of an action or proceeding concerning the debtor’s assets, and against execution thereof, to the extent that such action, proceeding or execution has not been automatically stayed under section 1520(a), (b) suspending the right to transfer or encumber assets to the extent not suspended under section 1520(a), (c) providing for examination of witnesses and taking of evidence concerning the debtor’s rights, assets, affairs or liabilities, (d) extending the relief granted under 1519(a) permitting the foreign representative to administer the U.S. assets and (e) granting additional relief available to a trustee, except for relief under sections 522, 544, 545, 547, 548, 550, and 724(a) of the Code. Accordingly, the avoiding powers under the Code generally cannot be utilized in a Chapter 15 case by the foreign representative.

Section 1522. The relief granted under sections 1519 or 1521 may be modified or terminated at the request of the foreign representative or an affected entity, to the extent that the interests of creditors, the debtor, and other parties in interest are protected.

Section 1523. Upon recognition, the foreign representative has standing to initiate avoidance actions in a case concerning the debtor that is pending under a chapter of the Code other than chapter 15.

Section 1524. Provides that, upon recognition, the foreign representative may intervene in any state or federal proceedings in which the debtor is a party.

Section 1525. The court shall cooperate with the foreign court or foreign representative to the extent possible and is entitled to communicate directly with, or request information or assistance from, the foreign court or foreign representative. This is subject to the rights of parties in interest to notice and participation.

Section 1526. As best possible, the trustee or examiner shall, subject to the supervision of the court, cooperate fully with the foreign court or foreign representative and may communicate directly with them.

Section 1527. Cooperation, as contemplated in sections 1525 and 1527, may include appointment of a person, including an examiner, to act at the direction of the court. It covers communication of information by any appropriate means, coordinating the administration of the debtor's assets and affairs, approval and implementation of agreements concerning the coordination of proceedings, and coordination of concurrent proceedings.

Section 1528. After recognition of a foreign main proceeding, a case may be commenced under a different chapter of the Code only if the debtor has assets in the U.S. The effect of such case shall be restricted to the assets of the debtor that are within the U.S., and to other assets under section 541(a) which are subject to court jurisdiction if not subject to the jurisdiction and control of a recognized foreign proceeding.

Section 1529. If a foreign proceeding and a case under another chapter are both pending, the court shall seek cooperation by ensuring that any relief granted under sections 1519 and 1521 are consistent with the relief granted in the U.S. case under another chapter. The stay provision in section 1520(a) do not necessarily apply if the foreign proceeding is recognized as a foreign main proceeding; that is, section 1520(a) relief shall be modified or terminated in recognized foreign main proceedings if the relief is inconsistent with the relief granted in a U.S. case under another chapter which was commenced after the foreign proceeding was recognized.

Section 1530. This contemplates coordination of more than one foreign proceeding regarding the debtor. It provides that the court shall seek cooperation under sections 1525, 1526, and 1527 and, in particular, through ensuring that any relief granted under sections 1519 and 1521 shall be consistent as between a foreign nonmain proceeding and foreign main proceeding.

Section 1531. Upon recognition of a foreign main proceeding, there is a rebuttable presumption that the debtor is not generally paying its debts as they become due for purposes of commencing a section 303 involuntary case.

Section 1532. A creditor who has been paid on account of its claim in a foreign proceeding may not receive payment for the same claim under any other chapter of the Bankruptcy Code as long as creditors of the same class receive proportionately less than the creditor has already received. This replaces former section 508 of the Code.