

M E M O R A N D U M

To E. Bruce Leonard
From Daniel M. Glosband, P.C.
Re Proposed Chapter 15 of the United States Bankruptcy Code
Date September 15, 2003

This memorandum is in response to your request that I provide an explanation of the relationship between proposed Chapter 15 of the United States Bankruptcy Code and the United Nations Commission on International Trade Law (“UNCITRAL”) Model Law on Cross-Border Insolvency (the “Model Law”). I understand that the memorandum is to be forwarded to the Canadian Senate.

Professor Jay Westbrook of the School of Law, University of Texas at Austin and I were the primary draftsmen of proposed Chapter 15. We did most of the work in consultation with an informal working group formed after the completion and adoption by UNCITRAL in May of 1997 of the Model Law. Professor Westbrook and I had been heavily involved in drafting the Model Law and sought to preserve it insofar as possible in the adaptation to United States legislation. To answer your specific question, there is no reciprocity requirement in Chapter 15, just as there is no such requirement in the Model Law.

The final version of the Chapter 15 draft that we prepared was adopted verbatim by the legislative staff of both Houses of Congress, after review and discussion with us, and has been

passed several times by both Houses as part of broader bankruptcy reform legislation. For reasons unrelated to Chapter 15, the broader legislation has not been enacted.

The following discussion explains the variations between Chapter 15 and the Model Law. It has been excerpted (and modified and updated as necessary) from a chapter that I wrote entitled *UNCITRAL Model Law on Cross-Border Insolvency and Proposed Chapter 15 of the United States Bankruptcy Code* which appears in the Practitioners Guide to Cross-Border Insolvencies published by Oceana Publications. I have also included the final version of Chapter 15 and the Legislative Commentary which was intended to serve as the legislative history for the Chapter. The attached version of Chapter 15 is the “stand alone” version, i.e. the version to be used if introduced as separate legislation as to opposed to being part of the comprehensive reform package.

COMPARISON OF CHAPTER 15 TO MODEL LAW

Chapter 15 is entitled “Ancillary and Other Cross-Border Cases,” simultaneously maintaining a nostalgic deference to current Section 304 (“cases ancillary to foreign proceedings”), preserving the UNCITRAL denomination “Cross-Border,” implying a scope broader than ancillary cases and deleting the UNCITRAL reference to insolvency as superfluous in a law already entitled Bankruptcy Code. Changes in statutory structure were few while changes in language were many, but most of those changes were idiomatic, not substantive.¹

Chapter 15 combines into a single section, Section 1501, the Preamble and Scope of Application provisions of the Model Law.² It also expands the categories of debtors excluded from application of the Model Law.³ In addition to incorporating the Section 109(b) exclusions of railroads, regulated financial institutions and domestic insurance companies, Chapter 15 excludes individuals who are within the Section 109(c) debt limits for chapter 13 (Adjustment of Debts of an Individual with regular Income”) eligibility, so long as they are U.S. citizens or permanent residents, and further excludes entities subject to proceedings under the Securities

¹ This discussion will highlight major variations from the Model Law. A section by section comparison appears in the attached Legislative Commentary. Professor Westbrook and I also drafted the Legislative Commentary. The Legislative Commentary actually appeared as a House Report on the 1998 version of the bill. *See* H REP. NO. 105-540 (1998) at 132-143. The House Report is reprinted at <<ftp://ftp.loc.gov/pub/thomas/cp105/hr540.txt>> and will be referred to as “H REP”. The page numbers correspond with on-line page numbers.

² Section 1501; H REP., at 132.

³ *See id.*

Investor Protection Act and stockbrokers or commodity brokers subject to, respectively, Subchapters III and IV of chapter 7.⁴

The key definitions of “foreign proceeding” and “foreign representative” will not be located in Chapter 15 but will replace the current definitions of those terms in Bankruptcy Code §§ 101(23) and (24).⁵ These essential determinants of the competency of the foreign proceeding (collective, judicial or administrative, in a foreign country, law relating to insolvency, debtor’s assets and affairs subject to control or supervision, purpose of liquidation or reorganization) and the foreign representative (person or body, authorized in foreign proceeding to administer reorganization or liquidation or to act as representatives of foreign proceeding) must be discovered outside of Chapter 15.

New definitions are added for purposes of Chapter 15. Defining “Debtor” as the entity that is the subject of a foreign proceeding eliminates the need to repeat the “subject to” reference throughout the Chapter.⁶ “Recognition” is defined as the entry of an order granting recognition of a foreign proceeding while a chapter-specific definition of “Trustee” makes clear that the term includes debtors in possession.⁷ Finally, the definition “within the territorial jurisdiction of the United States” limits subsequent sections which are not intended to invoke the otherwise universal grant of jurisdiction to the bankruptcy court “of all property of the debtor wherever

⁴ See §1501(c). The Chapter 13 limits are unsecured debts of \$290,525 and secured debts of \$871,550, subject to periodic inflation adjustments. 11 U.S.C. §109(c).

⁵ See Amendments to Other Chapters in Title 11, United States Code, at end of Chapter 15 draft.

⁶ See §1502(1).

⁷ See §1502 (6), (7).

located.”⁸ Remaining definitions essentially track the Model Law, with modifications to accommodate American spelling or vernacular.

Article 4 of the Model Law was designed to identify the courts or authorities which would administer the Model Law. That function becomes superfluous by weaving Chapter 15 into a Bankruptcy Code already implemented by the bankruptcy court structure and by adding cases under Chapter 15 to the list of core proceedings within that structure.⁹ Section 1504, the Chapter 15 equivalent of Article 4, thus was available for alternative use. The Section 1504 space was used to make a clear statement that the filing of a petition for recognition under Section 1515 commences a “case” under Chapter 15, just as Section 304 provided for commencement of “[a] case ancillary to a foreign proceeding...”¹⁰ A “case” under Chapter 15 is also a case under Title 11 of the United States Code for the purposes of the many references in the Bankruptcy Code to “cases under this title.”¹¹

Model Law Article 5 was intended to empower an estate representative to act in a foreign country (subject of course to that country’s laws), since some countries’ insolvency laws are strictly territorial while others are silent on the authority of an administrator to act abroad. Section 1505 of Chapter 15 eliminates the Model Law’s automatic authorization to act and vests discretion in the bankruptcy court to authorize a trustee or other entity, including an examiner, to

⁸ 28 U.S. C. § 1334(e); §1502(8).

⁹ *See* Amendments to Other Chapters in Title 11, United States Code, at end of Chapter 15 draft. (adding subsection (P) to 28 U.S.C. § 157).

¹⁰ *See* 11 U.S. C. § 304(a); H REP., at 134.

¹¹ *See e.g.*, 11 U.S.C. §§ 105(b), 107.

act for the estate in another country.¹² Requiring a judicial imprimatur should not be overly restrictive and the specific court authorization should facilitate recognition by a foreign court. Section 1505 is also the first of several locations where the carefully chosen words “authorized by the court” were used, in contrast to the word “designated”. The distinction reflects the division of authority between the bankruptcy judge, who can authorize the appointment or empowerment of a fiduciary, and the United States Trustee, who usually designates the actor.¹³

Recognizing that the Model Law might not anticipate all of the types of relief needed by a foreign representative and that might otherwise be available under the laws of a particular country, Article 7 provided that nothing in the Model Law limited the power of the court to provide such additional assistance. In the U.S. Advisory Group, some members saw this provision as a way to incorporate the jurisprudence that has developed under Section 304 notwithstanding the anticipated repeal of that section and its replacement by Chapter 15.¹⁴ Other members saw it as an open invitation to evade the strictly specified requirements for relief contained in Chapter 15. Section 1507 embodies a marriage of these perspectives. On the one hand, additional assistance is “subject to the specific limitations stated elsewhere in this chapter” and can only follow recognition of the foreign proceeding, while on the other the court must review the former section 304(c) factors as part of its deliberation.¹⁵

¹² See §1505; H REP., at 133.

¹³ See 11 U.S.C. §§ 701(a), 721, 903, 1104.

¹⁴ See e.g., Charles D. Booth, *Recognition of Foreign Bankruptcies: An Analysis and Critique of the Inconsistent Approaches of United States Courts*, 66 Am. Bankr. L.J. 135, 171 (1992) (analyzing different approaches courts have followed in interpreting 11 U.S. C. § 304).

¹⁵ The former section 304(c) reads as follows:

In determining whether to grant additional assistance, the court must consider whether it is consistent with principles of comity and whether it will reasonably assure realization of the factors that formerly comprised section 304(c).¹⁶ A confusing aspect of Section 304 has been remedied, however. The listed factors were mostly elements of “comity”, but comity was itself on the list.¹⁷ Section 1507(b) elevates comity to the introduction so that additional assistance,

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- (c) In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with --
- (1) just treatment of all holders of claims against or interests in such estate;
 - (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
 - (3) prevention of preferential or fraudulent dispositions of property of such estate;
 - (4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;
 - (5) comity; and
 - (6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

11 U.S.C. § 304(c) (1994).

¹⁶ See §1507(b).

¹⁷ . The former section 304(c) reads as follows:

- (c) In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with --
- (1) just treatment of all holders of claims against or interests in such estate;
 - (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
 - (3) prevention of preferential or fraudulent dispositions of property of such estate;
 - (4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;
 - (5) comity; and
 - (6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

11 U.S.C. § 304(c) (1994).

“consistent with the principles of comity” must reasonably assure the several subsidiary factors.¹⁸

This device resuscitates the Section 304 jurisprudence.

Section 1509 represents another significant departure from the Model Law. Where Model Law Article 9 stood for the simple proposition that a foreign representative could go “directly” to court in a country that enacted the Model Law, Section 1509 stakes out more precise boundaries.¹⁹ The inability of a foreign representative to get prompt access to a court is one of the major impediments to an effective international insolvency administration.²⁰ Formal requirements range from lengthy recognition of judgment proceedings to intricate diplomatic approval procedures.²¹ By the time, if ever, the foreign representative gets to court the debtor and its assets may be of historical interest only. Direct access hurdles the barriers and provides a major improvement in the field.

Chapter 15 preserves the concept of direct access (as Section 304 did silently) but limits that access in the first instance to the bankruptcy court.²² The foreign representative can directly commence a case under Chapter 15 by filing a petition for recognition in the bankruptcy court.

¹⁸ See §1507(b); H REP., at 132.

¹⁹ See §1509

²⁰ See §1509. See National Bankr. Review Comm’n, *Bankruptcy: The Next Twenty Years* (1997) reprinted at <<http://www.nbrc.gov/report/cont.html>>, at 358-359 (“NBRC Report”); Daniel M. Glosband *Memorandum for Committee J Meeting, The UNCITRAL Model Law on Cross-Border Insolvency (as adopted on May 30, 1997)* (November 4, 1997) (on file with the author). Mr. Glosband was the representative of the Insolvency and Creditors Rights Committee on the International Bar Association to the four sessions of the Working Group on Insolvency Law of UNCITRAL at 5; See Thomas M. Gaa, Paula E. Garzon, *International Creditors Rights and Bankruptcy*, 31 Int’l Law 273 (Summer 1997), at 275.

²¹ See *id.*

²² See H REP., at 136.

Only after recognition can he go to other state or federal courts if necessary. Also, after recognition and subject to the special appearance status granted by Section 1510, the foreign representative can sue or be sued and will be subject to laws of general application.²³ More importantly, subsections (d) and (e) of Section 1509 funnel into bankruptcy court nearly all cases involving requests for comity by a foreign representative. An exception was created in subsection (f) for simple claim account receivable collections by a foreign representative. These provisions will halt the separate development of possibly inconsistent law under free standing comity principles and will preclude forum shopping by a foreign representative who has been denied recognition or relief by a bankruptcy court.²⁴

Where the Model Law simply gives a foreign representative authority to commence a domestic bankruptcy proceeding, Chapter 15 bifurcates that authority. Upon recognition, any foreign representative can file an involuntary petition by virtue of Section 1511(a)(1), but only the representative of a foreign main proceeding is given authority to commence a voluntary case by Section 1511(a) (2).²⁵

Acknowledging that relief may be necessary on an emergency basis, before recognition can be granted, Article 19 of the Model Law authorized injunctive and other relief when “urgently needed to protect the assets of the debtor or the interests of the creditors.”²⁶ While Section 1519 adopts this approach, it adds three limitations: (1) no police or regulatory act may

²³ *See id.*

²⁴ *Compare e.g., Cunard S.S. Co. Ltd. v. Salen Reefer Servs. AB*, 773 F.2d 452, 456 (2d Cir. 1985) to Section 1509.

²⁵ *See* §1511(a)(1)-(2).

²⁶ *See* Model Law, Art. 19(1).

be enjoined under the section (but section 105 of the Bankruptcy Code still applies and may be an avenue to such relief); (2) the standards, procedures and limitations applicable to an injunction shall apply; and (3) the rights relative to the financial contracts which are excepted from stay under section 362 and granted in various of the "500" sections may not be stayed in a proceeding under Chapter 15.²⁷ Upon recognition, Article 20 of the Model Law imposes an automatic stay against litigation execution and transfer of assets. Section 1520, instead, incorporates Sections 361 and 362 of the Bankruptcy Code (limited to property “within the territorial jurisdiction”), to stay actions against the debtor and establish the standards for adequate protection when it is required to protect the interests of a party in property. Incorporation of Section 362 brings with it the exceptions to stay of subsections 362(b) and the grounds for relief from stay contained therein.²⁸ Section 1520 also imports the Bankruptcy Code sections dealing with post-petition use, sale or lease of property, restrictions on post-petition transfer of property on the post-petition effects of security interests and the operation of the debtor’s business.²⁹

Augmenting the automatic effects of recognition is the list of discretionary relief which the Model Law includes in Article 21 and Chapter 15 includes in Section 1521. Section 1521 contains the same constraints as Section 1519, that police and regulatory actions may not be stayed and injunctive-type requests must meet the standards, procedures and limitations

²⁷ See §1519(d)(e)(f); Federal Rule of Civil Procedure 65; Bankruptcy Rule 7065; 11 U.S.C. §362; 11 U.S.C. §§555, 556, 559, 560.

²⁸ See §1520(a)(2),(3); 11 U.S.C. §§ 362, 363, 549, 552.

²⁹ See §1520(a)(2),(3); 11 U.S.C. §363, 549, 552.

otherwise applicable to requests for injunctions from a Federal court and financial contract rights must remain unimpeded.³⁰

Section 1522 bears subtle homage to the United States Trustee system. It specifies that a requirement for security may be among the conditions that a court may impose for relief.³¹ Since an examiner may be authorized under Section 1505 to act in a foreign country or may be entrusted with the administration of assets under Section 1519 or 1521, Section 1526(c) directs that Bankruptcy Code Section 1104(d) shall apply to such appointment.³² In addition, the examiner must qualify as if it were a Trustee under Section 322. These provisions confirm that the United States Trustee must name the examiner; the examiner must file a bond “in favor of the United States conditioned on the faithful performance of ... duties”; the United States Trustee determines the amount of the bond and the sufficiency of the surety of the bond.³³

The United States delegation to UNCITRAL was opposed to conferring avoiding powers on a foreign representative. While the provision in Article 23 of the Model Law survived this opposition, the Advisory Group finessed the issue. Chapter 15 provides that the foreign representative has standing to bring an avoidance action under Section 1523, but he can only bring it in a case pending under another chapter.³⁴ In other words, the foreign representative must commence a full bankruptcy case via Section 1509 and risk losing control over much of that case to a trustee or debtor in possession. In exchange, he can chase avoidable transactions.

³⁰ See §1521.

³¹ See §1521

³² See §1522; *See also, e.g.*, 11 U.S.C. §§322(b)(2), 1104(d).

³³ 11 U.S.C. §§322(b)(2), 1104(d)

The remainder of the Model Law sets forth its provisions for cooperation and communication among courts and representatives, for the coordination of multiple proceedings and for untangling Chapter 15 cases from cases which involve the same debtor which have been commenced under other chapters. Subchapter IV and V of Chapter 15, which contain these provisions, closely follow the Model Law.³⁵

³⁴ Section 1523(a).

³⁵ Sections 1525-1532

ANCILLARY AND OTHER CROSS-BORDER CASES

AMENDMENT TO ADD CHAPTER 15 TO TITLE 11, UNITED STATES CODE.

- (a) IN GENERAL- Title 11, *United States Code*, is amended by inserting after chapter 13 the following:

CHAPTER 15--ANCILLARY AND OTHER CROSS-BORDER CASES

Sec.

1501. *Purpose and scope of application.*

SUBCHAPTER I--GENERAL PROVISIONS

1502. *Definitions.*

1503. *International obligations of the United States.*

1504. *Commencement of ancillary case.*

1505. *Authorization to act in a foreign country.*

1506. *Public policy exception.*

1507. *Additional assistance.*

1508. *Interpretation.*

SUBCHAPTER II--ACCESS OF FOREIGN REPRESENTATIVES AND CREDITORS TO THE COURT

1509. *Right of direct access.*

1510. *Limited jurisdiction.*

1511. *Commencement of case under section 301 or 303.*

1512. *Participation of a foreign representative in a case under this title.*

1513. *Access of foreign creditors to a case under this title.*

1514. *Notification to foreign creditors concerning a case under this title.*

SUBCHAPTER III--RECOGNITION OF A FOREIGN PROCEEDING AND RELIEF

1515. *Application for recognition.*

1516. *Presumptions concerning recognition.*

1517. *Order granting recognition.*

1518. *Subsequent information.*

1519. *Relief that may be granted upon petition for recognition.*

1520. *Effects of recognition of a foreign main proceeding.*

1521. *Relief that may be granted upon recognition.*

1522. *Protection of creditors and other interested persons.*

- `1523. *Actions to avoid acts detrimental to creditors.*
- `1524. *Intervention by a foreign representative.*

`SUBCHAPTER IV--COOPERATION WITH FOREIGN COURTS AND FOREIGN REPRESENTATIVES

- `1525. *Cooperation and direct communication between the court and foreign courts or foreign representatives.*
- `1526. *Cooperation and direct communication between the trustee and foreign courts or foreign representatives.*
- `1527. *Forms of cooperation.*

`SUBCHAPTER V--CONCURRENT PROCEEDINGS

- `1528. *Commencement of a case under this title after recognition of a foreign main proceeding.*
- `1529. *Coordination of a case under this title and a foreign proceeding.*
- `1530. *Coordination of more than one foreign proceeding.*
- `1531. *Presumption of insolvency based on recognition of a foreign main proceeding.*
- `1532. *Rule of payment in concurrent proceedings.*

`Sec. 1501. Purpose and scope of application

- `(a) *The purpose of this chapter is to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency with the objectives of--*
 - `(1) *cooperation between--*
 - `(A) *United States courts, 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.

`(b) This chapter applies 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 this title;

`(3) a foreign proceeding and a case under this title with respect to the same debtor are taking place 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 this title.

`(c) This chapter does not apply to--

`(1) a proceeding concerning an entity, other than a foreign insurance company, identified by exclusion in section 109(b);

`(2) an individual, or to an individual and such individual's spouse, who have debts within the limits specified in section 109(e) and who are citizens of the United States or aliens lawfully admitted for permanent residence in the United States; or

`(3) an entity subject to a proceeding under the Securities Investor Protection Act, a stockbroker subject to subchapter III of chapter 7 of this title, or a commodity broker subject to subchapter IV of chapter 7 of this title.

`(d) The court may not grant relief under this chapter with respect to any deposit, escrow, trust fund, or other security required or permitted under any applicable State insurance law or regulation for the benefit of claim holders in the United States.

`SUBCHAPTER I--GENERAL PROVISIONS

`Sec. 1502. Definitions

`For the purposes of this chapter, the term--

- `(1) `debtor´ means an entity that is the subject of a foreign proceeding;
- `(2) `establishment´ means any place of operations where the debtor carries out a nontransitory economic activity;
- `(3) `foreign court´ means a judicial or other authority competent to control or supervise a foreign proceeding;
- `(4) `foreign main proceeding´ means a foreign proceeding taking place in the country where the debtor has the center of its main interests;
- `(5) `foreign´ nonmain proceeding´ means a foreign proceeding, other than a foreign main proceeding, taking place in a country where the debtor has an establishment;
- `(6) `recognition´ means the entry of an order granting recognition of a foreign main proceeding or a foreign nonmain proceeding under this chapter;
- `(7) `trustee´ includes a trustee, a debtor in possession in a case under any chapter of this title, or a debtor under chapter 9 of this title; and
- `(8) `within the territorial jurisdiction of the United States,´ when used with reference to property of a debtor, refers to tangible property located within the territory of the United States and intangible property deemed under applicable nonbankruptcy law to be located within that territory, including any property subject to attachment or garnishment that may properly be seized or garnished by an action in a Federal or State court in the United States.

`Sec. 1503. International obligations of the United States

`To the extent that this chapter conflicts with an obligation of the United States arising out of any treaty or other form of agreement to which it is a party with one or more other countries, the requirements of the treaty or agreement prevail.

`Sec. 1504. Commencement of ancillary case

`A case under this chapter is commenced by the filing of a petition for recognition of a foreign proceeding under section 1515.

`Sec. 1505. Authorization to act in a foreign country

` A trustee or another entity (including an examiner) may be authorized by the court to act in a foreign country on behalf of an estate created under section 541. An entity authorized to act under this section may act in any way permitted by the applicable foreign law.

`Sec. 1506. Public policy exception

` Nothing 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.

`Sec. 1507. Additional assistance

- `(a) Subject to the specific limitations stated elsewhere in this chapter, if recognition is granted, the court may provide additional assistance to a foreign representative under this title or under other laws of the United States.*
- `(b) In determining whether to provide additional assistance under this title or under other laws of the United States, the court shall consider whether such additional assistance, consistent with the principles of comity, will reasonably assure--*
 - `(1) just treatment of all holders of claims against or interests in the debtor's property;*
 - `(2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;*
 - `(3) prevention of preferential or fraudulent dispositions of property of the debtor;*
 - `(4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and*
 - `(5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.*

`Sec. 1508. Interpretation

` In interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions.

`SUBCHAPTER II--ACCESS OF FOREIGN REPRESENTATIVES AND CREDITORS TO THE COURT

`Sec. 1509. Right of direct access

- `(a) A foreign representative may commence a case under section 1504 of this title by filing directly with the court a petition for recognition under section 1515 of this title.
- `(b) If the court grants recognition under section 1515 of this title, and subject to any limitations that the court may impose consistent with the policy of this chapter--

 - `(1) the foreign representative has the capacity to sue and be sued in a court in the United States;
 - `(2) the foreign representative may apply directly to a court in the United States for appropriate relief in that court; and
 - `(3) a court in the United States shall grant comity or cooperation to the foreign representative.
- `(c) A request for comity or cooperation by a foreign representative in a court in the United States other than the court which granted recognition shall be accompanied by a certified copy of an order granting recognition under section 1517 of this title.
- `(d) If the court denies recognition under this chapter, the court may issue any appropriate order necessary to prevent the foreign representative from obtaining comity or cooperation from courts in the United States.
- `(e) Whether or not the court grants recognition, and subject to sections 306 and 1510 of this title, a foreign representative is subject to applicable nonbankruptcy law.
- `(f) Notwithstanding any other provision of this section, the failure of a foreign representative to commence a case or to obtain recognition under this chapter does not affect any right the foreign representative may have to sue in a court in the United States to collect or recover a claim which is the property of the debtor.

`Sec. 1510. Limited jurisdiction

`The sole fact that a foreign representative files a petition under section 1515 does not subject the foreign representative to the jurisdiction of any court in the United States for any other purpose.

`Sec. 1511. Commencement of case under section 301 or 303

- `(a) Upon recognition, a foreign representative may commence--
 - `(1) an involuntary case under section 303; or
 - `(2) a voluntary case under section 301 or 302, if the foreign proceeding is a foreign main proceeding.
- `(b) The petition commencing a case under subsection (a) must be accompanied by a certified copy of an order granting recognition. The court where the petition for recognition has been filed must be advised of the foreign representative's intent to commence a case under subsection (a) prior to such commencement.

`Sec. 1512. Participation of a foreign representative in a case under this title

`Upon recognition, the foreign representative in the recognized proceeding is entitled to participate as a party in interest in a case regarding the debtor under this title.

`Sec. 1513. Access of foreign creditors to a case under this title

- `(a) Foreign creditors have the same rights regarding the commencement of, and participation in, a case under this title as domestic creditors.
- `(b)(1) Subsection (a) does not change or codify present law as to the priority of claims under section 507 or 726 of this title, except that the claim of a foreign creditor under those sections shall not be given a lower priority than that of general unsecured claims without priority solely because the holder of such claim is a foreign creditor.
 - `(2)(A) Subsection (a) and paragraph (1) do not change or codify present law as to the allowability of foreign revenue claims or other foreign public law claims in a proceeding under this title.
 - `(B) Allowance and priority as to a foreign tax claim or other foreign public law claim shall be governed by any applicable tax treaty of the United States, under the conditions and circumstances specified therein.

`Sec. 1514. Notification to foreign creditors concerning a case under this title

- `(a) Whenever in a case under this title notice is to be given to creditors generally or to any class or category of creditors, such notice shall also be given to the known

creditors generally, or to creditors in the notified class or category, that do not have addresses in the United States. The court may order that appropriate steps be taken with a view to notifying any creditor whose address is not yet known.

- `(b) Such notification to creditors with foreign addresses described in subsection (a) shall be given individually, unless the court considers that, under the circumstances, some other form of notification would be more appropriate. No letters rogatory or other similar formality is required.
- `(c) When a notification of commencement of a case is to be given to foreign creditors, the notification shall--
 - `(1) indicate the time period for filing proofs of claim and specify the place for their filing;
 - `(2) indicate whether secured creditors need to file their proofs of claim; and
 - `(3) contain any other information required to be included in such a notification to creditors under this title and the orders of the court.
- `(d) Any rule of procedure or order of the court as to notice or the filing of a claim shall provide such additional time to creditors with foreign addresses as is reasonable under the circumstances.

`SUBCHAPTER III--RECOGNITION OF A FOREIGN PROCEEDING AND RELIEF

`Sec. 1515. Application for recognition

- `(a) A foreign representative applies to the court for recognition of the foreign proceeding in which the foreign representative has been appointed by filing a petition for recognition.
- `(b) A petition for recognition shall be accompanied by--
 - `(1) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or
 - `(2) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or
 - `(3) in the absence of evidence referred to in paragraphs (1) and (2), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.

- `(c) A petition for recognition shall also be accompanied by a statement identifying all foreign proceedings with respect to the debtor that are known to the foreign representative.
- `(d) The documents referred to in paragraphs (1) and (2) of subsection (b) must be translated into English. The court may require a translation into English of additional documents.

`Sec. 1516. Presumptions concerning recognition

- `(a) If the decision or certificate referred to in section 1515(b) indicates that the foreign proceeding is a foreign proceeding as defined in section 101 and that the person or body is a foreign representative as defined in section 101, the court is entitled to so presume.
- `(b) The court is entitled to presume that documents submitted in support of the petition for recognition are authentic, whether or not they have been legalized.
- `(c) In 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.

`Sec. 1517. Order granting recognition

- `(a) Subject to section 1506, after notice and a hearing an order granting recognition shall be entered if--
 - `(1) the foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502;
 - `(2) the foreign representative applying for recognition is a person or body as defined in section 101; and
 - `(3) the petition meets the requirements of section 1515.
- `(b) The foreign proceeding shall be recognized—
 - `(1) as a foreign main proceeding if it is taking place in the country where the debtor has the center of its main interests; or

- ` (2) as a foreign nonmain proceeding if the debtor has an establishment within the meaning of section 1502 in the foreign country where the proceeding is pending.
- ` (c) A petition for recognition shall be decided upon at the earliest possible time.
- ` (d) The provisions of this subchapter do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist, but in considering such action the court shall give due weight to possible prejudice to parties that have relied upon the order granting recognition.
- ` (e) A case under this chapter may be closed in the manner prescribed under section 350.

`Sec. 1518. Subsequent information

`From the time of filing the petition for recognition, the foreign representative shall file with the court promptly a notice of change of status concerning--

- ` (1) any substantial change in the status of the foreign proceeding or the status of the foreign representative's appointment; and
- ` (2) any other foreign proceeding regarding the debtor that becomes known to the foreign representative.

`Sec. 1519. Relief that may be granted upon filing petition for recognition

` (a) From the time of filing a petition for recognition until the court rules on the petition, the court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including--

- ` (1) staying execution against the debtor's assets;
- ` (2) entrusting the administration or realization of all or part of the debtor's assets located in the United States to the foreign representative or another person authorized by the court, including an examiner, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy; and
- ` (3) any relief referred to in paragraph (3), (4), or (7) of section 1521(a).

- `(b) Unless extended under section 1521(a)(6), the relief granted under this section terminates when the petition for recognition is granted.
- `(c) It is a ground for denial of relief under this section that such relief would interfere with the administration of a foreign main proceeding.
- `(d) The court may not enjoin a police or regulatory act of a governmental unit, including a criminal action or proceeding, under this section.
- `(e) The standards, procedures, and limitations applicable to an injunction shall apply to relief under this section.
- * (f) The exercise of rights not subject to the stay arising under section 362(a) pursuant to paragraph (6), (7), (17) or (32) of section 362(b) or pursuant to section 362(1) shall not be stayed by any order of a court or administrative agency in any proceeding under this chapter.

`Sec. 1520. Effects of recognition of a foreign main proceeding

- `(a) Upon recognition of a foreign proceeding that is a foreign main proceeding--
 - `(1) sections 361 and 362 apply with respect to the debtor and that property of the debtor that is within the territorial jurisdiction of the United States;
 - `(2) sections 363, 549, and 552 of this title apply to a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States to the same extent that the sections would apply to property of an estate;
 - `(3) unless the court orders otherwise, the foreign representative may operate the debtor's business and may exercise the rights and powers of a trustee under and to the extent provided by sections 363 and 552; and
 - `(4) section 552 applies to property of the debtor that is within the territorial jurisdiction of the United States.
- `(b) Subsection (a) does not affect the right to commence an individual action or proceeding in a foreign country to the extent necessary to preserve a claim against the debtor.

- `(c) Subsection (a) does not affect the right of a foreign representative or an entity to file a petition commencing a case under this title or the right of any party to file claims or take other proper actions in such a case.

`Sec. 1521. Relief that may be granted upon recognition

`(a) Upon recognition, whether the foreign proceeding is main or nonmain, where necessary to effectuate the purposes of this chapter and to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including--

- `(1) staying the commencement or continuation of an individual action or proceeding concerning the debtor's assets, rights, obligations or liabilities to the extent they have not been stayed under section 1520(a);
 - `(2) staying execution against the debtor's assets to the extent it has not been stayed under section 1520(a);
 - `(3) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under section 1520(a);
 - `(4) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;
 - `(5) entrusting the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States to the foreign representative or another person, including an examiner, authorized by the court;
 - `(6) extending relief granted under section 1519(a); and
 - `(7) granting any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a).
- `(b) If recognition is granted, whether the foreign proceeding is main or nonmain, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in the United States to the foreign representative or another person, including an examiner, authorized by the court, provided that the court is satisfied that the interests of creditors in the United States are sufficiently protected.

- `(c) In granting relief under this section to a representative of a foreign nonmain proceeding, the court must be satisfied that the relief relates to assets that, under the law of the United States, should be administered in the foreign nonmain proceeding or concerns information required in that proceeding.
- `(d) The court may not enjoin a police or regulatory act of a governmental unit, including a criminal action or proceeding, under this section.
- `(e) The standards, procedures, and limitations applicable to an injunction shall apply to relief under paragraphs (1), (2), (3), and (6) of subsection (a).
- `(f) The exercise of rights not subject to the stay arising under section 362(a) pursuant to paragraph (6), (7), (17) or (32) of section 362(b) or pursuant to section 362(1) shall not be stayed by any order of a court or administrative agency in any proceeding under this chapter.

`Sec. 1522. Protection of creditors and other interested persons

- `(a) The court may grant relief under section 1519 or 1521, or may modify or terminate relief under subsection (c) hereof, only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected.
- `(b) The court may subject relief granted under section 1519 or 1521, or the operation of the debtor's business under section 1520(a)(3) of this title, to conditions it considers appropriate, including the giving of security or the filing of a bond.
- `(c) The court may, at the request of the foreign representative or an entity affected by relief granted under section 1519 or 1521, or at its own motion, modify or terminate such relief.
- `(d) Section 1104(d) shall apply to the appointment of an examiner under this chapter. Any examiner shall comply with the qualification requirements imposed on a trustee by section 322.

`Sec. 1523. Actions to avoid acts detrimental to creditors

- `(a) If recognition is granted, the foreign representative has standing in a case concerning the debtor pending under another chapter of this title to initiate actions under sections 522, 544, 545, 547, 548, 550, 553, and 724(a).
- `(b) When the foreign proceeding is a foreign nonmain proceeding, the court must be satisfied that an action under subsection (a) relates to assets that, under United States law, should be administered in the foreign nonmain proceeding.

`Sec. 1524. Intervention by a foreign representative

`If recognition is granted, the foreign representative may intervene in any proceeding in a State or Federal court in the United States in which the debtor is a party.

`SUBCHAPTER IV--COOPERATION WITH FOREIGN COURTS AND FOREIGN REPRESENTATIVES

`Sec. 1525. Cooperation and direct communication between the court and foreign courts or foreign representatives

- `(a) Consistent with section 1501, the court shall cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through the trustee.*
- `(b) The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives, subject to the rights of parties in interest to notice and participation.*

`Sec. 1526. Cooperation and direct communication between the trustee and foreign courts or foreign representatives

- `(a) Consistent with section 1501, the trustee or other person authorized by the court, including an examiner, shall, subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts or foreign representatives.*
- `(b) The trustee or other person authorized by the court, including an examiner, is entitled, subject to the supervision of the court, to communicate directly with foreign courts or foreign representatives.*

`Sec. 1527. Forms of cooperation

`Cooperation referred to in sections 1525 and 1526 may be implemented by any appropriate means, including--

- `(1) appointment of a person or body, including an examiner, to act at the direction of the court;*
- `(2) communication of information by any means considered appropriate by the court;*
- `(3) coordination of the administration and supervision of the debtor's assets and affairs;*

- `(4) approval or implementation of agreements concerning the coordination of proceedings; and
- `(5) coordination of concurrent proceedings regarding the same debtor.

`SUBCHAPTER V--CONCURRENT PROCEEDINGS

`Sec. 1528. Commencement of a case under this title after recognition of a foreign main proceeding

`After recognition of a foreign main proceeding, a case under another chapter of this title may be commenced only if the debtor has assets in the United States. The effects of such case shall be restricted to the assets of the debtor that are within the territorial jurisdiction of the United States and, to the extent necessary to implement cooperation and coordination under sections 1525, 1526, and 1527, to other assets of the debtor that are within the jurisdiction of the court under section 541(a) of this title, and section 1334(e) of title 28, to the extent that such other assets are not subject to the jurisdiction and control of a foreign proceeding that has been recognized under this chapter.

`Sec. 1529. Coordination of a case under this title and a foreign proceeding

`Where a foreign proceeding and a case under another chapter of this title are taking place concurrently regarding the same debtor, the court shall seek cooperation and coordination under sections 1525, 1526, and 1527, and the following shall apply:

- `(1) When the case in the United States is taking place at the time the petition for recognition of the foreign proceeding is filed--
 - `(A) any relief granted under sections 1519 or 1521 must be consistent with the relief granted in the case in the United States; and
 - `(B) even if the foreign proceeding is recognized as a foreign main proceeding, section 1520 does not apply.
- `(2) When a case in the United States under this title commences after recognition, or after the filing of the petition for recognition, of the foreign proceeding--
 - `(A) any relief in effect under sections 1519 or 1521 shall be reviewed by the court and shall be modified or terminated if inconsistent with the relief granted in the case in the United States; and

`(B) if the foreign proceeding is a foreign main proceeding, any relief in effect under section 1520(a) shall be modified or terminated if inconsistent with the relief granted in the case in the United States.

- `(3) In granting, extending, or modifying relief granted to a representative of a foreign nonmain proceeding, the court must be satisfied that the relief relates to assets that, under the laws of the United States, should be administered in the foreign nonmain proceeding or concerns information required in that proceeding.
- `(4) In achieving cooperation and coordination under sections 1528 and 1529, the court may grant any of the relief authorized under section 305.

`Sec. 1530. Coordination of more than one foreign proceeding

`In matters referred to in section 1501, with respect to more than one foreign proceeding regarding the debtor, the court shall seek cooperation and coordination under sections 1525, 1526, and 1527, and the following shall apply:

- `(1) Any relief granted under section 1519 or 1521 to a representative of a foreign nonmain proceeding after recognition of a foreign main proceeding must be consistent with the foreign main proceeding.
- `(2) If a foreign main proceeding is recognized after recognition, or after the filing of a petition for recognition, of a foreign nonmain proceeding, any relief in effect under section 1519 or 1521 shall be reviewed by the court and shall be modified or terminated if inconsistent with the foreign main proceeding.
- `(3) If, after recognition of a foreign nonmain proceeding, another foreign nonmain proceeding is recognized, the court shall grant, modify, or terminate relief for the purpose of facilitating coordination of the proceedings.

`Sec. 1531. Presumption of insolvency based on recognition of a foreign main proceeding

`In the absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of commencing a proceeding under section 303, proof that the debtor is generally not paying its debts as such debts become due.

Sec. 1532. Rule of payment in concurrent proceedings

Without prejudice to secured claims or rights in rem, a creditor who has received payment with respect to its claim in a foreign proceeding pursuant to a law relating to insolvency may not receive a payment for the same claim in a case under any other chapter of this title regarding the debtor, so long as the payment to other creditors of the same class is proportionately less than the payment the creditor has already received.

(b) CLERICAL AMENDMENT- The table of chapters for title 11, United States Code, is amended by inserting after the item relating to chapter 13 the following:

1501'.

SEC. 902. OTHER AMENDMENTS TO TITLES 11 AND 28, UNITED STATES CODE.

(a) APPLICABILITY OF CHAPTERS- Section 103 of title 11, United States Code, is amended--

(1) in subsection (a), by inserting before the period the following: ', and this chapter, sections 307, 362 (1), 555 through 557, 559, 560, 561 and 562 apply in a case under chapter 15 of this title; and

(2) by adding at the end the following:

'(j) Chapter 15 applies only in a case under such chapter, except that--

'(1) sections 1505, 1513, and 1514 apply in all cases under this title; and

'(2) section 1509 applies whether or not a case under this title is pending.

(b) DEFINITIONS- Paragraphs (23) and (24) of section 101 of title 11, United States Code, are amended to read as follows:

'(23) 'foreign proceeding' means 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;

'(24) 'foreign representative' means 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 the foreign proceeding;

(c) AMENDMENTS TO TITLE 28, UNITED STATES CODE-

(1) PROCEDURES- Section 157(b)(2) of title 28, United States Code, is amended--

(A) in subparagraph (N), by striking `and' at the end;

(B) in subparagraph (O), by striking the period at the end and inserting `; and'; and

(C) by adding at the end the following:

(P) recognition of foreign proceedings and other matters under chapter 15 of title 11, United States Code.

(2) BANKRUPTCY CASES AND PROCEEDINGS- Section 1334(c)(1) of title 28, United States Code, is amended by striking `Nothing in' and inserting `Except with respect to a case under chapter 15 of title 11, nothing in'.

(3) VENUE OF CASES ANCILLARY TO FOREIGN PROCEEDINGS- Section 1410 of title 28, United States Code, is amended to read:

A case under chapter 15 of title 11 may be commenced in the district court for the district ---

(1) in which the debtor has its principal place of business or principal assets in the United States; or

(2) if the debtor does not have a place of business or assets in the United States, in which there is pending against the debtor an action or proceeding or enforcement of judgment in a State or Federal court; or

(3) in cases other than those specified in subsections (1) or (2) of this section, in which venue will be consistent with the interests of justice and the convenience of the parties having regard to the relief sought by the foreign representative.

(4) DUTIES; SUPERVISION BY ATTORNEY GENERAL- Section 586(a)(3) of title 28, United States Code, is amended by striking `or 13' and inserting `13, or 15,' after `chapter'.

(d) OTHER SECTIONS OF TITLE 11-

- (1) Section 109(b)(3) of title 11, United States Code, is amended to read as follows:
 - (3) (A) a foreign insurance company, engaged in such business in the United States; or
 - (B) a foreign bank, savings bank, cooperative bank, savings and loan association, building and loan association, or credit union, which has a branch or agency (as defined in section 3101 of title 12, United States Code) in the United States.
- (2) Section 303(k) of title 11, United States Code, is amended to read as follows: "Notwithstanding subsection (a) of this section, an involuntary case may be commenced against a foreign bank that does not have a branch or agency in the United States only under chapter 7 of this title and only if a foreign proceeding concerning such bank is pending.
- (3) (A) Section 304 of title 11, United States Code, is repealed.
- (B) The table of sections of chapter 3 of title 11, United States Code, is amended by striking the item relating to section 304.
- (C) Section 306 of title 11, United States Code, is amended by striking ` , 304, ' each place it appears.
- (4) Section 305(a)(2) of title 11, United States Code, is amended to read:
 - (2) (A) a petition under section 1515 of this title for recognition of a foreign proceeding has been granted; and
 - (B) the purposes of chapter 15 of this title would be best served by such dismissal or suspension. '.
- (5) Section 508 of title 11, United States Code, is amended by striking subsection (a) and by striking out the letter `(b)` at the beginning of the second paragraph.

Legislative Commentary

ANCILLARY AND OTHER CROSS-BORDER CASES

H.R. 333 adds a new chapter to the Bankruptcy Code (the “Code”) for transnational bankruptcy cases. This incorporates the Model Law on Cross-Border Insolvency to encourage cooperation between the United States and foreign countries with respect to transnational insolvency cases. Title VIII is intended to provide greater legal certainty for trade and investment as well as to provide for the fair and efficient administration of cross-border insolvencies, which protects the interests of creditors and other interested parties, including the debtor. In addition, it serves to protect and maximize the value of the debtor’s assets.

Section 1501. Purpose and Scope of Application

The chapter introduces into the Bankruptcy Code the Model Law on Cross-Border Insolvency (“Model Law”), which was promulgated by the United Nations Commission on International Trade Law (“UNCITRAL”) at its Thirtieth Session, May 12-30, 1997.³⁶

Cases brought under this chapter are intended to be ancillary to cases brought in a debtor’s home country, unless a full United States bankruptcy case is brought under another chapter. Even if a full case is brought, the court may decide under section 305 to stay or dismiss

³⁶ The text of the Model Law and the Report of UNCITRAL on its adoption are found at U.N. G.A., 52d Sess., Supp. No. 17 (A/52/17) (“Report”). That Report and the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, U.N. Gen. Ass., UNCITRAL 30th Sess. U.N. Doc. A/CN.9/442 (1997) (“Guide”), which was discussed in the negotiations leading to the Model Law and published by UNCITRAL as an aid to enacting countries, should be consulted for guidance as to the meaning and purpose of its provisions. The development of the provisions in the negotiations at UNCITRAL, in which the United States was an active participant, is recounted in the interim reports of the Working Group that are cited in the Report.

the United States case under the other chapter and limit the United States' role to an ancillary case under this chapter.³⁷ If the full case is not dismissed, it will be subject to the provisions of this chapter governing cooperation, communication and coordination with the foreign courts and representatives.

In any case, an order granting recognition is required as a prerequisite to the use of sections 301 and 303 by a foreign representative.

Section 1501 combines the Preamble to the Model Law (subsection (1)) with its article 1 (subsections (2) and (3))³⁸.

It largely follows the language of the Model Law and fills in blanks with appropriate United States references. However, it adds in subsection (3) an exclusion of certain natural persons who may be considered ordinary consumers. Although the consumer exclusion is not in the text of the Model Law, the discussions at UNCITRAL recognized that some such exclusion would be necessary in countries like the United States where there are special provisions for consumer debtors in the insolvency laws.³⁹

The reference to section 109(e) essentially defines “consumer debtors” for purposes of the exclusion by incorporating the debt limitations of that section, but not its requirement of regular income. The exclusion adds a requirement that the debtor or debtor couple be citizens or long-term legal residents of the United States. This ensures that residents of other countries will

³⁷ See § 1529 and commentary.

³⁸ Guide at 16-19.

³⁹ See *id.* at 18, ¶¶60; 19 ¶¶66.

not be able to manipulate this exclusion to avoid recognition of foreign proceedings in their home countries or elsewhere.

The first exclusion in subsection (c) constitutes, for the United States, the exclusion provided in article 1, subsection (2), of the Model Law.⁵⁴⁰ Foreign representatives of foreign proceedings which are excluded from the scope of chapter 15 may seek comity from courts other than the bankruptcy court since the limitations of section 1509(b)(2) and (3) would not apply to them.

The reference to section 109(b) interpolates into chapter 15 the entities governed by specialized insolvency regimes under United States law which are currently excluded from liquidation proceedings under title 11. Section 1501 contains an exception to the section 109(b) exclusions so that foreign proceedings of foreign insurance companies are eligible for recognition and relief under chapter 15 as they had been under section 304. However, section 1501(d) has the effect of leaving to State regulation any deposit, escrow, trust fund or the like posted by a foreign insurer under State law.

Section 1502. Definitions

“Debtor” is given a special definition for this chapter. That definition does not come from the Model Law but is necessary to eliminate the need to refer repeatedly to “the same debtor as in the foreign proceeding.” With certain exceptions, the term “person” used in the Model Law has been replaced with “entity,” which is defined broadly in section 101(15) to include natural persons and various legal entities, thus matching the intended breadth of the term “person” in the Model Law. The exceptions include contexts in which a natural person is

⁴⁰ Id. at 17.

intended and those in which the Model Law language already refers to both persons and entities other than persons. The definition of “trustee” for this chapter ensures that debtors in possession and debtors, as well as trustees, are included in the term.⁴¹

The definition of “within the territorial jurisdiction of the United States” in subsection (7) is not taken from the Model Law. It has been added because the United States, like some other countries, asserts insolvency jurisdiction over property outside its territorial limits under appropriate circumstances. Thus a limiting phrase is useful where the Model Law and this chapter intend to refer only to property within the territory of the enacting state. In addition, a definition of “recognition” supplements the Model Law definitions and merely simplifies drafting of various other sections of chapter 15.

Two key definitions of “foreign proceeding” and “foreign representative,” are found in sections 101(23) and (24), which have been amended consistent with Model Law article 2.⁴²

The definitions “establishment,” “foreign court,” “foreign main proceeding,” and “foreign non-main proceeding” have been taken from Model Law article 2, with only minor language variations necessary to comport with United States terminology. Additionally, defined terms have been placed in alphabetical order.⁴³

In order to be recognized as a foreign non-main proceeding, the debtor must at least have an establishment in that foreign country.⁴⁴

⁴¹ See § 1505.

⁴² Guide at 19-21, ¶¶67-68.

⁴³ See Guide at 19, (Model Law) 21 ¶75 (concerning establishment); 21 ¶74 (concerning foreign court); 21 ¶¶72, 73 and 75 (concerning foreign main and non-main proceedings).

⁴⁴ See id. at 21, ¶75.

Section 1503. International Obligations of the United States

This section is taken exactly from the Model Law with only minor adaptations of terminology.⁴⁵

Although this section makes an international obligation prevail over chapter 15, the courts will attempt to read the Model Law and the international obligation so as not to conflict, especially if the international obligation addresses a subject matter less directly related than the Model Law to a case before the court.

Section 1504. Commencement of Ancillary Case

Article 4 of the Model Law is designed for designation of the competent court which will exercise jurisdiction under the Model Law. In United States law, section 1334(a) of title 28 gives exclusive jurisdiction to the district courts in a “case” under this title.⁴⁶

Therefore, since the competent court has been determined in title 28, this section instead provides that a petition for recognition commences a “case,” an approach that also invokes a number of other useful procedural provisions. In addition, a new subsection (P) to section 157 of title 28 makes cases under this chapter part of the core jurisdiction of bankruptcy courts when referred to them by the district courts, thus completing the designation of the competent court. Finally, the particular bankruptcy court that will rule on the petition is determined pursuant to a revised section 1410 of title 28 governing venue and transfer.⁴⁷

⁴⁵ See id. at 22, Art. 3.

⁴⁶ See id. at 23, Art. 4.

⁴⁷ New § 1410 of title 28 provides as follows:

A case under chapter 15 of title 11 may be commenced in the district court for the district

The title “ancillary” in this section and in the title of this chapter emphasizes the United States policy in favor of a general rule that countries other than the home country of the debtor, where a main proceeding would be brought, should usually act through ancillary proceedings in aid of the main proceedings, in preference to a system of full bankruptcies (often called “secondary” proceedings) in each state where assets are found. Under the Model Law, notwithstanding the recognition of a foreign main proceeding, full bankruptcy cases are permitted in each country (see sections 1528 and 1529). In the United States, the court will have the power to suspend or dismiss such cases where appropriate under section 305.

Section 1505. Authorization to Act in a Foreign Country

The language in this section varies from the wording of article 5 of the Model Law as necessary to comport with United States law and terminology. The slight alteration to the language in the last sentence is meant to emphasize that the identification of the trustee or other entity entitled to act is under United States law, while the scope of actions that may be taken by the trustee or other entity under foreign law is limited by the foreign law.⁴⁸

The related amendment to section 586(a)(3) of title 28 makes acting pursuant to authorization under this section an additional power of a trustee or debtor in possession. While

-
- (1) in which the debtor has its principal place of business or principal assets in the United States; or
 - (2) if the debtor does not have a place of business or assets in the United States in which there is pending against the debtor an action or proceeding or enforcement of judgment in a State or Federal court; or
 - (3) in cases other than those specified in subsections (1) or (2) of this section, in which venue will be consistent with the interests of justice and the convenience of the parties having regard to the relief sought by the foreign representative.

⁴⁸ See Guide at 24.

the Model Law automatically authorizes an administrator to act abroad, this section requires all trustees and debtors to obtain court approval before acting abroad. That requirement is a change from the language of the Model Law, but one that is purely internal to United States law.⁴⁹

Its main purpose is to ensure that the court has knowledge and control of possibly expensive activities, but it will have the collateral benefit of providing further assurance to foreign courts that the United States debtor or representative is under judicial authority and supervision. This requirement means that the first-day orders in reorganization cases should include authorization to act under this section where appropriate.

This section also contemplates the designation of an examiner or other natural person to act for the estate in one or more foreign countries where appropriate. One instance might be a case in which the designated person had a special expertise relevant to that assignment. Another might be where the foreign court would be more comfortable with a designated person than with an entity like a debtor in possession. Either are to be recognized under the Model Law.¹⁵⁵⁰

Section 1506. Public Policy Exception

This provision follows the Model Law article 5 exactly, is standard in UNCITRAL texts and has been narrowly interpreted on a consistent basis in courts around the world. The word “manifestly” in international usage restricts the public policy exception to the most fundamental policies of the United States.⁵¹

⁴⁹ See id. at 24, Art. 5.

⁵⁰ See id. at 23-24, ¶82.

⁵¹ See id. at 25.

Section 1507. Additional Assistance

Subsection (1) follows the language of Model Law article 7.⁵²

Subsection (2) makes the authority for additional relief (beyond that permitted under sections 1519-1521, below) subject to the conditions for relief heretofore specified in United States law under section 304, which is repealed. This section is intended to permit the further development of international cooperation begun under section 304, but is not to be the basis for denying or limiting relief otherwise available under this chapter. The additional assistance is made conditional upon the court's consideration of the factors set forth in the current subsection 304(c) in a context of a reasonable balancing of interests following current case law. The references to "estate" in section 304 have been changed to refer to the debtor's property, because many foreign systems do not create an estate in insolvency proceedings of the sort recognized under this chapter. Although the case law construing section 304 makes it clear that comity is the central consideration, its physical placement as one of six factors in subsection (c) of section 304 is misleading, since those factors are essentially elements of the grounds for granting comity. Therefore, in subsection (2) of this section, comity is raised to the introductory language to make it clear that it is the central concept to be addressed.⁵³

⁵² Id. at 26.

⁵³ Id.

Section 1508. Interpretation

This provision follows conceptually Model Law article 8 and is a standard one in recent UNCITRAL treaties and model laws. Language changes were made to express the concepts more clearly in United States vernacular.⁵⁴

Interpretation of this chapter on a uniform basis will be aided by reference to the Guide and the Reports cited therein, which explain the reasons for the terms used and often cite their origins as well. Uniform interpretation will also be aided by reference to CLOUT, the UNCITRAL Case Law On Uniform Texts, which is a service of UNCITRAL. CLOUT receives reports from national reporters all over the world concerning court decisions interpreting treaties, model laws, and other text promulgated by UNCITRAL. Not only are these sources persuasive, but they are important to the crucial goal of uniformity of interpretation. To the extent that the United States courts rely on these sources, their decisions will more likely be regarded as persuasive elsewhere.

Section 1509. Right of Direct Access.

This section implements the purpose of article 9 of the Model Law, enabling a foreign representative to commence a case under this chapter by filing a petition directly with the court without preliminary formalities that may delay or prevent relief. It varies the language to fit United States procedural requirements and it imposes recognition of the foreign proceeding as a condition to further rights and duties of the foreign representative. If recognition is granted, the foreign representative will have full capacity under U.S. law (subsection (b)(1)), may request such relief in a state or federal court other than the bankruptcy court (subsection (b)(2)) and may

⁵⁴ Id. at 26, ¶91.

be granted comity or cooperation by such non-bankruptcy court (subsection (b)(3) and (c)). Subsections (b)(2), (b)(3) and (c) make it clear that chapter 15 is intended to be the exclusive door to ancillary assistance to foreign proceedings. The goal is to concentrate control of these questions in one court. That goal is important in a federal system like that of the United States with many different courts, state and federal, that may have pending actions involving the debtor or the debtor's property. This section, therefore, completes for the United States the work of article 4 of the Model Law ("competent court") as well as article 9.⁵⁵

Although a petition under current section 304 is the proper method for achieving deference by a United States court to a foreign insolvency under present law, some cases in state and federal courts under current law have granted comity suspension or dismissal of cases involving foreign proceedings without requiring a section 304 petition or even referring to the requirements of that section. Even if the result is correct in a particular case, the procedure is undesirable, because there is room for abuse of comity. Parties would be free to avoid the requirements of this chapter and the expert scrutiny of the bankruptcy court by applying directly to a state or federal court unfamiliar with the statutory requirements. Such an application could be made after denial of a petition under section 304. This section concentrates the recognition and deference process in one United States court, ensures against abuse, and empowers a court that will be fully informed of the current status of all foreign proceedings involving the debtor.⁵⁶

Subsection (d) has been added to ensure that a foreign representative cannot seek relief in courts in the United States after being denied recognition by the court under this chapter.

⁵⁵ See *id.* at 23, Art. 4, ¶¶79-83; 27 Art. 9, ¶93.

⁵⁶ See *id.* at 27, Art. 9; 34-35, Art. 15 and ¶¶116-119; 39-40, Art. 18, ¶¶133-134; see also § 1515(3) and § 1518.

Subsection (e) makes activities in the United States by a foreign representative subject to applicable United States law, just as 28 U.S.C. section 959 does for a domestic trustee in bankruptcy.⁵⁷

Subsection (f) provides a limited exception to the prior recognition requirement so that collection of a claim which is property of the debtor, for example an account receivable, by a foreign representative may proceed without commencement of a case or recognition under this chapter.

Section 1510. Limited Jurisdiction

Section 1510, article 10 of the Model Law, is modeled on section 306 of the Code.

Although the language referring to conditional relief in section 306 is not included, the court has the power under section 1522 to attach appropriate conditions to any relief it may grant. Nevertheless, the authority in section 1522 is not intended to permit the imposition of jurisdiction over the foreign representative beyond the boundaries of the case under this chapter and any related actions the foreign representative may take, such as commencing a case under another chapter of this title.

Section 1511. Commencement of Case Under Section 301 or 303

This section follows the intent of article 11 of the Model Law, but adds language that conforms to United States law or that is otherwise necessary in the United States given its many bankruptcy court districts and the importance of full information and coordination among them.⁵⁸

⁵⁷ Id. at 27, ¶93.

⁵⁸ See id. at 28, Art. 11.

Article 11 does not distinguish between voluntary and involuntary proceedings, but seems to have implicitly assumed an involuntary proceeding.⁵⁹

Subsection 1(a)(2) goes farther and permits a voluntary filing, with its much simpler requirements, if the foreign proceeding that has been recognized is a main proceeding.

Section 1512. Participation of a Foreign Representative in a Case Under this Title

This section follows article 12 of the Model Law with a slight alteration to tie into United States procedural terminology.⁶⁰ The effect of this section is to make the recognized foreign representative a party in interest in any pending or later commenced United States bankruptcy case.⁶¹

Throughout this chapter, the word “case” has been substituted for the word “proceeding” in the Model Law when referring to cases under the United States Bankruptcy Code, to conform to United States usage.

Section 1513. Access of Foreign Creditors to a Case Under this Title

This section mandates nondiscriminatory or “national” treatment for foreign creditors, except as provided in subsection (b) and section 1514. It follows the intent of Model Law article 13, but the language required alteration to fit into the Bankruptcy Code.⁶²

The law as to priority for foreign claims that fit within a class given priority treatment under section 507 (for example, foreign employees or spouses) is unsettled. This section permits

⁵⁹ Id. at 38, ¶¶97-99.

⁶⁰ Id. at 29, Art. 12.

⁶¹ Id. at 29, ¶¶10-102.

⁶² Id. at 30, ¶103.

the continued development of case law on that subject and its general principle of national treatment should be an important factor to be considered. At a minimum, under this section, foreign claims must receive the treatment given to general unsecured claims without priority, unless they are in a class of claims in which domestic creditors would also be subordinated.⁶³

The Model Law allows for an exception to the policy of nondiscrimination as to foreign revenue and other public law claims.⁶⁴ Such claims (such as tax and social security claims) have been denied enforcement in the United States traditionally, inside and outside of bankruptcy. The Code is silent on this point, so the rule is purely a matter of traditional case law. It is not clear if this policy should be maintained or modified, so this section leaves it to developing case law. It also allows the Department of the Treasury to negotiate reciprocal arrangements with our tax treaty partners in this regard, although it does not mandate any restriction of the evolution of case law pending such negotiations.

Section 1514. Notification of Foreign Creditors Concerning a Case Under Title 11

This section ensures that foreign creditors receive proper notice of cases in the United States.⁶⁵

As “foreign creditor” is not a defined term, foreign addresses are used as the distinguishing factor. The Federal Rules of Bankruptcy Procedure (“Rules”) should be amended to conform to the requirements of this section, including a special form for initial notice to such creditors. In particular, the Rules must provide for additional time for such creditors to file

⁶³ See id. at 30, ¶104.

⁶⁴ See id. at 31, ¶105.

⁶⁵ See Model Law, Art. 14; Guide at 31-32, ¶¶106-109.

proofs of claim where appropriate and must provide for the court to make specific orders in that regard in proper circumstances. The notice must specify that secured claims must be asserted, because in many countries such claims are not affected by an insolvency proceeding and need not be filed.⁶⁶ Of course, if a foreign creditor has made an appropriate request for notice, it will receive notices in every instance where notices would be sent to other creditors who have made such requests.

Subsection (d) replaces the reference to “a reasonable time period” in Model Law article 14(3)(a).⁶⁷ It makes clear that the Rules, local rules, and court orders must make appropriate adjustments in time periods and bar dates so that foreign creditors have a reasonable time within which to receive notice or take an action.

Section 1515. Application for Recognition of a Foreign Proceeding

This section follows article 15 of the Model Law with minor changes.⁶⁸

The Rules will require amendment to provide forms for some or all of the documents mentioned in this section, to make necessary additions to Rules 1000 and 2002 to facilitate appropriate notices of the hearing on the petition for recognition, and to require filing of lists of creditors and other interested persons who should receive notices. Throughout the Model Law, the question of notice procedure is left to the law of the enacting state.⁶⁹

⁶⁶ Guide at 33, ¶111.

⁶⁷ Id. at 31, Art. 14(3)(a).

⁶⁸ Id. at 33.

⁶⁹ See id. at 36, ¶121.

Section 1516. Presumptions Concerning Recognition

This section follows article 16 of the Model Law with minor changes.⁷⁰

Although sections 1515 and 1516 are designed to make recognition as simple and expedient as possible, the court may hear proof on any element stated. The ultimate burden as to each element is on the foreign representative, although the court is entitled to shift the burden to the extent indicated in section 1516. The word “proof” in subsection (3) has been changed to “evidence” to make it clearer using United States terminology that the ultimate burden is on the foreign representative.⁷¹

“Registered office” is the term used in the Model Law to refer to the place of incorporation or the equivalent for an entity that is not a natural person.⁷²

The presumption that the place of the registered office is also the center of the debtor’s main interest is included for speed and convenience of proof where there is no serious controversy.

Section 1517. Order Granting Recognition.

This section closely follows article 17 of the Model Law, with a few exceptions.⁷³

The decision to grant recognition is not dependent upon any findings about the nature of the foreign proceedings of the sort previously mandated by section 304(c). The requirements of

⁷⁰ Id. at 36

⁷¹ Id. at 36, Art. 16(3).

⁷² Id.

⁷³ Id. at 37.

this section, which incorporates the definitions in section 1502 and sections 101(23) and (24), are all that must be fulfilled to attain recognition.

Reciprocity was specifically suggested as a requirement for recognition on more than one occasion in the negotiations that resulted in the Model Law. It was rejected by overwhelming consensus each time. The United States was one of the leading countries opposing the inclusion of a reciprocity requirement.⁷⁴ In this regard, the Model Law conforms to section 304, which has no such requirement.

The drafters of the Model Law understood that only a main proceeding or a non-main proceeding meeting the standards of section 1502 (that is, one brought where the debtor has an establishment) were entitled to recognition under this section. The Model Law has been slightly modified to make this point clear by referring to the section 1502 definition of main and non-main proceedings, as well as to the general definition of a foreign proceeding in section 101(23). Naturally, a petition under section 1515 must show that proceeding is a main or a qualifying non-main proceeding in order to win recognition under this section.

Consistent with the position of various civil law representatives in the drafting of the Model Law, recognition creates a status with the effects set forth in section 1520, so those effects are not viewed as orders to be modified, as are orders granting relief under sections 1519 and 1521. Subsection (4) states the grounds for modifying or terminating recognition. On the other hand, the effects of recognition (found in section 1520 and including an automatic stay) are subject to modification under section 362(d), made applicable by section 1520(2), which permits lifting the stay of section 1520 for cause.

⁷⁴ Report of the working group on Insolvency Law on the work of its Twentieth Session (Vienna, 7-18 October 1996), at 6, ¶¶16-20.

Paragraph 1(d) of section 17 of the Model Law has been omitted as an unnecessary requirement for United States purposes, because a petition submitted to the wrong court will be dismissed or transferred under other provisions of United States law.⁷⁵

The reference to section 350 refers to the routine closing of a case that has been completed and will invoke requirements including a final report from the foreign representative in such form as the Rules may provide or a court may order.⁷⁶

Section 1518. Subsequent Information.

This section follows the Model Law, except to eliminate the word “same” which is rendered unnecessary by the definition of “debtor” in section 1502 and to provide for a formal document to be filed with the court.⁷⁷

Judges in several jurisdictions, including the United States, have reported a need for a requirement of complete and candid reports to the court of all proceedings, worldwide, involving the debtor. This section will ensure that such information is provided to the court on a timely basis. Any failure to comply with this section will be subject to the sanctions available to the court for violations of the statute. The section leaves to the Rules the form of the required notice and related questions of notice to parties in interest, the time for filing, and the like.

Section 1519. Relief May be Granted upon Petition for Recognition of a Foreign Proceeding.

This section generally follows article 19 of the Model Law.⁷⁸

⁷⁵ Guide at 37, Art. 17(1)(d).

⁷⁶ Id.

⁷⁷ Id. at 39-40, ¶¶133, 134.

⁷⁸ Id. at 40.

The bankruptcy court will have jurisdiction to grant emergency relief under Rule 7065 pending a hearing on the petition for recognition. This section does not expand or reduce the scope of section 105 as determined by cases under section 105 nor does it modify the sweep of sections 555 to 560. **Subsection (d) precludes injunctive relief against police and regulatory action under section 1519, leaving section 105 as the only avenue to such relief. Subsection (e) makes clear that this section contemplates injunctive relief and that such relief is subject to specific rules and a body of jurisprudence.** Subsection (f) was added to complement amendments to the Code provisions dealing with financial contracts.

Section 1520. Effects of Recognition of a Foreign Main Proceeding.

In general, this chapter sets forth all the relief that is available as a matter of right based upon recognition hereunder, although additional assistance may be provided under section 1507 and this chapter have no effect on any relief currently available under section 105.

The stay created by article 20 of the Model Law is imported to chapter 15 from existing provisions of the Code. Subsection (a)(1) combines subsections 1(a) and (b) of article 20 of the Model Law, because section 362 imposes the restrictions required by those two subsections and additional restrictions as well.⁷⁹

Subsections (a)(2) and (4) apply the Code sections that impose the restrictions called for by subsection 1(c) of the Model Law. In both cases, the provisions are broader and more complete than those contemplated by the Model Law, but include all the restraints the Model Law provisions would impose.⁸⁰

⁷⁹ Id. at 42, Art. 20 1(a), (b).

⁸⁰ Id. at 42, 45.

As the foreign proceeding may or may not create an “estate” similar to that created in cases under this title, the restraints are applicable to actions against the debtor under section 362(a) and with respect to the property of the debtor under the remaining sections. The only property covered by this section is property within the territorial jurisdiction of the United States as defined in section 1502. To achieve effects on property of the debtor which is not within the territorial jurisdiction of the United States, the foreign representative would have to commence a case under another chapter of this title.

By applying sections 361 and 362, subsection (a) makes applicable the United States exceptions and limitations to the restraints imposed on creditors, debtors, and other in a case under this title, as stated in article 20(2) of the Model Law.⁸¹ It also introduces the concept of adequate protection provided in sections 362 and 363.

These exceptions and limitations include those set forth in sections 362(b), (c) and (d). As one result, the court has the power to terminate the stay pursuant to section 362(d), for cause, including a failure of adequate protection.⁸²

Subsection (a)(2), by its reference to sections 363 and 552 adds to the powers of a foreign representative of a foreign main proceeding an automatic right to operate the debtor’s business and exercise the power of a trustee under sections 363 and 542, unless the court orders otherwise. A foreign representative of a foreign main proceeding may need to continue a business operation to maintain value and granting that authority automatically will eliminate the risk of delay. If the

⁸¹ Id. at 42, Art. 20(2); 44, ¶¶ 148, 150.

⁸² Id. at 42, Art. 20(3); 44-45, ¶¶ 151 152.

court is uncomfortable about this authority in a particular situation it can “order otherwise” as part of the order granting recognition.

Two special exceptions to the automatic stay are embodied in subsections (b) and (c). To preserve a claim in certain foreign countries, it may be necessary to commence an action. Subsection (b) permits the commencement of such an action, but would not allow for its further prosecution. Subsection (c) provides that there is no stay of the commencement of a full United States bankruptcy case. This essentially provides an escape hatch through which any entity, including the foreign representative, can flee into a full case. The full case, however, will remain subject to subchapters IV and V on cooperation and coordination of proceedings and to section 305 providing for stay or dismissal.

Section 108 of the Bankruptcy Code provides the tolling protection intended by Model Law article 20(3), so no exception is necessary as to claims that might be extinguished under United States law.⁸³

Section 1521. Relief that May be Granted Upon Recognition of a Foreign Proceeding.

This section follows article 21 of the Model Law, with detailed changes to fit United States law.⁸⁴

The exceptions in subsection (a)(7) relate to avoiding powers. The foreign representative’s status as to such powers is governed by section 1523 below. The avoiding power in section 549 and the exceptions to that power are covered by section 1520(a)(2).

⁸³ Id.

⁸⁴ Id. at 45-46, Art. 21.

The word “adequately” in the Model Law, articles 21(2) and 22(1), has been changed to “sufficiently” in sections 1521(b) and 1522(a) to avoid confusion with a very specialized legal term in United States bankruptcy, “adequate protection.”⁸⁵

Subsection (c) is designed to limit relief to assets having some direct connection with a non-main proceeding, for example where they were part of an operating division in the jurisdiction of the non-main proceeding when they were fraudulently conveyed and then brought to the United States.⁸⁶ Subsections (d), (e) and (f) are identical to those same subsections of section 1519.

This section does not expand or reduce the scope of relief currently available in ancillary cases under sections 105 and 304 nor does it modify the sweep of sections 555 through 560.

Section 1522. Protection of Creditors and Other Interested Persons.

This section follows article 22 of the Model Law with changes for United States usage and references to relevant Code sections.⁸⁷

It gives the bankruptcy court broad latitude to mold relief to circumstances, including appropriate responses if it is shown that the foreign proceeding is seriously and unjustifiably injuring United States creditors. For response to a showing that the conditions necessary to recognition did not actually exist or have ceased to exist, see section 1517. Concerning the change of “adequately” in the Model Law to “sufficiently” in this section, see section 1521. Subsection (d) is new and simply makes clear that an examiner appointed in a case under chapter

⁸⁵ Id. at 46, Art. 21(2); 47, Art. 22(1).

⁸⁶ See id. at 46-47, ¶¶ 158, 160.

⁸⁷ Id. at 47.

15 shall be subject to certain duties and bonding requirements based on those imposed on trustees and examiners under other chapters of this title.

Section 1523. Actions to Avoid Acts Detrimental to Creditors.

This section follows article 23 of the Model Law, with wording to fit it within procedure under this title.⁸⁸

It confers standing on a recognized foreign representative to assert an avoidance action but only in a pending case under another chapter of this title. The Model Law is not clear about whether it would grant standing in a recognized foreign proceeding if no full case were pending. This limitation reflects concerns raised by the United States delegation during the UNCITRAL debates that a simple grant of standing to bring avoidance actions neglects to address very difficult choice of law and forum issues. This limited grant of standing in section 1523 does not create or establish any legal right of avoidance nor does it create or imply any legal rules with respect to the choice of applicable law as to the avoidance of any transfer of obligation.⁸⁹

The courts will determine the nature and extent of any such action and what national law may be applicable to such action.

Section 1524. Intervention by a Foreign Representative.

The wording is the same as the Model Law, except for a few clarifying words.⁹⁰

This section gives the foreign representative whose foreign proceeding has been recognized the right to intervene in United States cases, state or federal, where the debtor is a

⁸⁸ Id. at 48-49.

⁸⁹ See id. at 49, ¶166.

⁹⁰ Id. at 49.

party. Recognition being an act under federal bankruptcy law, it must take effect in state as well as federal courts. This section does not require substituting the foreign representative for the debtor, although that result may be appropriate in some circumstances.

Section 1525. Cooperation and Direct Communication Between the Court and Foreign Courts or Foreign Representatives.

The wording is almost exactly that of the Model Law.⁹¹

The right of courts to communicate with other courts in worldwide insolvency cases is of central importance. This section authorizes courts to do so. This right must be exercised, however, with due regard to the rights of the parties. Guidelines for such communications are left to the Rules.

Section 1526 Cooperation and Direct Communication Between the Trustee and Foreign Courts or Foreign Representatives.

This section follows the Model Law almost exactly.⁹²

The language in Model Law article 26 concerning the trustee's function was eliminated as unnecessary because always implied under United States law. The section authorizes the trustee, including a debtor in possession, to cooperate with other proceedings.

Subsection (3) is not taken from the Model Law but is added so that any examiner appointed under this chapter will be designated by the United States Trustee and will be bonded.

⁹¹ Id. at 50.

⁹² Id. at 51.

Section 1527. Forms of Cooperation.

This section follows the Model Law exactly.⁹³ United States bankruptcy courts have already engaged in most of the forms of cooperation mentioned here, but they now have explicit statutory authorization for acts like the approval of protocols of the sort used in cases.⁹⁴

Section 1528. Commencement of a Case Under Title 11 After Recognition of a Foreign Main Proceeding.

This section follows the Model Law, with specifics of United States law replacing the general clause at the end to cover assets normally included within the jurisdiction of the United States courts in bankruptcy cases, except where assets are subject to the jurisdiction of another recognized proceeding.⁹⁵

In a full bankruptcy case, the United States bankruptcy court generally has jurisdiction over assets outside the United States. Here that jurisdiction is limited where those assets are controlled by another recognized proceeding, if it is a main proceeding.

The court may use section 305 of this title to dismiss, stay, or limit a case as necessary to promote cooperation and coordination in a cross-border case. In addition, although the jurisdictional limitation applies only to United States bankruptcy cases commenced after recognition of a foreign proceeding, the court has ample authority under the next section and section 305 to exercise its discretion to dismiss, stay, or limit a United States case filed after a petition for recognition of a foreign main proceeding has been filed but before it has been approved, if recognition is ultimately granted.

⁹³ Guide at 51, 53.

⁹⁴ See e.g., In re Maxwell Communication Corp., 93 F.2d 1036 (2d Cir. 1996).

⁹⁵ Guide at 54-55.

Section 1529. Coordination of a Case Under Title 11 and a Foreign Proceeding.

This section follows the Model Law almost exactly, but subsection (4) adds a reference to section 305 to make it clear the bankruptcy court may continue to use that section, as under present law, to dismiss or suspend a United States case as part of coordination and cooperation with foreign proceedings.⁹⁶ This provision is consistent with United States policy to act ancillary to a foreign main proceeding whenever possible.

Section 1530. Coordination of More than One Foreign Proceeding.

This section follows exactly article 30 of the Model Law.⁹⁷

It ensures that a foreign main proceeding will be given primacy in the United States, consistent with the overall approach of the United States favoring assistance to foreign main proceedings.

Section 1531. Presumption of Insolvency Based on Recognition of a Foreign Main Proceeding.

This section follows the Model Law exactly, inserting a reference to the standard for an involuntary case under this title.⁹⁸

Where an insolvency proceeding has begun in the home country of the debtor, and in the absence of contrary evidence, the foreign representative should not have to make a new showing that the debtor is in the sort of financial distress requiring a collective judicial remedy. The word “proof” here means “presumption.” The presumption does not arise for any purpose outside this section.

⁹⁶ Id. at 55-56.

⁹⁷ Id. at 57.

⁹⁸ Id. at 58.

Section 1532. Rule of Payment in Concurrent Proceeding.

This section follows the Model Law exactly and is very similar to prior section 508(a), which is repealed. The Model Law language is somewhat clearer and broader than the equivalent language of prior section 508(a).⁹⁹

OTHER AMENDMENTS TO TITLES 11 AND 28

Other sections of title 11 have been amended to apply relevant provisions in those sections to chapter 15 and to specify which portions of chapter 15 apply in cases under other chapters of title 11.

The key definitions of foreign proceeding and foreign representative do not appear in chapter 15, but rather replace the prior definitions of those terms in sections 101(23) and 101(24). The new definitions are nearly identical to those contained in the Model Law but add to the phrase “under a law relating to insolvency” the words “or debt adjustment.” This addition emphasizes that the scope of the Model Law and chapter 15 is not limited to proceedings involving only debtors which are technically insolvent, but broadly includes all proceedings involving debtors in severe financial distress, so long as those proceedings also meet the other criteria of section 101(24).¹⁰⁰

The amendment to section 157(b)(2) of title 28 provides that proceedings under chapter 15 will be core proceedings while other amendments to title 28 provide that the United States Trustee’s standing extends to cases under chapter 15 and that the United States Trustee’s duties include acting in chapter 15 cases.

⁹⁹ Id. at 59.

¹⁰⁰ Id. at 51-52, 71.

Although the United States will continue to assert worldwide jurisdiction over property of a domestic or foreign debtor in a full bankruptcy case under chapters 7 and 13 of this title, subject to deference to foreign proceedings under chapter 15 and section 305, the situation is different in a case commenced under chapter 15. There the United States is acting solely in an ancillary position, so jurisdiction over property is limited to that stated in chapter 15.

Amendments to section 109 permit recognition of foreign proceedings involving foreign insurance companies and involving foreign banks which do not have a branch or agency in the United States (as defined in 12 U.S.C. section 3101).¹⁰¹ While a foreign bank not subject to United States regulation will be eligible for chapter 15 as a consequence of the amendment to section 109, section 303 prohibits the commencement of a full involuntary case against such a foreign bank unless the bank is a debtor in a foreign proceeding.¹⁰²

While section 304 is repealed and replaced by chapter 15, access to the jurisprudence which developed under section 304 is preserved in the context of new section 1507. On deciding whether to grant the Additional Assistance contemplated by section 1507, the Court must consider the same factors that had been imposed by former section 304.

The venue provisions for cases ancillary to foreign proceedings have been amended to provide a hierarchy of choices beginning with principal place of business in the United States, if any. If there is no principal place of business in the United States, but there is litigation against a debtor, then the district in which the litigation is pending would be the appropriate venue. In any

¹⁰¹ H.R. 823, § 902(1).

¹⁰² Id. at § 902(2).

other case, venue must be determined with reference to the interests of justice and the convenience of the parties.