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Legislative Commentary

TITLE VIII -- ANCILLARY AND OTHER CROSS-BORDER CASES

Title VII of 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, 1997.¹

¹ 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.

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 the United States case under the other chapter and limit the United States' role to an ancillary case under this chapter.² 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))³.

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.⁴

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

² See § 1529 and commentary.

³ Guide at 16-19.

⁴ See id. at 18, ¶¶60; 19 ¶¶66.

long-term legal residents of the United States. This ensures that residents of other countries will 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.⁵⁵ 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

⁵ 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.⁶

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 2.⁷

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.⁸

In order to be recognized as a foreign non-main proceeding, the debtor must at least have an establishment in that foreign country.⁹

Section 1503. International Obligations of the United States

⁶ See § 1505.

⁷ Guide at 19-21, ¶¶67-68.

⁸ 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).

⁹ See id. at 21, ¶75.

This section is taken exactly from the Model Law with only minor adaptations of terminology.¹⁰

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.¹¹

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.¹²

¹⁰ See id. at 22, Art. 3.

¹¹ See id. at 23, Art. 4.

¹² 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

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

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.¹³

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 the Model Law automatically authorizes an administrator to act abroad, this section requires all

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- (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.

¹³ See Guide at 24.

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.¹⁴

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.¹⁵

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.¹⁶

Section 1507. Additional Assistance

Subsection (1) follows the language of Model Law article 7.¹⁷

¹⁴ See id. at 24, Art. 5.

¹⁵ See id. at 23-24, ¶82.

¹⁶ See id. at 25.

¹⁷ Id. at 26.

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.¹⁸

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.¹⁹

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

¹⁸ Id.

¹⁹ Id. at 26, ¶91.

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 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 9.²⁰

²⁰ See *id.* at 23, Art. 4, ¶¶79-83; 27 Art. 9, ¶93.

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.²¹

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.

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.²²

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.

²¹ 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.

²² *Id.* at 27, ¶93.

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.²³

Article 11 does not distinguish between voluntary and involuntary proceedings, but seems to have implicitly assumed an involuntary proceeding.²⁴

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.²⁵ The effect of this section is to make the recognized foreign

²³ See id. at 28, Art. 11.

²⁴ Id. at 38, ¶¶97-99.

²⁵ Id. at 29, Art. 12.

representative a party in interest in any pending or later commenced United States bankruptcy case.²⁶

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.²⁷

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 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.²⁸

The Model Law allows for an exception to the policy of nondiscrimination as to foreign revenue and other public law claims.²⁹ 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

²⁶ Id. at 29, ¶¶10-102.

²⁷ Id. at 30, ¶103.

²⁸ See id. at 30, ¶104.

²⁹ See id. at 31, ¶105.

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.³⁰

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 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.³¹ 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).³² It makes clear that the Rules, local rules, and court orders must make

³⁰ See Model Law, Art. 14; Guide at 31-32, ¶¶106-109.

³¹ Guide at 33, ¶111.

³² Id. at 31, Art. 14(3)(a).

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.³³

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.³⁴

Section 1516. Presumptions Concerning Recognition

This section follows article 16 of the Model Law with minor changes.³⁵

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.³⁶

³³ Id. at 33.

³⁴ See id. at 36, ¶121.

³⁵ Id. at 36

³⁶ Id. at 36, Art. 16(3).

“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.³⁷

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.³⁸

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 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.³⁹ 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-

³⁷ Id.

³⁸ Id. at 37.

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.

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.⁴⁰

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.⁴¹

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.⁴²

³⁹ Report of the working group on Insolvency Law on the work of its Twentieth Session (Vienna, 7-18 October 1996), at 6, ¶¶16-20.

⁴⁰ Guide at 37, Art. 17(1)(d).

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.⁴³

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.

⁴¹ Id.

⁴² Id. at 39-40, ¶¶133, 134.

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.⁴⁴

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.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.⁴⁶ It also introduces the concept of adequate protection provided in sections 362 and 363.

⁴³ Id. at 40.

⁴⁴ Id. at 42, Art. 20 1(a), (b).

⁴⁵ Id. at 42, 45.

⁴⁶ Id. at 42, Art. 20(2); 44, ¶¶ 148, 150.

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.⁴⁷

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 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.⁴⁸

⁴⁷ Id. at 42, Art. 20(3); 44-45, ¶¶ 151 152.

⁴⁸ Id.

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.⁴⁹

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).

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."⁵⁰

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.⁵¹ 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.⁵²

⁴⁹ Id. at 45-46, Art. 21.

⁵⁰ Id. at 46, Art. 21(2); 47, Art. 22(1).

⁵¹ See id. at 46-47, ¶¶ 158, 160.

⁵² Id. at 47.

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 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.⁵³

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.⁵⁴

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

⁵³ Id. at 48-49.

⁵⁴ See id. at 49, ¶166.

Section 1524. Intervention by a Foreign Representative.

The wording is the same as the Model Law, except for a few clarifying words.⁵⁵

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 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.⁵⁶

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.⁵⁷

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.

⁵⁵ Id. at 49.

⁵⁶ Id. at 50.

⁵⁷ Id. at 51.

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.

Section 1527. Forms of Cooperation.

This section follows the Model Law exactly.⁵⁸ 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.⁵⁹

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.⁶⁰

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

⁵⁸ Guide at 51, 53.

⁵⁹ See e.g., In re Maxwell Communication Corp., 93 F.2d 1036 (2d Cir. 1996).

⁶⁰ Guide at 54-55.

petition for recognition of a foreign main proceeding has been filed but before it has been approved, if recognition is ultimately granted.

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.⁶¹ 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.⁶²

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.⁶³

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

⁶¹ Id. at 55-56.

⁶² Id. at 57.

⁶³ Id. at 58.

“proof” here means “presumption.” The presumption does not arise for any purpose outside this section.

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).⁶⁴

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).⁶⁵

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

⁶⁴ Id. at 59.

⁶⁵ Id. at 51-52, 71.

Trustee's standing extends to cases under chapter 15 and that the United States Trustee's duties include acting in chapter 15 cases.

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).⁶⁶ 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.⁶⁷

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

⁶⁶ H.R. 823, § 902(1).

⁶⁷ Id. at § 902(2).

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

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