

Locale chapter

The new bankruptcy law adds Chapter 15 to the Bankruptcy Code: ancillary and cross-border bankruptcy cases

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President Bush in April signed into law the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Although the popular press has suggested that the act predominantly affects consumers and other individuals filing for bankruptcy protection, the law will also have a significant impact on the conduct of Chapter 11 and other commercial bankruptcy cases.

One of the most sweeping changes brought about by the act is the introduction of Chapter 15 to the Bankruptcy Code, concerning ancillary and other cross-border cases. With the purpose of incorporating the Model Law on Cross-Border Insolvency—originally proposed in 1997 by the United Nations Commission on International Trade Law—Chapter 15 replaces the former Section 304. It is intended to provide effective mechanisms for dealing with cross-border insolvency cases. Among its objectives are: cooperation between U.S. courts and non-U.S. courts; greater legal certainty for trade and investment; fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested parties, including the debtor; protection and maximization of the value of the debtor's assets; and facilitation of the rescue of financially troubled businesses.

The chapter applies where: 1) court assistance is sought in the U.S. by a "foreign representative" in connection with a "foreign proceeding"; 2) court assistance is sought outside the U.S. in connection with a U.S. bankruptcy case; 3) a foreign proceeding and a U.S. bankruptcy proceeding are pending concurrently; or 4) creditors or other interested persons outside the U.S. have an interest in requesting the commencement of, or participation in, a U.S. bankruptcy proceeding.

Upon recognition of a "foreign main proceeding" (that is, a foreign proceeding pending in a

country where the debtor has the center of its main interests), an automatic stay will apply to the debtor and its property within the U.S. This is a significant change from previous law. Additional provisions of the Bankruptcy Code will also apply in Chapter 15 cases: for example, Section 361 regarding adequate protection; sections 363, 549 and 552 regarding transfers of property within the U.S.; unless the court orders otherwise, sections 363 and 552 regarding operation of the debtor's business; and Section 552 regarding the post-petition effect of a security interest. Upon recognition of a foreign proceeding, whether main or nonmain, the court may at the request of the foreign representative grant any appropriate relief.

A Chapter 15 case is commenced by the filing of a petition for recognition of a foreign proceeding. There is a presumption in favor of recognition. A petition for recognition should be decided upon at the earliest possible time, after notice and a hearing. Non-U.S. creditors have the same rights regarding participation in a Chapter 15 case as U.S. creditors. Whenever notice is to be given to creditors generally or to any class or category of creditors, such notice shall also be given to non-U.S. creditors. Non-U.S. creditors may also be afforded additional time to file proofs of claim.

The order granting recognition will recognize the foreign proceeding as a "foreign main proceeding" or a "foreign nonmain proceeding." The determination of whether a foreign proceeding is a "foreign main proceeding" could be the subject of litigation. For example, the European Regulation on Insolvency Proceedings provides that the primary jurisdiction for an insolvency proceeding is the court of the member state where the debtor's center of main interest is located. The EU regulation allows for the courts in countries other than the home state to open "territorial" insolvency proceedings, but

only to administer assets located in that other member state. The regulation has led to forum shopping by parties that want to establish the debtor's center of main interest in a particular jurisdiction. Similar issues may arise under Chapter 15.

The new law includes provisions to facilitate cooperation, coordination and communication among the U.S. bankruptcy court and non-U.S. courts and foreign representatives. The debtor, trustee or other person authorized by the court shall, subject to the supervision of the court, cooperate to the maximum extent possible with a non-U.S. court or foreign representative. Such debtor, trustee or other person authorized by the court is entitled, subject to the supervision of the court, to communicate directly with a non-U.S. court or foreign representative.

After recognition of a foreign main proceeding, a case under another chapter of the U.S. Bankruptcy Code may be commenced only if the debtor has assets in the U.S. Such case will be limited to assets within the United States and to other assets necessary to implement cooperation and coordination with the non-U.S. court or the foreign representative. The act contains provisions for the coordination of these concurrent proceedings. If a debtor has the proper corporate authority and can satisfy the jurisdictional prerequisites necessary to file for Chapter 11 relief, the debtor might be able to circumvent these provisions of Chapter 15 simply by commencing a Chapter 11 case without first commencing a Chapter 15 case.

The law is set to take effect Oct. 17 and will not apply to cases commenced under the Bankruptcy Code before the effective date. ■

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