Chapter 15 and the UNCITRAL Model Law: narrowing the US approach to international judicial cooperation?

Fred S Hodara, partner
Lisa G Beckerman, partner
Brian D Geldert, associate
Akin Gump Strauss Hauer & Feld LLP

On April 20 2005 President George W Bush signed into law the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, thereby enacting the most fundamental changes to the US Bankruptcy Code since 1978. One of the most significant changes to the code was the creation of Chapter 15 to replace Section 304, which was the previous statutory mechanism for the commencement of a proceeding ancillary to a foreign insolvency proceeding. The bedrock underlying former Section 304 as well as Chapter 15 is the fundamental principle of comity – that is, respect for foreign judicial systems and processes. Nevertheless, as a new piece of legislation Chapter 15 is subject to differing interpretations, certain of which question the continuing primacy of comity as the guiding principle of cross-border insolvency jurisprudence. Some commentators have interpreted Chapter 15 as actually having a narrower or more rigid approach to comity than Section 304. However, this chapter argues that Congress was clear that the principle of comity is paramount and that, in time, the intent of Congress to enhance cooperation among nations in the global economic community through a broad application of comity will become the norm. This chapter explores the issues underlying the debate of the role of comity under Chapter 15.

Chapter 15

The United States has long been a leader in encouraging international judicial cooperation. In 1978 Congress enacted Section 304 of the Bankruptcy Code at a time when global markets were rapidly expanding to provide an effective and innovative regime to assist in the administration of insolvency proceedings pending in foreign jurisdictions. As scholars have noted, "[s]ection 304 was a breakthrough when it was adopted in 1978, putting the United States among the most advanced countries in the world in providing deference toward foreign proceedings and active cooperation with those proceedings" (Jay Lawrence Westbrook, "Chapter 15 and Discharge", 13 *Am Bankr Inst L Rev* 503, 503-504 (2005)). Unfortunately, multinational adoption of procedures based on Section 304 was slow to follow (see N Desai, "How Insolvent Multinational Businesses Should Adjust to Congress's Creation: Chapter 15", 7 *Hous Bus & Tax LJ* 138, 144 (2006), quoting Jay Lawrence Westbrook, "Chapter 15 At Last", 79 *Am Bankr LJ* 713, 719 (2005)).

Despite the failure of Section 304 to create more uniformity and certainty with respect to international insolvency laws, efforts continued. These multinational efforts resulted in the promulgation of the Model Law on Cross-Border Insolvency in 1997. The Model Law was drafted by the United Nations Commission on International Trade Law (UNCITRAL) and was designed to "assist [enacting] States to equip their insolvency laws with a

modern, harmonized and fair framework to address more effectively instances of cross-border insolvency". Chapter 15 is the US version of the Model Law. Although it took the United States eight years to enact Chapter 15, when it did so Congress was clear that its intent was to foster the uniformity of insolvency law given the global economy of the 21st century (see HR Report No 109 to 131, pt 1, at 110, as reprinted in 2005 US CCAN 88, 172). Indeed, Congress took the unusual step of incorporating a statement of the underlying principles in the statute itself.

While Section 304 of the Bankruptcy Code entailed a relatively extensive and subjective analysis before a foreign proceeding could be recognised by a US bankruptcy court and thereby qualify for the protective cooperation of the US bankruptcy system, Chapter 15 was intended to streamline and simplify the process. As the legislative history of Section 1517 states: "[T]he 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) of the Bankruptcy Code. 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" (HR Report, 175).

The streamlined and simple process is also reflected in the UNCITRAL Model Law, which lists as one of its key objectives the provision of a system designed "to provide expedited and direct access for foreign representatives to the courts of the enacting State" and to "avoid the need to rely on cumbersome and time-consuming letters rogatory or other forms of diplomatic or consular communications that might otherwise have to be used" (*Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, 28).

Once a Chapter 15 proceeding is commenced, the bankruptcy court must determine whether, and on what basis, to recognise the foreign proceeding. To that end, Chapter 15 contains certain "recognition provisions" in Sections 1515 to 1517. Section 1517 requires recognition of a foreign proceeding when:

- the foreign proceeding for which recognition is sought is a foreign main proceeding or foreign non-main proceeding within the meaning of Section 1502;
- the foreign representative applying for recognition is a person or body; and
- the petition meets the requirements of Section 1515. These requirements are met if the petition includes:
  - a certified copy of the decision to commence the foreign proceeding;
  - a certificate from the foreign court affirming the existence of the foreign proceeding and appointment of the foreign representative; and
  - any other evidence that is acceptable to the bankruptcy court if the requirements of Sections 1515(b)(1) to (2) cannot be satisfied.

Under Chapter 15, US courts must afford main recognition to a foreign proceeding if the debtor's centre of main interest (COMI) is in the same country as the foreign insolvency proceeding, or non-main recognition if the debtor's COMI is elsewhere but the debtor has an establishment in that country. Although 'COMI' is left undefined by the statute, there is a statutory presumption that the COMI is the place where the debtor has its registered office. An 'establishment' is defined to be "any place of operations where the debtor carries out non-transitory economic activity".

Whether a foreign representative attains main or non-main recognition will dictate whether certain injunctive relief (not dissimilar to the automatic stay provisions of Section 362 of the Bankruptcy Code) will be available to such foreign representative as a matter of right, or whether such relief will be discretionary based on the facts of the attendant case. This injunction would protect assets within the bankruptcy court's jurisdiction, ensuring that all creditors, whether foreign or domestic, receive equitable distribution of a debtor's assets.

Comity – the heart of the legislation

At the heart of former Section 304 was the facilitation and coordination of insolvency proceedings pending in multiple jurisdictions. In enacting Section 304, Congress affirmed the longstanding principle of comity in insolvency matters, making the United States a world leader in promoting cooperation in cross-border insolvency cases (see *Maxwell Commc'n Corp v Societe Generale (In re Maxwell Commc'n Corp)*, 93 F 3d 1036, 1048 (2d Cir 1996), citing legislative history of Section 304). The jurisprudence underlying Section 304 stayed true to these principles of comity and cooperation. However, under Section 304 comity was just one of six factors for a bankruptcy court to consider in determining whether to grant recognition of a foreign proceeding.

Economic globalisation has made the principles of comity and international cooperation between

courts increasingly important. Indeed, in enacting Chapter 15 Congress confirmed the increased importance of the principle of comity by elevating it to the forefront, as evidenced by the legislative history of Section 1507: "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."

As the House Judiciary Committee noted in its report, comity is so important to Chapter 15 that it is included in the introductory language as the statute's overarching goal "mak[ing] clear that it is the central concept to be addressed" (*United States v JA Jones Constr Group*, LLC, 333 BR 637, 638 (EDNY 2005) (quoting HR Report at 109; see also 11 USC §1507, stating that any determination of a request for assistance under Chapter 15 must be "consistent with principles of comity"). Chapter 15's statement of purpose and scope of application, taken from the preamble to the UNCITRAL Model Law, states that: "[t]he 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) courts of the United States, 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 (11 USC §1501(a))."

Such a statement of statutory purpose is unique in the context of the US Bankruptcy Code. Moreover, Section 1508 of the code explicitly directs that in interpreting its individual provisions, US bankruptcy courts should "consider [Chapter 15's] 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".

The principles embraced by Chapter 15 are not new to US courts and fully comport with longstanding judicial recognition of the "particular need to extend comity to foreign bankruptcy proceedings" (see *Finanz AG Zurich v Banco Economico SA*, 192 F 3d 240, 247 (2d Cir 1999); Maxwell, 93 F 3d at 1048 ("deference to foreign insolvency proceedings will, in many cases, facilitate 'equitable, orderly and systematic' distribution of the debtor's assets"), quoting *Cunard SS Co v Salen Reefer Servs AB*, 773 F 2d 452, 458 (2d Cir 1985); *Allstate Life Ins Co v Linter Group Ltd*, 994 F 2d 996, 999 (2d Cir 1993)).

Before Chapter 15 was enacted US courts regularly granted comity to foreign insolvency proceedings under former Section 304 of the Bankruptcy Code, provided that the foreign proceedings were substantially similar to US proceedings and the underlying law was not repugnant to US law (eg, see *Bank of NY v Treco*, 240 F 3d 148, 157-158 (2d Cir 2001)). In fact, as early as 1895 (more than 80 years before the enactment of Section 304), comity was an entrenched concept in US jurisprudence. As the Supreme Court explained: "[Comity] is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, upon the other, [but is rather] the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws" (*Hilton v Guyot*, 159 US 113, 163-164 (1895)).

Time and again, the US Supreme Court has recognised that as a nation "[w]e cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts" (The *M/S Bremen v Zapata Off-Shore Co*, 407 US 1, 9 (1972)). For that reason, US courts have long afforded respect to foreign judicial proceedings involving commercial disputes (see *Hilton v Guyot*, 159 US at 202-203). This fundamental principle of judicial comity is of enormous relevance in the global economy of the 21st century. Today more than ever, multinational corporations operate in a worldwide arena that demands a heightened level of international judicial cooperation. Nowhere is this cooperation more critical than in the field of insolvency, where

the failure of courts to respect foreign insolvency proceedings can lead to administrative chaos, uncertainty and expense to the detriment of creditors worldwide – consequences that are antithetical to the efficient resolution of bankruptcy cases and the operation of the global capital markets.

Can Chapter 15 be read to curtail the role of comity?

Certain Chapter 15 provisions can arguably be read to limit or retreat from the longstanding principle of comity. For example, Section 1509(b) provides that "if the court grants recognition under section 1517… a court in the United States shall grant comity or cooperation to the foreign representative". Section 1509(c) further mandates that any request for comity "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". Moreover, Section 1509(d) permits a court to "prevent the foreign representative from obtaining comity or cooperation from courts in the United States" if recognition is denied. At least one commentator has correctly noted that Section 1509 is a significant departure from the UNCITRAL Model Law as "Model Law Article 9 states succinctly that a foreign representative could go 'directly' to court in a country that enacted the Model Law" and "Section 1509 sets forth more detailed requirements and limitations" (see Adam C Rogoff, *Primary Areas of Change in Chapter 15, as Compared to UNCITRAL Model Law*).

Some have argued that these provisions of Section 1509 illustrate that "comity comes into play after recognition" because, when read literally, any US court is required only to grant comity "[i]f the court grants recognition". Thus, proponents of a narrow approach to comity note that requests for recognition must be accompanied by a copy of the recognition order and therefore courts may deny comity if recognition is denied (eg, see *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd (in Provisional Liquidation)*, Case 07-8730, Docket 7, *amici curiae* brief at 17 (SDNY November 28 2007), arguing that Section 1509 "makes clear that comity comes into play after recognition and not for purposes of determining recognition"). The result of such a narrow reading of Chapter 15 could severely curtail US courts' cooperation with foreign nations and their judicial systems, leading to a US-centric interpretation of Chapter 15's codification of the UNCITRAL Model Law, as well as conflict, delay and expense flowing from competing international court proceedings. Given the backdrop of comity discussed above, this could not be what Congress intended. In fact, this is in direct contradiction to Congress's explicit mandate in Section 1508 that the courts should interpret Chapter 15 in a manner that is consistent with its analogues enacted in foreign jurisdictions.

The legislative history of Chapter 15 and the impetus for enactment thereof require a more flexible and pragmatic reading of Chapter 15, reflecting Congress's intent to foster comity and cooperation between US and foreign courts. In general, comity should be accorded to foreign proceedings if such proceedings do not violate US laws or public policy, and if the foreign court abides by fundamental standards of procedural fairness (see *Finanz AG Zurich*, 192 F 3d at 246; *Cunard*, 773 F 2d at 457; *Treco,* 240 F 3d at 157). In the absence of such a circumstance, it was not Congress's intention to curtail comity or to limit its application to cases where recognition of foreign insolvency proceedings has been granted.

Moreover, even a strict reading of Section 1509 demonstrates that Congress did not intend this section to swallow the overriding principles of Chapter 15. The legislative history explains that Section 1509 concerns the respect owed to a foreign representative (as opposed to a foreign proceeding) by non-bankruptcy courts, in which a foreign representative may seek relief after the bankruptcy court grants recognition to a foreign proceeding under Section 1517: "If recognition is granted, the foreign representative will have full capacity under [US] law (subsection (b)(1)), may request such relief in a state or Federal court other than the bankruptcy court (subsection (b)(2), and shall be granted comity or cooperation by such non-bankruptcy court (subsection (b)(3) and (c))" (HR Report at 100-111)). Similarly, the legislative history makes clear that "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 [bankruptcy] court under this chapter" (HR Report at 110). Thus, Section 1509 does not address the role and application of the principle of comity in a bankruptcy court's implementation of the provisions of Chapter 15. Rather, in considering whether to grant recognition in the first instance, Section 1509 is intended to channel requests for comity through the bankruptcy court instead of having foreign representatives initiate proceedings in US federal or

state courts. It is beyond the scope of this chapter to address whether these provisions have foreclosed avenues other than Chapter 15 to seek assistance for foreign proceedings. However, at least one Chapter 15 scholar has expressed the view that, in light of Article 7 of the UNCITRAL Model Law, there may be a "residual common law discretion which can be used in special cases" (see Gabriel Moss QC, "Beyond the Sphinx – Is Chapter 15 the Sole Gateway?", 20 *Insolvency Intelligence* 56 (2007)). Article 7 of the UNCITRAL Model Law provides that "[n]othing in this law limits the power of a court… to provide additional assistance to a foreign representative under other laws of [the enacting] state". Chapter 15 contains no such provision and thus has led some to question whether Chapter 15 is the sole gateway for foreign representatives to seek comity in US courts.

Further, the permissive language in Section 1509(d) that a [bankruptcy] may "prevent the foreign representative from obtaining comity or cooperation from courts in the United States" if recognition is denied carries the necessary implication that the court could still grant comity even if recognition is denied. Therefore, Section 1509 of the Bankruptcy Code does not curtail the bankruptcy court's consideration of the principle of comity.

In fact, according to the HR Report, comity is referenced at the forefront of Chapter 15's statement of purpose to "make clear that it is the central concept to be addressed" (HR Report at 109). Thus, it stands to reason that comity is the lens through which to view the statute as a whole, as well as its individual provisions. There is nothing in the statute to indicate that the statutory purposes set forth in Section 1501 – including comity and cooperation – are to be cast aside when reading the recognition provisions of Sections 1515 to 1517.

In the absence of Congressional direction to the contrary, "the doctrine [of comity] may properly be used to interpret any statute… because Congress legislates against a backdrop that includes those international norms that guide comity analysis" (see *Maxwell*, 93 F 3d at 1048). This maxim applies with special force in the case of a statute that explicitly cites comity as its overarching principle. Thus, where Congress has affirmatively legislated that comity be considered when interpreting Chapter 15, and when the legislative history of Chapter 15 and the impetus for enactment thereof affirm these conclusions, Chapter 15 should be read in a pragmatic and flexible manner by courts so as to reflect Congress's intent to foster comity and cooperation between US and foreign courts. Indeed, at least two courts applying the recognition provisions have utilised pragmatic approaches that allowed the principle of comity to guide such courts' interpretation and application of Chapter 15, with an eye towards the detrimental effect on comity that would occur if US courts considered the principle of comity only upon recognition (see *In re Schefenacker PLC*, Chapter 15 Case 07-11482 (Bankr SDNY June 15 2007) – granting recognition to a UK proceeding without making a finding as to whether the proceedings constituted foreign main or foreign non-main proceedings; *In re SPhinX, Ltd*, 351 BR 103, 120 (Bankr SDNY 2006) – applying Chapter 15 pragmatically based on the understanding that recognition should be withheld only in very limited circumstances and noting that "the reasonable interests of creditors and the maximization of value, as well as considerations of international comity, generally support the bankruptcy court's deference to [a foreign] proceeding"). In both cases the courts permitted comity to permeate the recognition proceedings from the start to assist with the interpretation of Chapter 15 and to guide the determination of whether to grant recognition.

Conclusion

Thus, in enacting Chapter 15 Congress envisioned a flexible and pragmatic application and interpretation of the law, with comity as a persuasive backdrop. Congress's intent is made clear in several pronouncements:

- the legislative history stating that the express purpose of Chapter 15 is "to promote international comity and greater certainty";
- the reference to comity in the statute's introductory language "to make clear that it is the central concept to be addressed"; and
- the provision of Section 1507 directing courts to address the list of factors to be considered in determining whether to grant additional assistance in a manner that is "consistent with principles of comity".

If US courts determine that comity comes into play only upon the granting of recognition, the purpose of Chapter 15's codification of the UNCITRAL Model Law (and its goal of uniformity of application and interpretation) will suffer a major setback.

As with any new legislation, the courts and commentators are actively engaged in the typical

early-stage dance of influencing the ultimate interpretation of Congress's intent. The authors think the intent was clear that US courts are to be guided in dealing with foreign insolvency proceedings by the principle of comity. At the time of writing, the interpretation of the provisions and nuances of Chapter 15 is in its infancy as few US courts have interpreted the statute and the continued role of comity. Given the global economy, these issues, including the proper role of comity in interpreting Chapter 15, will no doubt come to the forefront. Although there may be bumps in the road, case law should evolve in line with the longstanding tradition of US courts' recognition of the importance of comity and cooperation with foreign courts.