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Chapter 15 of the United States Bankruptcy Code: A Very Brief Overview for Non-US Practitioners

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The rise of a global economy has itself given rise to a very practical question: What happens when a business with cross-border debt, assets, and business relationships faces insolvency?

Where commercial insolvency is concerned, firms with cross-border business relationships face essentially the same issues as their domestic counterparts – but with one additional consideration. Unlike their domestic counterparts, cross-border firms operating under judicial protection[1] while they reorganise or liquidate must also consider the question of how best to extend that protection as far as their business interests.

This very practical, economic question implicates a number of fundamental, philosophical ones: For example, should national borders afford some creditors of a cross-border firm a legal or judicial advantage over others? Should debtors be able to 'forum shop' in advance by registering or incorporating in debtor-friendly jurisdictions, or by 'parking' assets in jurisdictions beyond the reach of creditors?

An adequate discussion of the philosophy and policy underlying the daily realities of cross-border insolvency is well beyond the scope of this brief article. The following discussion instead seeks a far more modest goal: To trace the broad outlines of cross-border insolvency practice in one of the world's leading insolvency jurisdictions – the US. More specifically, it will address the question of how US law and US Bankruptcy Courts treat the business interests of those insolvent debtors who are reorganising or liquidating beyond the reach of domestic US insolvency law.

The problem

American cross-border insolvency law is designed to address the following fundamental problem (illustrated by Figure 1):

A foreign (non-US) debtor, operating under judicial protection in an insolvency proceeding *outside* the US, needs to address claims, administer assets, or prosecute recoveries pending *inside* the US. How best to do this?

The solution

US law has recognised three primary routes to addressing this problem:

– The debtor (or its court-appointed representative) may commence an insolvency proceeding in the US, under US law (i.e., under Chapters 7 or 11 of the US Bankruptcy Code). For many firms seeking to reorganise, this approach has much to commend it: American bankruptcy law permits any (natural or corporate) 'person' with 'domicile, place of business or property' in the US to be a debtor under the Bankruptcy Code.[2] The broad applicability of US insolvency law, combined with its generally 'debtor-friendly' provisions, have made the US a 'forum of choice' for many debtors otherwise operating or headquartered outside the US.

  But the benefits of American insolvency law are not without commensurate burdens. First, US bankruptcy proceedings are notoriously costly. Second, they are frequently cumbersome in terms of the regulatory compliance imposed by the US Department of Justice, operating through the Office of the United States Trustee. And third, some firms may find it otherwise tactically advantageous to remain outside the US.

– Historically, it was common to make a general request for 'comity' (i.e., deference and enforcement) with respect to administrative and other decisions

Notes

1 Of course, not all firms facing insolvency resort to judicial protection. The reality is that many insolvent firms – or their creditors – instead simply rely, for a variety of reasons, on 'self-help.' Since it discusses the law of insolvency in a cross-border context, this article limits its discussion to those debtors (or creditors) who have sought some type of formal, judicially-supervised or statutorily recognised insolvency proceeding.

2 11 USC 109(a).

Figure 1.

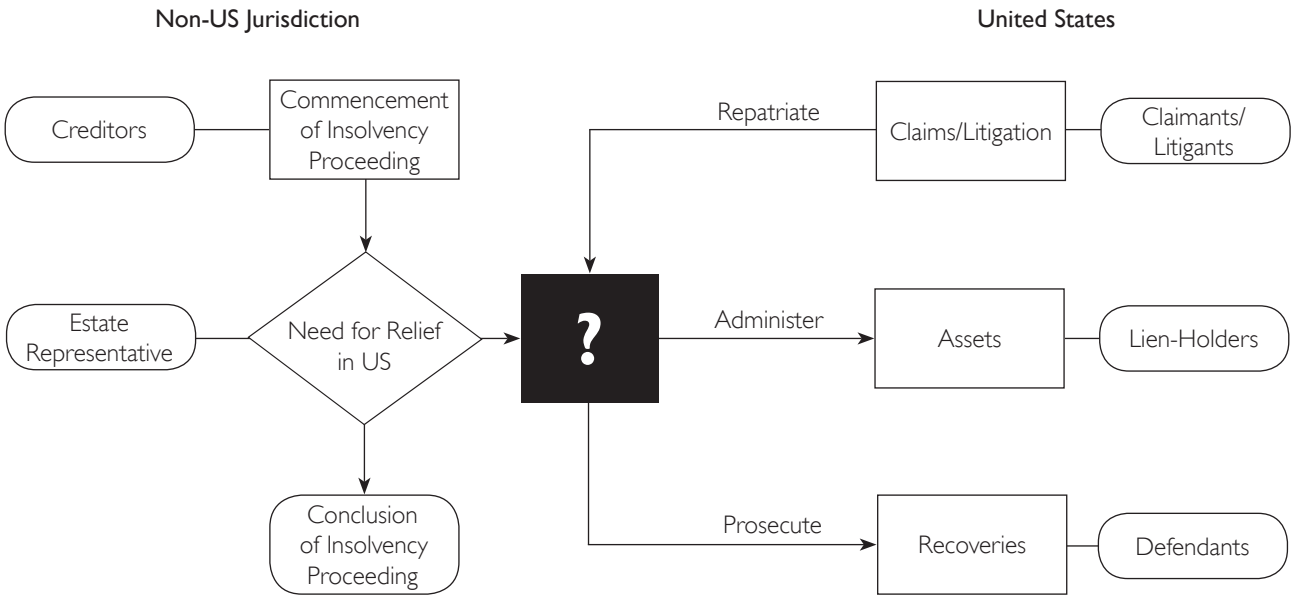
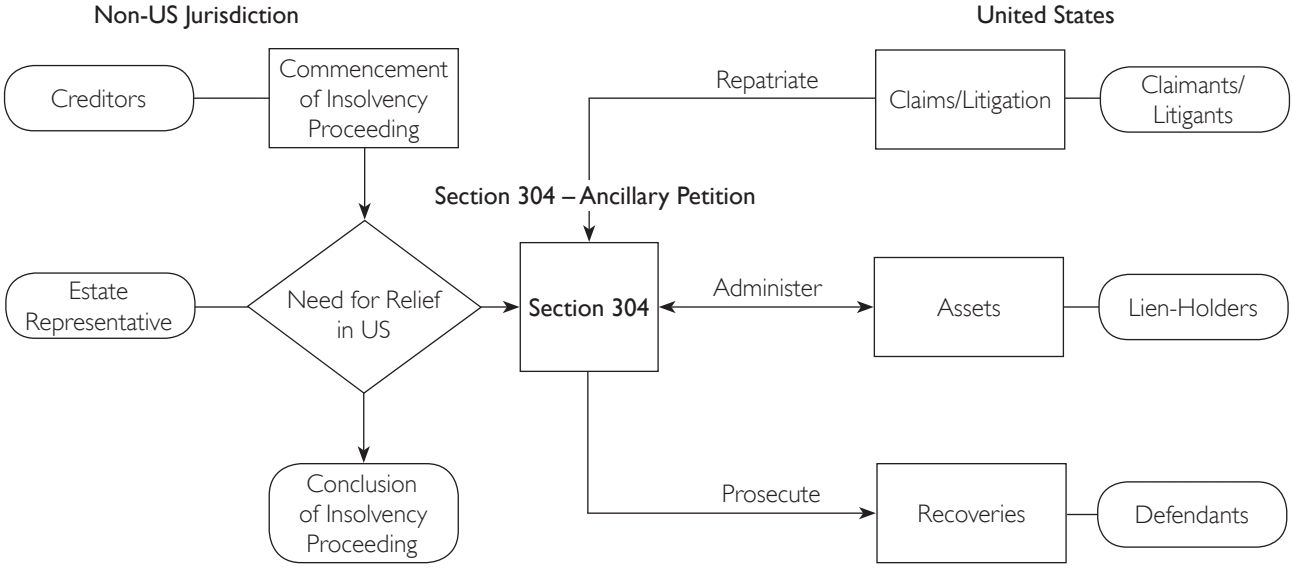


Figure 2.



rendered by a non-US insolvency court.[3] Requests for 'comity' were made of the US District Court, and were typically heard and approved on a case-by-case basis.

Early efforts to bring some degree of predictability to this process took the form of a single statute – former Section 304 of the US Bankruptcy Code – which authorised US Bankruptcy Courts (operating under the auspices of the US District Courts) to (i) enjoin litigation or judgment enforcement against a debtor or the debtor's property; (ii) require the turnover of property to the debtor or its foreign-court-appointed administrator; and (iii) provide 'other appropriate relief.' Though the statute was drafted with an eye to some specific types of commonly-requested relief, the main consideration continued to be the fact-intensive, often case-specific application of principles of judicial 'comity.' See Figure 2.

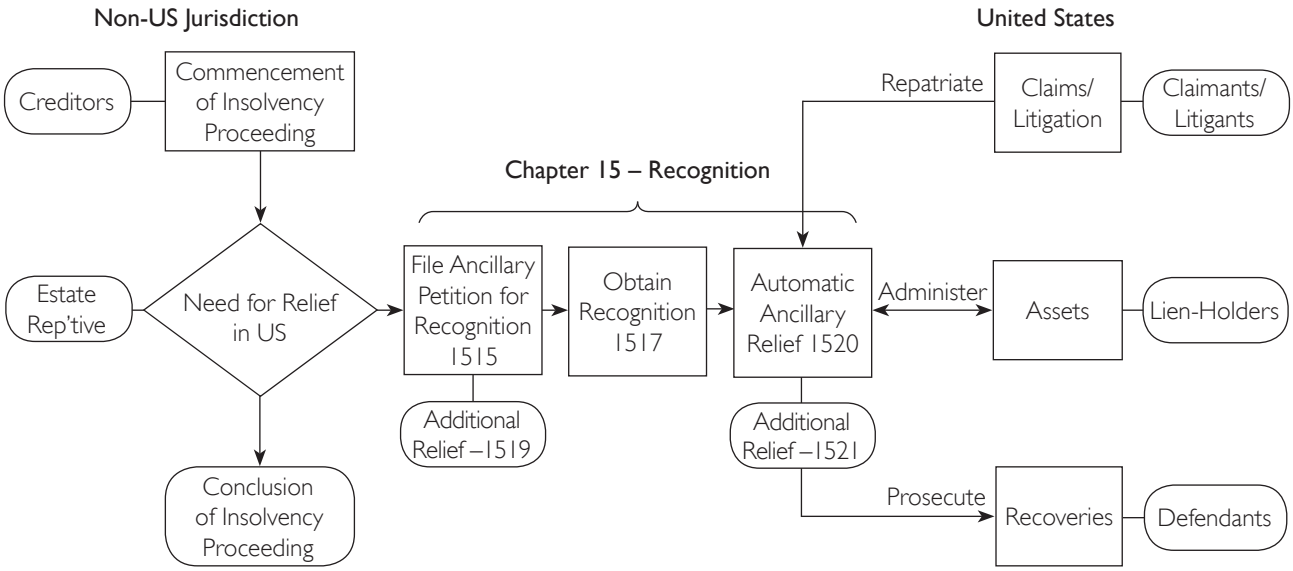
– This historic, *ad hoc* approach to 'comity' has been incorporated and further streamlined by the provisions of Chapter 15 of the US Bankruptcy Code, which (with only minor exceptions) makes 'recognition' under that Chapter the exclusive gateway to US courts for foreign debtors and their court-appointed representatives, and provides for additional cooperation between US and non-US courts. Recognition under Chapter 15 invokes the jurisdiction of the US Bankruptcy Court to further the administrative needs which arise in a non-US insolvency proceeding. See Figure 3.

Chapter 15: a very brief introduction

Chapter 15 was added by Congress in 2005 as part of the sweeping 'Bankruptcy Abuse Prevention and Consumer Protection Act' (BAPCPA) amendments implemented that year. It represents a complete overhaul of the US Bankruptcy Code's cross-border provisions.

As the focus of this article suggests, Chapter 15 is most often used in the cross-border business context. Its flexibility and streamlined procedure is designed for ease of use with larger, multi-national corporations, as well as closely-held, 'sole shareholder' enterprises with cross-border relationships and ownership.[4] Further, it may be – and has been – used for high-asset individuals with property interests and holdings located in the US.[5]

Figure 3.



Notes

3 The concept of 'comity' – a case law doctrine by which US courts attempt, where possible, to defer to and enforce the judgments and decisions of foreign courts – goes well outside the scope of this article, but remains an important underlying concept of present US law. It is codified under Section 1509(b) of the present Bankruptcy Code. See 11 USC 1509(b)(3).

4 *See, e.g., In re Iida*, 377 BR 243 (Bankr 9th Cir. 2007) (case involving Hawaiian corporations owned or controlled by a sole Japanese shareholder).

5 *See, e.g., In re Loy*, 380 BR 154 (Bankr. ED VA 2007) (case involving individual English debtor with real property interests in US).

Chapter 15's primary advantage over prior law is that it adds procedural structure and certainty to what used to be a single statute, somewhat unpredictably applied. Specifically, it provides foreign debtors and their administrators with 'turn-key' compliance for requests for recognition from US courts. In certain cases (described below), it also provides for 'automatic' relief once that recognition is granted.

What follows is a very brief overview of how the statutory scheme works, and what sorts of relief it affords.

Requesting recognition

Obtaining recognition of a non-US insolvency proceeding in a US Bankruptcy Court under Chapter 15 is a straightforward process. There must be evidence of:

- A recognisable 'foreign [insolvency] proceeding' (US law recognises two distinct types: 'main' or 'nonmain' proceedings);[6] and
- A properly designated 'foreign [i.e., non-US] representative.'[7]

The procedural steps for obtaining recognition are equally direct. Recognition requires:

- A petition for recognition, filed by a foreign representative;
- A filed, certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; and
- A certificate from the foreign court affirming the existence of such proceeding and of the appointment of the foreign representative.[8]

Once these requirements are met, the US Bankruptcy Code specifies that recognition 'shall' be granted after a noticed hearing, held 'at the earliest possible time.'[9] Perhaps because of its intended user-friendliness, Congress further provided that Chapter 15's recognition process be the exclusive means of access to US Courts for non-US debtors and their administrators.[10]

Unfortunately (or perhaps fortunately for lawyers), the statute's simplicity has not entirely eliminated litigation over this procedure. Early on, US Bankruptcy Courts had to address definitional issues under the statute. What was meant, for example, by the term 'foreign proceeding' as it is used in Chapter 15?[11] Courts initially had to grapple with other terms as well, such as what constitutes a '[foreign] main proceeding' (and the related determination of what is a debtor's 'centre of main interests');[12] and who may be a proper 'foreign representative.'[13]

What if recognition isn't quick enough?

For all the simplicity and straightforwardness of Chapter 15's recognition process, Congress recognised that foreign representatives might be faced with administrative needs which might not wait until the 'earliest possible time' for recognition. As a result, Chapter 15 provides for some limited, pre-recognition relief under certain circumstances. Section 1519(a) in particular provides a number of means by which foreign representatives may preserve and protect assets or further non-US litigation which may be ongoing.[14] The statute also provides for further 'additional relief' of an interim nature (discussed below).

This 'pre-recognition relief' is subject to certain exceptions, such as governmental exercise of 'police powers' or the normal functions of the financial markets.[15] These exceptions are similar to those applicable after recognition applies,[16] or under other domestic bankruptcy cases. The standards for obtaining this relief are generally the same as those applicable to the procurement of a temporary injunction under domestic US law.[17]

Notes

6 The terms 'foreign main proceeding' and 'foreign nonmain proceeding' are defined at 11 USC 1502.
7 The terms 'foreign proceeding' and 'foreign representative' are defined at 11 USC 101(23), (24).
8 11 USC 1515(a), (b).
9 11 USC 1517(c).
10 11 USC 1509(b), (c), (d). The statute provides minor exceptions at 1509(f).
11 *In re Betcorp*, 400 BR 266 (Bankr. D. Nev. 2009) (deeming an Australian voluntary winding-up to be a 'foreign proceeding').
12 *See, e.g., In re SPhinX, Ltd.*, 351 BR 103 (Bankr. SDNY), aff'd. 371 B.R. 10 (SDNY 2007) (Model Law's presumption that a debtor's 'Centre of Main Interests' is its place of registration is rebuttable by a showing that it is a 'letterbox' company not carrying out any business in the territory in which its registered office is situated); *see also In re Ran* 390 BR 257 (Bankr SD Tex 2008), aff'd. 406 BR 277 (SD Tex 2009), aff'd. 607 F3d 1017 (5th Cir 2010) (providing extensive discussion, in an individual case, of what may constitute a debtor's 'Centre of Main Interests' for purpose of recognising a 'foreign main proceeding').
13 *In re ABC Learning Centres Ltd.*, 445 BR 318 (Bankr. D. Del. 2010) (individuals whom the debtors' creditors appointed as liquidators in an Australian voluntary winding up were 'foreign representatives' within the meaning of the statute).
14 11 USC 1519(a).
15 11 USC 1519(f).
16 11 USC 1521(f).
17 11 USC 1519(e).

Once recognition is granted, what then?

Once a 'foreign proceeding' is recognised, what happens next is dependent on whether that proceeding is a 'main' proceeding, or a 'nonmain' one:[18]

- Upon recognition, the foreign representative in a 'foreign main proceeding' is entitled to (i) immediate application of the same automatic stay[19] which applies in domestic bankruptcies; (ii) the ability to use, sell, or lease property located in the US within the 'ordinary course' of the debtor's business;[20] and (iii) the ability to avoid any post-petition transfers of, or liens against, the debtor's US-based property.[21] Importantly, *all* of this relief is *automatic*, and applies *without* the petitioning representative's need to specifically request it.[22]
- By contrast to a 'foreign main proceeding,' the representative of a 'foreign *non*main' proceeding is entitled to *no* automatic relief upon recognition, but *is* entitled to other, 'appropriate relief' upon specific request.[23]

Recognition and 'additional relief'

As noted above, foreign representatives may request 'additional relief' beyond that specified in Chapter 15 – either prior to recognition,[24] or upon recognition.[25]

- Pre-recognition relief provides additional flexibility for foreign representatives. Common requests under this section include preliminary approval of actions in furtherance of pending matters in the non-US case, such as expedited sale procedures motions or post-petition financing, pending recognition.
- Once recognition is granted, 'additional relief' is available in both 'main' and 'nonmain' proceedings. Post-recognition 'additional relief' includes, among other things, a stay of actions 'concerning the [d]ebtor's assets, rights, obligations or liabilities' to the extent not *already* stayed by Section 1520 (i.e., through the application of Section 362's 'automatic stay' upon recognition of a 'main proceeding');[26] furtherance of discovery;[27] and the effective administration of the debtor's US assets.[28]

The general thrust of these provisions is to preserve US assets or further non-US litigation. 'Additional relief' generally *does not* include avoidance actions and recoveries available under domestic US bankruptcy law.[29]

Recognition and 'additional assistance'

Where the evidentiary burdens of 'additional relief' are too great, or otherwise not applicable, upon recognition, 'the [bankruptcy] court ... may provide additional assistance [to a foreign representative] ... under [the Bankruptcy Code] or [other US law].'[30]

The 'additional assistance' provision is a 'catch-all' statute, providing for additional (albeit limited) relief, entirely within the Bankruptcy Court's discretion. An early case[31] recognises that in exercising this discretion, the Bankruptcy Court should be guided by principles of comity (discussed above), and should weigh:

- The 'just treatment' of claim and interest holders;
- The 'protection of [US] claim holders' against prejudice and inconvenience in foreign proceedings;
- The prevention of preferential and fraudulent transfers;
- The ability of creditors to realise distributions 'substantially in accordance' with the Bankruptcy Code; and, if applicable,

Notes

18 Though the terms 'foreign main proceeding' and 'foreign nonmain proceeding' are admittedly somewhat awkward, they are employed to make a relatively straightforward distinction between an insolvency proceeding (i) in a jurisdiction where the foreign debtor maintains its 'centre of main interests' (a 'main' proceeding); and a proceeding (ii) in a jurisdiction *other* than the one where the foreign debtor's 'centre of main interests' is located (a 'nonmain' proceeding). *See* 11 USC 1502(4), (5).
19 11 USC 362.
20 11 USC 363. This 'ordinary course use' authority is nevertheless subject to prohibitions against the use of 'cash collateral' (i.e., cash which serves as collateral for the debtor's obligations to a secured creditor) without further review and approval of the US Bankruptcy Court.
21 11 USC 549, 552.
22 11 USC 1520.
23 11 USC 1521(a).
24 11 USC. 1519(a).
25 11 USC 1521(a).
26 11 USC 1521(a)(2).
27 11 USC 1521(a)(4).
28 11 USC 1521(a)(5).
29 11 USC 1521(a)(7) (carving out certain avoidance actions available under other chapters of the US Bankruptcy Code).
30 11 USC 1507(a).
31 *In re Atlas Shipping A/S*, 404 B.R. 726, 740-41 (Bankr. SDNY 2009).

– The provision of a 'fresh start.'

Though employed less often than the 'additional relief' provisions outlined above, Bankruptcy Courts have reviewed requests for 'additional assistance' in connection with the application of Bankruptcy Code tolling statutes to avoidance actions[32] and requested access to e-mails in connection with non-US litigation.[33]

What type of relief *isn't* available?

As the foregoing discussion suggests, one of the primary policy aims of US cross-border insolvency law (and of Chapter 15 in particular) is to minimise the impact of national borders on global business. But this is not to say that national borders have no bearing whatsoever on insolvency – or that US cross-border law is entirely devoid of national interest.

The relief outlined above – and in particular, the 'additional relief' and 'additional assistance' provisions of Section 1519, 1521, and 1507 – remains bounded by two primary concerns: US 'public policy' and the 'interests of creditors,' as each are assessed from an American point of view.

The 'public policy exception'

Section 1506 provides, simply, that '[n]othing ... prevents the court from refusing to take an action governed by this chapter if [it] would be manifestly contrary to the public policy of the United States.'[34] Though very easy to articulate, Chapter 15's 'public policy exception' raises several potentially very difficult questions:

– What exactly *is* the 'public policy' of the United States on insolvency-related matters? Is it the US Bankruptcy Code (and if so, isn't the 'public policy exception' then simply an indirect means of ensuring that all cross-border relief complies with domestic US insolvency law)? Something less than – or different from – the US Bankruptcy Code (and if so, where does one then reliably look for 'US public policy' as to insolvency-related matters)?
– What relief applicable to a 'foreign proceeding' might be said to be 'manifestly contrary' to US public policy, so that the 'public policy' exception applies? And what relief might be said to be only 'slightly divergent' from it, so that the exception *doesn't* apply?
– Finally, the statute is, by its terms, entirely discretionary: Bankruptcy Courts are not '*prevented*' from applying the exception in any particular set of circumstances. But neither are they *required* to apply it. What criteria ought to guide a US Bankruptcy Court in exercising discretion either way in applying this exception?

In general, Bankruptcy Courts are in agreement that the statute should be narrowly construed, and 'invoked only under exceptional circumstances concerning matters of fundamental importance for the United States.'[35] Though this might seem to be merely restating the statute while resolving none of its original ambiguity, Courts have focused on a few specific circumstances in applying the 'public policy' exception:

– Relief which would occasion or perpetuate 'procedural unfairness,'[36] as 'unfairness' might be viewed from the perspective of Anglo-American judicial tradition (e.g., lack of due process).
– Relief would '"severely impinge the value and import" of a U.S. statutory or constitutional right, such that granting comity would "severely hinder United States bankruptcy courts' abilities to carry out ... the most fundamental policies and purposes' of these rights."'[37] In other words, relief which would either (i) restrict the ability of a US Bankruptcy Court to apply US law to the same proceeding where circumstances required it; or (ii) entirely circumvent US law to achieve what would otherwise be impermissible in a US Court.

The 'interests of creditors and other interested entities, including the debtor'

Section 1522(a) conditions the 'additional relief' discussed above upon the 'sufficient protection' of 'creditors and other interested entities.'[38] Section 1522(a) is entirely discretionary in its application. The standards which inform that application focus on 'the need to tailor relief and conditions so as to balance the

Notes

32 *In re Fairfield Sentry Ltd.*, 452 B.R. 52, 63 (Bankr. SDNY 2011) (request granted, under both 1507 and 1521(a)).
33 In re *Toft*, 453 BR 186 (Bankr SDNY 2011) (request denied on the basis of the 'public policy exception' (discussed below)).
34 11 USC 1506.
35 *In re Vitro S.A.B. de CV*, 701 F.3d 1031, 1069-70 (5th Cir. 2012) *cert. dismissed,* 12-1177, 2013 WL 1629212 (U.S. Apr. 16, 2013) (quoting *In re Ran,* 607 F.3d 1017, 1021 (5th Cir. 2010)). *See also In re Fairfield Sentry Ltd.*, 2013 WL 1593348 (2d Cir. Apr. 16, 2013).
36 *In re Vitro, S.A.B. de C.V.,* 473 B.R. 117, 123 (Bankr. N.D. Tex. 2012) (quoting *In re Qimonda AG Bankr. Litig.*, 433 B.R. 547, 568-69 (E.D. Va. 2010)).
37 *Id.*
38 11 USC 1522(a).

relief granted to the foreign representative and the interests of those affected by such relief, without unduly favoring one group of creditors over another.'[39]

Conclusion

As the global economy grows ever more integrated, the resolution of corporate insolvency will increasingly involve cross-border business interests. Chapter 15 – and statutes like it in other commercially sophisticated jurisdictions – represents a significant move forward in balancing and protecting these interests, and in making corporate rescue a more efficient and economically valuable endeavour.

Notes

39 *In re Tri-Cont'l Exch. Ltd.*, 349 B.R. 627, 637 (Bankr. E.D. Cal. 2006).

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International Corporate Rescue addresses the most relevant issues in the topical area of insolvency and corporate rescue law and practice. The journal encompasses within its scope banking and financial services, company and insolvency law from an international perspective. It is broad enough to cover industry perspectives, yet specialized enough to provide in-depth analysis to practitioners facing these issues on a day-to-day basis. The coverage and analysis published in the journal is truly international and reaches the key jurisdictions where there is corporate rescue activity within core regions of North and South America, UK, Europe Austral Asia and Asia.

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