

**UTILIZING CROSS-BORDER INSOLVENCY LAWS
TO ATTACK FRAUD:
AN ANALYSIS ON HOW IT COULD WORK**

THE UNITED STATES EXPERIENCE

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I. INTRODUCTION

With the receivership of Fraudsters under way in the British Virgin Islands ("BVI"), and the BVI Liquidator beginning to assemble and liquidate its assets, he will eventually be forced to consider what to do with Fraudsters' assets in the United States. The sooner that he does this, the better, because local creditors can seize those assets or encumber them with valid liens. Fraudsters has two assets in the United States of interest to the BVI Liquidator: (i) a bank account in New York; and (ii) Fraudsters United, Inc., Fraudsters' wholly-owned subsidiary located in Dallas, Texas and organized as a Texas corporation, which owns bank accounts in Florida and in Canada. His goal with respect to those two assets will be to obtain their benefit, and to distribute that benefit, if any, under the rules and laws applicable to the BVI Receivership, as opposed to a potentially haphazard, contradictory, and inequitable dismemberment that would occur through multiple, independent actions taken by creditors against those assets.

The United States, recognizing the importance of uniformity in international insolvencies, and in light of the rise of their number and the extent of their economics, has recently provided the BVI Liquidator with a new tool to help him obtain the benefits of Fraudsters' United States assets and to assist him and the BVI court that appointed him to fulfill his duties. This new option is Chapter 15¹ ("Chapter 15") of the United States Bankruptcy Code ("Bankruptcy Code")² – a powerful new tool in cross-border insolvencies.

This section is intended to provide the experienced practitioner with a detailed understanding of Chapter 15 through the eyes of the BVI Liquidator and answer the initial questions he is sure to ask. First, what exactly is Chapter 15, and what is the Bankruptcy Code? Second, are there alternatives to Chapter 15, and what are the advantages, if any, to Chapter 15 over those alternatives? Third, how does Chapter 15 work? Finally, how does the BVI Liquidator initiate a Chapter 15 bankruptcy case and what happens thereafter?

While the authors of this section of the Article have extensive insolvency, receivership, and bankruptcy experience, they caution the reader that much is not yet known about Chapter 15 (including basic questions as to its constitutionality³) simply because it is new. A reader reviewing this Article in the future must seek appropriate

¹ 11 U.S.C. §§ 1501-1532 (2005).

² *Id.* §§ 101, *et. seq.*

³ By way of a very brief explanation, bankruptcy judges are not so-called Article III federal judges, referring to Article III of the United States Constitution. Article III judges are appointed by the President and approved by the Senate, with lifetime tenure, who cannot be removed except by impeachment in the Senate. The United States Supreme Court once before ruled that portions of the Bankruptcy Court were unconstitutional because it granted too much judicial power to bankruptcy judges without the protections that the Constitution confers on Article III judges. Certain aspects of Chapter 15 may raise the same constitutionality issues. Most problematic is the power that Chapter 15 grants to bankruptcy judges to determine the public policy of the United States, as discussed below. It is conceivable that the Supreme Court could find this provision unconstitutional, since the determination of what is the public policy of the United States may require it be determined by an Article III judge.

counsel before he relies on this section of the Article. In fact, it will quickly become apparent to the reader that this Article has very few citations to cases for the simple reason that those cases do not yet exist.

II. WHY CHAPTER 15?

A. CHAPTER 15 WITHIN THE BROADER UNITED STATES BANKRUPTCY CODE

Chapter 15 became law in April, 2005, and became effective in October, 2005, as part of the comprehensive Bankruptcy Abuse, Prevention and Consumer Protection Act of 2005. Chapter 15 represents the United States' implementation of the Model Law on Cross Border Insolvency propounded by the United Nations Commission of International Trade Law. As such, Chapter 15 should be somewhat familiar to practitioners fluent in the Model Law, with some significant changes designed specifically to harmonize that law with the federal system and jurisdictional limitations constitutionally imposed on United States courts in general.

Chapter 15 is only one of several chapters of the Bankruptcy Code, with each chapter providing a different treatment of the debtor and its liabilities, sometimes in substantial ways. For purposes of the BVI Liquidator, however, only two of those chapters are relevant: Chapter 7 and Chapter 11.⁴ Chapter 7 of the Bankruptcy Code contains the liquidation provisions, under which the assets of the debtor are collected and liquidated by a neutral, third party trustee for the benefit of the debtor's creditors, and during which the business of the debtor ceases to operate with limited exceptions. Chapter 11, on the other hand, contains the provisions applicable to corporate reorganizations (but has been utilized by wealthy individuals), during which either the corporation retains control of its assets and operations, or a trustee is appointed to handle those responsibilities. The end goal of Chapter 11 is the submission of a plan of reorganization (or liquidation) which is affirmatively voted on by the creditors, and approved or "confirmed" by the bankruptcy court. While Chapter 7 includes only one statutorily prescribed mechanism for liquidation and distributions to creditors, Chapter 11 is exceedingly broad and flexible in its application. Frequently, it is only the imagination of the principal parties, together with the votes of the requisite number of creditors, that provides the boundaries of what the reorganization plan will provide.

A few more points concerning the Bankruptcy Code discussed below will be of importance to the BVI Liquidator. Under any chapter of the Bankruptcy Code, the administrative costs of liquidation or reorganization will be an important issue — and potentially a determinative one. Attorneys' fees, costs of court, and the fees of officially appointed committees and their counsel are all borne by the debtor. Sometimes the potential costs of bankruptcy professionals favor an out-of-court resolution. Additionally, the debtor and its assets are subject to the jurisdiction of the bankruptcy court — a federal court that sits without a jury (except in extremely rare situations) — and the court's mandate, schedule, and personality must be taken into account. Since most

⁴ The Bankruptcy Code contains the following additional chapters: 9 (reorganization by state and local municipalities), 12 (reorganization by family farmers), and 13 (reorganization by consumer debtors).

actions affecting the debtor and its assets which are not in the "ordinary course of business" require court approval, the creditors and other parties-in-interest are entitled to notice of proposed actions, and the right to object to those actions. Frequently, litigation will result over matters as simple as the decision to sell a particular asset, compromise a particular debt, or distribute particular funds. The decisions affecting the estate and its assets are transparent and are frequently subjected to microscopic examination and analysis. Moreover, for constitutional reasons outside the scope of this Article, bankruptcy courts are courts of limited jurisdiction, and a complicated jurisdictional and appellate process has been installed so as to give bankruptcy courts the leeway they require, while still complying with constitutional requirements.

It must also be remembered that, although the Bankruptcy Code is statutory, the legal system implementing it is based on the common law and on *stare decisis* – (i.e., legal precedents). This raises two issues for the BVI Liquidator. First, since Chapter 15 is new, it has yet to be adequately examined by courts in several important respects, and certain "missing pieces" have yet to be filled-in (although they will, and this consideration will lose importance with time). It will be critical for the BVI Liquidator to consult *capable* American bankruptcy counsel who will have access to the latest judicial interpretations of Chapter 15. Second, and equally as important, even when Chapter 15 is reviewed and interpreted by various courts, and the BVI Liquidator has comfort that he fully understands it, many of the collateral areas of law that are implicated, such as jurisdictional issues, jury rights, abstention doctrines, and underlying substantive law, are creatures of the common law which the BVI Liquidator may never suspect even exist (or understand, for that matter).

In this instance, however, *stare decisis* has an expanded role – much more so than with most United States laws – because under Chapter 15, the bankruptcy court is commanded to "consider its [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."⁵ This is a very rare example in which United States courts are not only encouraged, but indeed, instructed to look to the laws of other countries implementing the Model Law for appropriate guidance and judicial harmony, which may be of particular benefit to the foreign practitioner who is knowledgeable of a foreign court's application of the Model Law in areas where United States courts have yet to speak.⁶

B. OTHER BANKRUPTCY / NON-BANKRUPTCY OPTIONS FOR THE BVI LIQUIDATOR

While Chapter 15 promises to be a powerful and effective international insolvency tool, it can be costly and complicated, and even a meritorious Chapter 15 petition may not be recognized or granted by the bankruptcy court. As an initial matter, therefore, the BVI Liquidator has to analyze whether filing a Chapter 15 case is in his

⁵ 11 U.S.C. § 1508.

⁶ As a side note, the language of Chapter 15 is not the standard language of American insolvency law. Phrases such as "center of debtor's main interests" and "habitual residence" are not typical phrases of American insolvency jurisprudence. Therefore, foreign interpretations of these critical provisions may assist the United States bankruptcy court in its interpretation.

best interests, or whether other non-bankruptcy or bankruptcy but non-Chapter 15 alternatives exist. This evaluation will be heavily dependent on the unique facts presented in each case. In fact, Chapter 15 contains a specific provision which provides that relief under Chapter 15 is cumulative of the foreign representative's rights, and the failure to file a Chapter 15 petition "does not affect any right the foreign representative may have to sue in a court in the United States to collect or recover a claim which is property of the debtor."⁷ Moreover, Chapter 15 specifically recognizes, and does not restrict, the ability of a foreign representative to commence a non-Chapter 15 bankruptcy case, if he otherwise has the authority to do so.⁸

With respect to the New York bank account, if the order appointing the BVI Liquidator grants him control over all of Fraudsters' assets, wherever located, the BVI Liquidator may not need to file a Chapter 15 petition, or any court proceeding, in order to obtain access to the bank account. He ought to be able to communicate with the bank, present evidence of his credentials and authority, and, as the *de facto* owner of the account, the New York bank should comply with his instructions concerning the account. This is especially so if a treaty exists between the United States and the country appointing a foreign receiver, or if the New York bank has assets in that country which it wants to protect by complying with its judicial processes even if it might not otherwise have to do so.

However, merely instructing the New York bank to transfer Fraudsters' funds may be (and often is) impossible for several reasons. Among other things, people defrauded by Fraudsters may have seized, attached, or commenced garnishment actions against the account (legal processes to essentially freeze the account so that it can be used to pay a judgment). In light of the notoriety surrounding Fraudsters' downfall, it would be likely that one or more creditors would have taken some legal action, whether they be creditors in the United States or from other countries, as foreigners typically have access to United States courts. Or, the funds in the account may be subject to a preexisting lien. Alternatively, the United States or a state agency might order the account frozen and forbid the bank from accessing or transferring the funds. Of course, the New York bank may simply not be satisfied with the BVI Liquidator's authority over the account, or it may have received conflicting instructions regarding the funds and does not want to risk liability, or it may itself have setoff or other claims to the funds on deposit.⁹

⁷ *Id.* § 1509(f).

⁸ *See id.* § 1520(c).

⁹ The potentials are illustrated by a recent Chapter 15 case in California concerning several Saint Vincent and the Grenadines' (SVG) entities, including Tri-Continental Exchange, Ltd. In that case, the SVG receiver filed a Chapter 15 concerning approximately \$1.6 million that had been seized by the United States from the bank accounts of the debtor, the debtor's attorney, and the debtor's attorney's law firm. The United States then began a forfeiture proceeding against the \$1.6 million, claiming that the funds were the proceeds of fraud. At least two defrauded creditors, the attorney for the putative debtor, and the attorney's law firm intervened in the forfeiture proceeding claiming rights to the funds. Had they succeeded, they would have obtained the funds at the expense of the debtor's other defrauded creditors, which is why the SVG receiver filed the Chapter 15 case. The United States supported the Chapter 15 case, agreeing with the

The situation regarding Fraudsters United, Inc. in Dallas, Texas is more complicated. First, if this is a solvent, legal, and profitable company, why liquidate it? Perhaps the BVI Liquidator can simply sell the stock to a third party and use the proceeds of that sale to benefit Fraudsters' creditors. Conversely, if Fraudsters United is insolvent, or has many of its own creditors, a sale or liquidation of Fraudsters United may be of little or no value to the BVI Liquidator, and he may wish to simply allow Fraudsters United to be wound-up under Texas state corporate laws. If the BVI Liquidator has control over the majority of the stock of Fraudsters United, he therefore has the authority to change its board of directors and undertake other actions that an owner of a corporation can undertake.

However, as with the New York bank account, complicating issues may arise. Fraudsters United owns a bank account in Miami, Florida, and in Toronto, Ontario, and those bank accounts, or the assets of Fraudsters United as a whole, may have been attached or seized by creditors or by governmental agencies. Fraudsters United may have its own set of creditors, and an orderly mechanism may be required in order to pay its separate creditors and then channel any remaining benefit to the BVI Liquidator. Of course, if Fraudsters United has assets transferred to it by Fraudsters, the creditors of Fraudsters can assert trust claims against those assets. Thus, a stay of civil litigation and the seizure of assets of Fraudsters United may be required, which may in turn require a bankruptcy to be filed regardless of the BVI Liquidator's authority over that company.

There is also the issue of control. Insolvency proceedings against Fraudsters United may already have been commenced by creditors or governmental agencies, such as by obtaining the appointment of a state court receiver to operate or liquidate Fraudsters United, which frequently occurs when a company is involved in massive fraud. In that scenario, it would be the receiver and the appointing court that would exercise management and control, and the BVI Liquidator, although he holds the company's stock, would not have any control in the liquidation proceedings, thereby thwarting his overall objectives.

Therefore, it is likely that some type of bankruptcy protection for Fraudsters United will be necessary. Nevertheless, the BVI Liquidator, as its sole shareholder, has the power under Texas corporate law and the Bankruptcy Code to cause Fraudsters United to commence a regular, *i.e.* non-Chapter 15, bankruptcy case (as the sole shareholder, the BVI Liquidator can appoint directors of his choosing to Fraudsters United's board, and those directors, or their appointed officers, can commence a

SVG receiver that Chapter 15 was the most equitable way to distribute the funds. The attorney and the creditors that intervened in the forfeiture proceeding, however, contested the Chapter 15 petition since they did not want to share the funds with other defrauded creditors. Their argument against recognition was that Chapter 15 would give preference to other creditors, ignoring the fact that, without Chapter 15, they would be the preferred creditors, and the whole point of the Bankruptcy Code is the equal treatment of similarly situated creditors. Ultimately, after a hearing on August 29, 2006, the bankruptcy court granted recognition of the Chapter 15 petition, ordered the forfeiture proceeding to cease, and ordered the seized funds deposited into a special, controlled account under its jurisdiction and the SVG receiver's control. See Case No. 2006-22652 (Bankr. E.D. Cal.).

voluntary Chapter 7 or Chapter 11 bankruptcy). This is so even after a state court has appointed a receiver for Fraudsters United.¹⁰ Of course, the directors and officers may refuse to comply, and a shareholder who is not a director or officer of a corporation may lack the ability to directly file a petition for that corporation. Indeed, it is not inconceivable that Fraudsters United's directors and officers will refuse to comply with the BVI Liquidator's instructions altogether, especially if they have in the past, or are continuing to engage in fraud or transfer assets to themselves – all of which would be jeopardized, and personal liability imposed upon them, in a bankruptcy case. Finally, even if the BVI Liquidator is successful in causing Fraudsters United to file a bankruptcy case under a chapter other than Chapter 15, he may lose control because a trustee may be appointed in a Chapter 11 case, and one is always appointed in a Chapter 7 case.

III. OVERVIEW OF CHAPTER 15

A. ADVANTAGES OF CHAPTER 15

Even though the BVI Liquidator has non-bankruptcy and non-Chapter 15 bankruptcy options, it is likely that he would seek relief under Chapter 15. This is because relief under Chapter 15 would give him more control over the liquidation of Fraudsters' United States assets, more tools to protect those assets, and more options to coordinate and synthesize any liquidation with his overall goals and the requirements of his appointing court.

1. Control

If a Chapter 15 petition is recognized, and unless the court orders otherwise, "the foreign representative may operate the debtor's business and may exercise the rights and powers of a trustee under and to the extent provided by sections 363 and 552."¹¹ Section 363 of the Bankruptcy Code generally provides that only the trustee, in this case the foreign representative, may lease or sell the debtor's property, and may make transfers outside the ordinary course of the debtor's business, with the approval of the bankruptcy court.¹² This ensures that only the foreign representative will be able to lawfully transfer assets outside the ordinary course of business, and if any such assets are transferred by someone other than the foreign representative, the transfer is subject to avoidance.¹³ Additionally, upon recognition of the foreign proceeding, the bankruptcy court may "entrust the distribution of all or part of the debtor's assets located in the United States to the foreign representative or another person . . . provided that the court is satisfied that the interests of creditors in the United States are sufficiently protected."¹⁴ Section 552 of the Bankruptcy Code generally provides that pre-bankruptcy liens do not attach to property acquired by the debtor after the petition for

¹⁰ In re: State Park Building Group, Ltd., 316 BR 466 (Bankr. N.D. Tex. 2004).

¹¹ *Id.* § 1520(a)(3).

¹² *See id.* § 363(b); (f).

¹³ *See* discussion *infra* at Section 4, p.8.

¹⁴ *Id.* § 1521(d).

recognition is recognized, meaning that the debtor will be able to generate unencumbered assets, albeit subject to significant restrictions.¹⁵

Therefore, one of the main benefits of a Chapter 15 filing, especially if managers of assets in the United States refuse to abide by the foreign representative's instructions, is that the foreign representative will be able to take control over the debtor and over any liquidation / reorganization proceedings.

2. Ability to File Bankruptcy Under Other Chapters

If the Chapter 15 petition is recognized, the foreign representative will have the authority to file a bankruptcy case under other chapters of the Bankruptcy Code (although he may have this authority without Chapter 15 as well).¹⁶ If the foreign proceeding is recognized as a "foreign main proceeding," the foreign representative will have the authority to file a voluntary bankruptcy petition on behalf of entities owned by the debtor in the United States.¹⁷ However, if the foreign proceeding is recognized as a "foreign nonmain proceeding," the foreign representative will be limited to filing an involuntary bankruptcy petition against any such entity.¹⁸ Although this provision is less desirable, since an involuntary bankruptcy may require litigation and relief is not automatic, it does nevertheless enable the foreign representative to trigger certain protections that are always triggered upon the filing of an involuntary bankruptcy petition,¹⁹ and it will force the management of the entity against which the foreign representative files the involuntary petition to treat the foreign representative seriously.

3. The Automatic Stay

Upon the recognition of a Chapter 15 petition by a bankruptcy court, the automatic stay becomes effective automatically.²⁰ The automatic stay is extremely broad and, although subject to certain limitations, it enjoins and prohibits creditors and governmental agencies from initiating or continuing a judicial proceeding against the debtor and its assets, and from seizing, foreclosing on, or setting off against the debtor's assets.²¹ "The purpose of the automatic stay . . . is to protect the debtor and his creditors by allowing the debtor to organize his affairs, and by ensuring that the bankruptcy procedure may operate to provide an orderly resolution of all claims."²² The automatic stay also prevents the proverbial "race to the courthouse," whereby the first creditor to get a judgment and a lien dismembers the debtor for his sole advantage, at the expense of other creditors.²³ In fact, the relief available to a foreign representative is even broader than is available to a domestic debtor because, while in the case of the

¹⁵ See *id.* § 552(b).

¹⁶ See *id.* § 1511(a).

¹⁷ See *id.* § 1511(a)(2).

¹⁸ See *id.* § 1511(a)(1).

¹⁹ 11 U.S.C. § 303.

²⁰ The foreign representative can request that the bankruptcy court impose the stay or other injunctive relief prior to recognition, on an interim basis, as discussed below.

²¹ See *id.* § 362(a).

²² *Pursifull v. Eakin*, 814 F.2d 1501, 1504 (10th Cir. 1987).

²³ See, e.g., *Ahlers v. Norwest Bank Worthington (In re Ahlers)*, 794 F.2d 388 (8th Cir. 1986).

domestic debtor the automatic stay is subject to various exceptions that the bankruptcy court must honor and cannot waive, Chapter 15 grants the bankruptcy court the power to stay even those actions that are not otherwise stayed by the automatic stay, if the bankruptcy court thinks it appropriate and necessary.²⁴

Since the automatic stay becomes effective automatically, the affirmative motion of a creditor, and the affirmative granting of relief by the bankruptcy court, must occur before the protections of the automatic stay with respect to any given property or action will be modified or terminated.²⁵ As such, bankruptcy courts treat the automatic stay, and any violations thereof, most seriously. Parties that violate the stay become subject to sanctions for contempt of court and to payment of actual and potentially punitive damages.²⁶ Furthermore, actions taken in violation of the automatic stay are at a minimum voidable, or void *ab initio* in some jurisdictions.²⁷ Equally as valuable, and depending on the jurisdiction, claims and causes of action owned jointly by the debtor company (or trustee) and creditors, such as alter ego, substantive consolidation, and breach of fiduciary duty actions against directors and officers, become property of the bankruptcy estate, meaning that the creditors are prohibited by the automatic stay from continuing to pursue their claims if the bankruptcy estate owns the same claims. This provides additional tools to the trustee to liquidate those claims and ensure an equitable distribution of their value.²⁸

4. Avoidance Actions

The Bankruptcy Code contains several so-called avoidance actions: actions designed to set aside fraudulent transfers (pre-bankruptcy transfers for less than reasonable equivalent value), preferential transfers (the favoring of one creditor over another), and unauthorized post-bankruptcy transfers.²⁹ Upon the avoidance of the transfer, either the property transferred or its value must be returned to the bankruptcy estate.³⁰ Avoidance actions are statutorily created and arise automatically upon the commencement of any bankruptcy case under non-Chapter 15 chapters of the Bankruptcy Code. Thus, if the foreign representative uses his Chapter 15 powers to file a regular bankruptcy case for or against an entity under the Bankruptcy Code, the avoidance powers will be available to the debtor and its estate. However, the foreign representative may face a problem if a bankruptcy case is already pending by or against an entity that he wants to administer, because only the trustee or the debtor entity has

²⁴ See *id.* § 1521(a)(1)-(2). While the bankruptcy court has this greater power, it may not enjoin a police or regulatory act of a governmental unit, including that of a criminal nature. See *id.* § 1521(d).

²⁵ See 11 U.S.C. § 362(d).

²⁶ See *id.* § 362(k).

²⁷ See, e.g., *Singleton v. Abusaad (In re Abusaad)*, 309 B.R. 895, 899 (Bankr. N.D. Tex. 2004).

²⁸ See, e.g., *S.I. Acquisition Inc. v. Eastway Delivery Serv. Inc. (In the Matter of S.I. Acquisition Inc.)*, 817 F.2d 1142, 1152 (5th Cir. 1987).

²⁹ See *id.* §§ 547; 548 and 549.

³⁰ See *id.* §§ 550; 551.

the standing to initiate avoidance actions, unless the bankruptcy court grants leave to another party to commence an avoidance action.³¹

Chapter 15 automatically grants the foreign representative that special standing: "[u]pon recognition of a foreign proceeding, the foreign representative has standing in a case concerning the debtor pending under another chapter of this title to initiate actions under sections 542, 544, 545, 547, 548, 550, 553 and 724(a)."³² This is a powerful tool because the foreign representative will not be subject to the will of a potentially hostile trustee or obstreperous debtor management (management which, for example, may have no intention of initiating avoidance actions to avoid transfers that they may have authorized to themselves or insiders).

5. Rights of Foreign Creditors

Another advantage of Chapter 15 is that it expressly provides that foreign creditors have the same rights regarding the commencement of, and participation in, a Chapter 15 proceeding as do domestic creditors.³³ Moreover, "the claim of a foreign creditor . . . shall not be given a lower priority than that of general unsecured claims without priority solely because the holder of such claim is a foreign creditor."³⁴ Foreign creditors are also to be provided notice of the Chapter 15 filing, together with sufficient time to file claims, and are entitled to notice of actions taken in the Chapter 15 case and to contest those actions.³⁵ Therefore, any fears that foreign creditors might be prejudiced in normal judicial proceedings in the United States, whether justified or not, are obviated through Chapter 15 – foreign creditors (except foreign taxing authorities) share equal rights with domestic creditors.

6. Ability to Intervene in Current Bankruptcies

In addition to obtaining access to courts in the United States in general, Chapter 15 specifically grants the foreign representative, upon the recognition of the Chapter 15 petition, the right "to participate as a party in interest in a case regarding the debtor under this title."³⁶ This is of potential significant importance, since it will mean that the foreign representative will be allowed to be heard, and to object to, actions being taken against the debtor whose assets it is administering in a foreign country in a United States bankruptcy proceeding against that debtor. It may also grant the foreign representative greater rights with respect to any bankruptcy case involving the foreign debtor's United States assets, such as a subsidiary.³⁷

³¹ See, e.g., *Girard v. Michener (In re Michener)*, 217 B.R. 263, 270 (Bankr. D. Minn. 1998).

³² *Id.* § 1523(a).

³³ See *id.* § 1513(a).

³⁴ *Id.* § 1513(b)(1).

³⁵ See *id.* § 1514(a)-(d).

³⁶ *Id.* § 1512.

³⁷ In this case, had Fraudsters United already filed a bankruptcy case, or had one been filed against it, the foreign representative should have the authority to protect his interests in such a case.

B. THE CARROT (ASSISTANCE TO THE FOREIGN REPRESENTATIVE AND THE FOREIGN COURT)

Chapter 15 contains numerous substantive advantages for a foreign representative, as discussed in greater detail in other sections of this Article, including access to courts in the United States, the imposition of the automatic stay and injunctions, and the critical consideration of control over the insolvency proceedings. However, Chapter 15 contains certain other benefits and protections worth noting, which are designed to both make the foreign representative's job easier and to protect the foreign representative.

1. Access to Courts in the United States

First, Chapter 15 opens the door to all courts in the United States and not just to courts of the United States (*i.e.*, federal courts only). Once the Chapter 15 petition is recognized, the foreign representative has the capacity to sue and to be sued in any court in the United States and to apply to any such court for assistance and relief.³⁸ Significantly, courts in the United States are *required* to "grant comity or cooperation to the foreign representative," although this provision may well prove to be unconstitutional. If a particular state or local court refuses to provide such comity or cooperation, an argument can be made that the federal government, absent a treaty (which Chapter 15 is not), lacks the authority to command courts of sovereign states of the United States. The foreign representative is also granted specific authority to intervene (become a party to) any legal proceeding in state or federal court in which the debtor is a party.³⁹

A foreign representative is subject to all United States non-bankruptcy law regardless of whether a Chapter 15 petition is recognized,⁴⁰ meaning simply that he is not above the law and must follow the same requirements and procedures as others. Nevertheless, if a foreign representative files a Chapter 15 petition, it "does not subject the foreign representative to the jurisdiction of any court in the United States for any other purpose."⁴¹ This protects the foreign representative from personal or derivative claims and does not alter the normal jurisdictional provisions, both subject matter and personal, and venue provisions, applicable to suing the foreign representative on other matters.

2. Cooperation / Coordination with Foreign Representative and Foreign Court

The bankruptcy court is authorized to provide assistance to the foreign representative in addition to, and other than, the specific relief that is identified in Chapter 15 and in the Bankruptcy Code.⁴² In other words, through the exercise of

³⁸ 11 U.S.C. § 1509(b)(1)-(2).

³⁹ *See id.* § 1524.

⁴⁰ *See id.* § 1509(e).

⁴¹ *Id.* § 1510.

⁴² *Id.* § 1507(a).

comity, the bankruptcy court is specifically authorized to take actions that it deems appropriate to ensure the just treatment of creditors, protect domestic creditors from prejudice in a foreign proceeding, prevent fraudulent or preferential transfers of property, distribute property under the equitable scheme of the Bankruptcy Code, and even grant a discharge.⁴³ A foreign representative will, therefore, have comfort that the bankruptcy court has the flexibility to fashion appropriate relief, other than the specific statutory relief contained in the Bankruptcy Code or Chapter 15, to allow the foreign representative to fulfill his duties. However, domestic creditors will also be able to request, and the bankruptcy court will be able to fashion similar relief to prevent unjust prejudice to such creditors, which may conflict or be inconsistent with the goals of the foreign representative.

Not only will the foreign representative obtain the assistance of courts in the United States, but also the bankruptcy court is directed to communicate and cooperate with the foreign court to the maximum extent possible.⁴⁴ The bankruptcy court is entitled to request information or assistance from the foreign court.⁴⁵ Similarly, in addition to the bankruptcy court, any bankruptcy trustee or examiner appointed concerning the debtor is directed to cooperate with the foreign representative and foreign court, and is entitled to communicate directly with them.⁴⁶ The cooperation between a United States bankruptcy court and any trustee or examiner appointed with the foreign representative and foreign court may take the form of, among other things, the appointment of persons to act at the court's direction, the coordinated administration of the debtor's assets, the implementation of agreements concerning the coordination of proceedings, and the coordination of concurrent proceedings regarding the same debtor.⁴⁷

3. Presumptions in Favor of the Foreign Representative

The foreign representative is granted several presumptions to assist him in fulfilling his duties. If the certificate from a foreign court submitted with a petition for recognition indicates that the foreign proceeding is a "foreign proceeding" for purposes of Chapter 15 (meaning that the elements of the term are satisfied), and that person is the "foreign representative," the bankruptcy court is entitled to presume the same.⁴⁸ The bankruptcy court is also entitled to presume that documents submitted with the petition for recognition are authentic and genuine, regardless of whether they are formally proved up.⁴⁹ For purposes of a "foreign main proceeding," the debtor's registered office, or, if the debtor is an individual, his habitual residence, is presumed to be the "center of the debtor's main interests."⁵⁰ If the foreign representative commences an involuntary bankruptcy proceeding, there is a presumption, upon the

⁴³ *Id.* § 1507(b).

⁴⁴ *See id.* § 1525(a).

⁴⁵ *See id.* § 1525(b).

⁴⁶ *See id.* § 1526(a)-(b).

⁴⁷ *See id.* § 1527(1)-(5).

⁴⁸ *See id.* § 1516(a).

⁴⁹ *See id.* § 1516(b).

⁵⁰ *See id.* § 1516(c).

recognition of the foreign proceeding, that the debtor is generally not paying its debts as they become due, which is one of the elements that must be met by anyone filing an involuntary bankruptcy case.⁵¹

C. THE STICK (BEWARE OF POLITICS AND PUBLIC POLICY)

Although Chapter 15 provides many advantages, it is not without its pitfalls: potentially significant pitfalls depending on the country of origin, the debtor, the judge, and American public opinion and policy. The United States, as with all democracies, has certain influential lobbyists and special interest groups, some of whom wield significant influence if their constituency are negatively impacted or threatened. A foreign insolvency representative, expecting to file a routine case, may well find himself suddenly confronted with issues or with archaic laws that he would never suspect (although it is highly unlikely that the BVI Liquidator would face these issues, since the British Virgin Islands and the United States share friendly relations). Nevertheless, just as the BVI Liquidator must be a master of insolvency laws, it would not hurt for him to have some understanding about American politics and public opinion.

1. Treaty Obligations Trump Chapter 15

Under United States law, treaties are given equal weight to the Constitution, and trump all statutes, whether federal or state. It is not surprising, therefore, that Chapter 15 provides: to the extent it conflicts "with an obligation of the United States arising out of any treaty or other form of agreement to which it is a party with one or more other countries, the requirements of the treaty or agreement prevail."⁵² By way of example, suppose that the United States does not recognize the government of a country (as it did not recognize communist China in the Sixties), and enters into a treaty with what it considers to be the lawful government of that country (in this example, Taiwan) to the effect that the agents of the unrecognized state will not have access to United States courts. Entities subject to the jurisdiction of the unrecognized government may be precluded from seeking relief under Chapter 15.

2. Public Policy Trumps Chapter 15

Additionally, Chapter 15 provides: "[n]othing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States."⁵³ This is Congress' safety-valve, which is designed to ensure that courts of the United States do not do the bidding of foreign governments or take actions perceived to be hostile to the interests of the United States, and may take many forms. For example, would a Cuban liquidator be granted relief under Chapter 15? Would an Iranian liquidator be able to propose a plan or liquidation that would transfer advanced technology to an Iranian company? Would a representative of Libya be granted relief under Chapter 15, if citizens of the United States had significant unpaid claims against that country? These are but a few

⁵¹ See *id.* § 1531.

⁵² 11 U.S.C. § 1503.

⁵³ *Id.* § 1506.

examples of situations which may raise issues of "public policy," or at least the "public policy" of the bankruptcy judge who may have his own views on the matter and is granted the discretion under Chapter 15 to make such decisions.

3. Denial of Recognition With Prejudice

Finally, the bankruptcy court has the power to refuse to recognize a Chapter 15 case and prevent other courts from accommodating the foreign representative. Specifically, if the bankruptcy court refuses to grant relief under Chapter 15, "the court may issue any appropriate order necessary to prevent the foreign representative from obtaining comity or cooperation from courts in the United States."⁵⁴ While the foreign representative may otherwise be able to obtain a favorable order from a non-bankruptcy court under principles of comity, such as from a local court that orders the garnishment of a bank account, if the foreign representative tries to obtain relief under Chapter 15 and fails, he could find all of the other courts in the United States closed to him.

D. THE MECHANICS OF CHAPTER 15

1. Foreign Proceedings and Foreign Representatives

A case under Chapter 15 is commenced by the filing of a petition with a United States bankruptcy court for "recognition of a foreign proceeding" under Chapter 15.⁵⁵ The petition for recognition is filed by the "foreign representative" who, by filing the petition, "applies to the court for the recognition of a foreign proceeding in which the foreign representative has been appointed."⁵⁶ The term "foreign representative" is defined as "a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding."⁵⁷ The foreign representative can, therefore, be an individual or a company, such as a professional organization of accountants, or other insolvency specialist, but the foreign representative must be appointed by the foreign court in the particular foreign proceeding that he is seeking the recognition of.⁵⁸

The phrase "foreign proceeding" is a defined term, meaning "a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation."⁵⁹

⁵⁴ *Id.* § 1509(d).

⁵⁵ 11 U.S.C. § 1504.

⁵⁶ *Id.* § 1515(a).

⁵⁷ *Id.* § 101(24).

⁵⁸ *Id.* § 1515(a).

⁵⁹ *Id.* § 101(23).

It is clear that not every foreign insolvency proceeding qualifies as a "foreign proceeding."⁶⁰ First, there must be court supervision of the process. Informal insolvency proceedings, private insolvency proceedings, or other proceedings lacking the supervision of a foreign court do not qualify for Chapter 15 relief. However, a court may not be technically necessary. If not a court, then the foreign tribunal must be an "other authority competent to control or supervise a foreign proceeding," which definition has yet to be fully addressed, although some level of governmental officialdom appears to be required.⁶¹ Second, that supervision must be for the purpose of a financial reorganization or liquidation of the entity the subject of the proceeding: a foreign proceeding to recover a single asset, without the overall purpose of reorganization or liquidation, for example, does not qualify. Third, the foreign proceeding must be a "collective" proceeding, meaning that it is designed to address the claims of creditors as a whole, as opposed to only one or a few creditors. For example, a foreign action the purpose of which is to provide relief to a single, albeit significant, creditor, does not qualify. Fourth, the foreign proceeding must be a proceeding in a court in a foreign country, which is straightforward. Fifth, the foreign proceeding must be a proceeding under a law relating to insolvency or reorganization. A proceeding under a law whose purpose is merely to recover assets to satisfy a judgment does not qualify. The use of the words "relating to" however could allow sufficient and potentially far reaching flexibility.

2. Entities that May Not Seek Relief Under Chapter 15

Even if the definitions of "foreign proceeding" and "foreign representative" are met, and assuming that no treaty exists or public policy exception applies, not every foreign entity is eligible for relief under Chapter 15. This is an important distinction because it is anticipated that a significant number of foreign insolvency proceedings will fit within the applicable exclusions and will, therefore, not be eligible for Chapter 15. This is because the Bankruptcy Code prohibits certain domestic entities from seeking or obtaining relief, and it would be paradoxical for foreign entities of the same excluded type to be able to seek or obtain such relief.⁶²

Specifically, Chapter 15 relief cannot be granted to an entity which is otherwise excluded by the Bankruptcy Code from seeking relief.⁶³ This means that railroads, domestic insurance companies, domestic banks of various types, and foreign banks with a branch in the United States may be precluded from seeking Chapter 15 relief.⁶⁴ The only exception is that, while a foreign insurance company engaged in business in

⁶⁰ The Bankruptcy Code contained a definition of "foreign proceeding" prior to the enactment of Chapter 15. That definition, however, has been extensively changed, and practitioners are advised not to rely on court interpretations of the prior definition.

⁶¹ *Id.* § 1502(3).

⁶² For historical, constitutional, and other reasons outside the scope of this Article, insurance and banking companies are generally prohibited from seeking relief under the Bankruptcy Code. In the United States, these types of companies are chartered and controlled by individual states, and must establish certain services and insurance/reinsurance, with each state providing detailed provisions for their court supervised insolvencies and receiverships.

⁶³ 11 U.S.C. § 1501(c).

⁶⁴ *See id.* § 109(b).

the United States may not seek relief under other chapters of the Bankruptcy Code, it apparently is permitted to seek relief under Chapter 15 (although it remains unclear as to whether it is still excluded if it engages in business in the United States).⁶⁵ Additionally, Chapter 15 relief cannot be granted to a stockbroker (with limitations), a commodity broker (with limitations), and entities and persons subject to the Securities Investor Protection Act of 1970 (generally, brokers and dealers outside the United States who engage in brokerage business inside the United States).⁶⁶

Aside from the types of entities that may not seek relief, Chapter 15 also contains limitations and exclusions on *in rem* remedies. Specifically, Chapter 15 relief is not available regarding "any deposit, escrow, trust fund, or other security required or permitted under any applicable State insurance law or regulation for the benefit of claim holders in the United States."⁶⁷ This provision relates to State laws that require insurance companies to establish reserve and security accounts, and evidences Congress' intent that those reserves be available to United States creditors, since the domestic creditors have effectively paid for those protections. Thus, with respect to bank accounts and the like, filing a Chapter 15 petition to obtain access to those types of accounts will be fruitless.

3. Foreign Main Proceeding Versus Foreign Nonmain Proceeding

Chapter 15 distinguishes between two types of foreign proceedings that may be recognized: (i) a "foreign main proceeding;" and (ii) a "foreign nonmain proceeding." This is an important distinction that will affect the rights and options of the foreign representative under Chapter 15.

A "foreign main proceeding" is a "foreign proceeding pending in the country where the debtor has the center of its main interests."⁶⁸ Significantly, the phrase "main interests" does not necessarily mean the country where the debtor has its main assets, and may be interpreted as, for example, the country where the debtor's principal corporate decisions and management reside or are made. In other words, "interests" may mean property interests, as that term is frequently used in American law, but it may also be interpreted in the broader linguistical sense such as business interests. However, in the absence of contrary evidence, "the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the center of the debtor's main interests."⁶⁹

A "foreign nonmain proceeding," on the other hand, is the opposite of a foreign main proceeding: a foreign nonmain proceeding is a "foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment."⁷⁰ Basically, this term means a foreign proceeding pending in any

⁶⁵ Compare *id.* § 1501(c)(1), with *id.* § 109(b)(3)(A).

⁶⁶ 11 U.S.C. § 1501(c)(3).

⁶⁷ *Id.* § 1501(d).

⁶⁸ *Id.* § 1502(4).

⁶⁹ *Id.* § 1516(c).

⁷⁰ *Id.* § 1502(5).

country against the debtor, other than the country where a foreign main proceeding is pending. However, there must nevertheless be a foreign proceeding pending, which raises the requirements and the considerations applicable to the determination of whether a foreign proceeding is pending, as discussed above.

4. The Petition for Recognition

A case under Chapter 15 is commenced by the filing of a petition with a United States bankruptcy court for "recognition of a foreign proceeding" under Chapter 15, also referred to as a petition for recognition.⁷¹

Procedurally, the petition for recognition must be accompanied by the following: (i) a certified copy of the decision or order commencing the foreign proceeding, and a certified copy of the decision or order appointing the foreign representative; or (ii) a certificate from the foreign court affirming the existence of the foreign proceeding, and the appointment of the foreign representative.⁷² Any of these documents must be translated into English, presumably by an accredited translator.⁷³ In the absence of either of these, the court may accept any other evidence acceptable to the court confirming the existence of the foreign proceeding and the appointment of the foreign representative.⁷⁴ In addition to the foregoing, the petition for recognition must be accompanied by a statement identifying all of the debtor's other foreign proceedings that are known to the foreign representative.⁷⁵ Finally, it goes without saying that the petition for recognition must be accompanied by the appropriate court filing fee.

5. Notice and Hearing Requirements

Upon the filing of a valid petition for recognition, accompanied by the proper fee and the proper documents, the bankruptcy court is commanded to decide the petition for recognition at the earliest practical time.⁷⁶ However, as with most court actions under the Bankruptcy Code, the court may grant the petition for recognition only after "notice and a hearing."⁷⁷ This is important, because the foreign representative must provide notice of the petition for recognition to appropriate parties, and those parties must have a reasonable opportunity to object to the recognition of the petition. Here, the method of notice depends on whether the foreign proceeding is main or non-main, under the provisional Bankruptcy Rules implementing Chapter 15.⁷⁸

⁷¹ *Id.* § 1504. See Exhibit 1 in Appendix A for an example of a Chapter 15 petition. Exhibit 2 is an Order granting the petition.

⁷² *Id.* § 1515(b)(1)-(2).

⁷³ *Id.* § 1515(d).

⁷⁴ *Id.* § 1515(b)(3).

⁷⁵ *Id.* § 1515(c).

⁷⁶ See *id.* § 1517(c).

⁷⁷ *Id.* § 1517(a).

⁷⁸ Many provisions of the Bankruptcy Code are implemented by rules contained in the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"). These rules are subject to approval by the United States Supreme Court, and the consent of Congress, after being proposed by practitioners and being subjected to public comment. Therefore, it can take significantly longer to

If the foreign proceeding is main, then any party-in-interest may contest the granting of the petition for recognition.⁷⁹ Therefore, the foreign representative should endeavor to provide notice of the petition, and of hearing on its approval, to as many parties-in-interest as possible. A party-in-interest is not specifically defined, but the concept is broad, and includes not only creditors, but parties with property interests in property of the debtor, actual or potential defendants in causes of action owned by the debtor, governmental units, and various other parties.

If the foreign proceeding is non-main, providing legal notice is much more difficult. First, the foreign representative has to obtain a summons from the clerk of the court (a document formally commanding a defendant to answer a pleading).⁸⁰ That summons, and the petition for recognition, must be served on the debtor and on any party against whom provisional relief under Chapter 15 is sought (as discussed below), in the manner prescribed for the service of summons in general.⁸¹ If the debtor is a United States entity, service of the summons is fairly straightforward but, if the debtor is not a United States entity, service of the summons can become quite complicated and expensive, may involve governmental entities and treaties, and may take a significant amount of time (adding to the potential that provisional relief under Chapter 15 may be needed until the summons is legally served). If service under the normal legal methods cannot be accomplished, the court has leeway to order other methods of service, including, if applicable, through publications.⁸² The debtor may, of course, defend against a non-main petition for recognition and, as with main petitions, so can any party-in-interest, meaning that, in addition to service of the actual summons, other notice of the petition and the hearing thereon should be provided to all parties-in-interest to the extent possible.⁸³

In addition to the procedural rules, Chapter 15 preserves the rights of foreign creditors. Among other things, "[f]oreign creditors have the same rights regarding the commencement of, and participation in, a case under this title as domestic creditors."⁸⁴ To ensure that foreign creditors are protected, therefore, Chapter 15 requires that any notice that must be served on domestic creditors (including notice of the hearing on the petition for recognition) must also be served on foreign creditors, and the bankruptcy court has the power to provide for notice to foreign creditors, including through notice publication in foreign newspapers, although individual notice is the statutorily preferred method.⁸⁵ Additionally, the notice provided to foreign creditors must inform them of the deadline for filing claims, as well as the mechanism applicable to the same.⁸⁶

enact a bankruptcy rule than a bankruptcy statute. This Article assumes that the final Bankruptcy Rules will be the same as the current provisional rules.

⁷⁹ See FED. R. BANKR. P. 1011(a).

⁸⁰ See FED. R. BANKR. P. 1010.

⁸¹ See *id.*

⁸² See *id.*

⁸³ See Fed. R. BANKR. P. 1011(a).

⁸⁴ 11 U.S.C. § 1513(a).

⁸⁵ See *id.* § 1514(a)-(b).

⁸⁶ See *id.* § 1514(c).

6. Interim Relief Prior to Recognition

Most of the relief under Chapter 15 is available only after the bankruptcy court recognizes the foreign proceeding. However, the period between the filing of the Chapter 15 petition and its recognition may enable creditors to seize assets or obtain liens against them, while fraud continues and new creditors arise, while management or others transfer assets for their own benefit or to preferred creditors. By the time that the bankruptcy court recognizes the Chapter 15 petition, it may be too late and the whole basis of the filing may be rendered moot.

Chapter 15 recognizes this danger and offers the foreign representative a valuable tool to counter it. Immediately upon the filing of the Chapter 15 petition, the bankruptcy court is authorized to grant provisional relief "where relief is urgently needed to protect the assets of the debtor or the interests of the creditors."⁸⁷ Only the foreign representative may request such provisional relief, and only if he satisfies the urgency and protection requirements.⁸⁸ Moreover, Chapter 15 expressly provides that the elements and standards applicable to the granting of injunctive relief apply to provisional Chapter 15 relief. This means that the foreign representative will have to make an evidentiary presentation, meet the difficult burdens that govern injunctions, and otherwise comply with fairly rigorous requirements that determine whether an injunction is appropriate and the extent to which it is appropriate.⁸⁹

The provisional relief that the bankruptcy court may grant under Chapter 15 includes, but is not limited to: (i) staying execution against the debtor's assets; (ii) entrusting the administration or realization of all or a portion of the debtor's assets in the United States to the foreign representative; (iii) suspending the right of the debtor to transfer, encumber (*i.e.* lien) or otherwise dispose of assets; (iv) ordering the examination of witnesses; and (v) granting additional relief that is otherwise available to an ordinary bankruptcy trustee.⁹⁰ However, the bankruptcy court may not enjoin a police or regulatory action of a governmental unit, including a criminal matter, and the court may not grant provisional relief that would interfere with the administration of a foreign main proceeding (thus, if the foreign proceeding is nonmain, the foreign nonmain representative will not be able to obtain relief that would bypass or frustrate a foreign main proceeding).⁹¹

⁸⁷ *Id.* 1519(a).

⁸⁸ *See id.*

⁸⁹ *See id.* § 1519(e). Generally, the following four elements must each be met before a court will grant a preliminary injunction: (1) a substantial likelihood of success on the merits; (2) a substantial threat that the plaintiff will suffer irreparable injury absent the injunction; (3) that the threatened injury outweighs any harm the injunction might cause the defendants; and (4) that the injunction will not impair the public interest. *See, e.g., Enrique Bernat F., S.A. v. Guadalajara Inc.*, 210 F.3d 439, 442 (5th Cir. 2000).

⁹⁰ *See id.* § 1519(a)(1)-(3).

⁹¹ *See id.* § 1519(c)-(d).

7. Need for the Recognition of the Foreign Proceeding

There is an immediate difference between Chapter 15 and other chapters of the Bankruptcy Code, since the Chapter 15 petition requires its "recognition" by the bankruptcy court. Under all other chapters of the Bankruptcy Code, and unlike the laws of many countries, a bankruptcy court does not need to make a finding that the debtor is insolvent, that the debtor is a bankrupt, or that bankruptcy is appropriate. Similarly, the filing of a bankruptcy petition automatically provides access to the Bankruptcy Code for the debtor. It takes the affirmative action of some party to move for, and to obtain, an order from the court dismissing the bankruptcy case. With respect to Chapter 15, however, the filing of the petition for recognition does not automatically grant access to the bankruptcy court or the bankruptcy laws since that petition must first, by definition, be recognized or granted by the bankruptcy court.

Parties must file an answer of objection to the petition for recognition within twenty days after service of the petition for recognition and the summons.⁹² Therefore, for all practical purposes, the court cannot consider granting the petition for recognition until at least twenty days after its filing. Also, if a summons is not served until sometime after the filing of the petition, the hearing may be further delayed because a summons must be served (if to be served in the United States) within ten days of its issuance.⁹³ If the foreign representative encounters problems serving the summons, he may have to go back to the court and request one or more reissued summons. In short, the hearing on the approval of the petition for recognition may take quite some time, potentially increasing the need for provisional relief under Chapter 15.

With the procedural requirements satisfied (*i.e.* notice of the petition and service of the summons), the court may hold the hearing on the petition and consider whether to grant the petition on a substantive basis. In this respect, the substantive issues are straightforward: (i) there must be a foreign proceeding, which includes an analysis of whether that definition is met, as discussed above; (ii) the foreign representative must have filed the petition, which includes an analysis of the definition of foreign representative, as discussed above; and (iii) the petition must have been properly filed, with the necessary certifications from the foreign court or other acceptable evidence, also as discussed above.⁹⁴

If the three requirements stated above, together with their subrequirements (such as the elements of the definition of "foreign proceeding" and "foreign representative") have been met, the bankruptcy court must recognize the petition, unless one of the public policy or treaty exceptions discussed above apply. At the time that the bankruptcy court recognizes the Chapter 15 petition, the bankruptcy court must also adjudicate whether the foreign proceeding is main or nonmain, and that issue is likely to be litigated (if in controversy) at the same time that recognition is litigated.⁹⁵

⁹² See FED. R. BANKR. P. 1011(b).

⁹³ See FED. R. BANKR. P. 7004(e).

⁹⁴ See 11 U.S.C. § 1517(a)(1)-(3) (2006).

⁹⁵ See *id.* § 1517(b).

IV. THE BVI LIQUIDATOR'S CHAPTER 15 CASE

The BVI Liquidator would, under the facts of our hypothetical, most likely find it advisable to file a Chapter 15 case so as to maximize his control over, and his options concerning, Fraudsters' New York bank account, and Fraudsters United and its assets. The following is a brief analysis of what the BVI Liquidator's Chapter 15 case would look like.

A. WHERE TO FILE

The first question that the BVI Liquidator would face, after deciding to file a Chapter 15 petition, is where to file that petition? A case under Chapter 15 may be commenced in the district where: (1) the debtor has its principal place of business or principal assets in the United States; (2) if the debtor does not have a principal place of business or assets in the United States, in the district where there is pending an action against the debtor in a federal or state court; or (3) if neither paragraphs (1) or (2) apply, the district in which venue will be consistent with the interests of justice and the convenience of the parties.⁹⁶

Under this statutory scheme, the "debtor" is Fraudsters, thereby necessitating an analysis of where, in the United States, it (and not the BVI Liquidator or any other company) has its principal place of business or principal assets. Did Fraudsters transact business in the United States? If so, its principal place of business is generally the location where its major (*i.e.*, high level) business decisions are made.⁹⁷ This may be of little help to the BVI Liquidator if Fraudsters made no business decisions in the United States. However, if Fraudsters transacted business through Fraudsters United, then the actual location of Fraudsters United may be applicable. But, if Fraudsters United is just a non-operating entity that Fraudsters owns, but it does not conduct its business through, Fraudsters United may not be Fraudsters' principal business in the United States.

However, both Fraudsters United and the New York bank account are assets of Fraudsters located in the United States. It is therefore necessary to determine whether one, or both, may be considered the principal assets of Fraudsters in the United States. This will depend on the relative value of these assets: the amount of funds in the New York bank account versus the value of Fraudsters United.⁹⁸ If both are of comparative value, then it is likely that the BVI Liquidator can characterize whichever one he wants as the principal assets, and it is not likely that a court would overturn the BVI Liquidator's characterization, since that kind of a characterization is entitled to deference from the court and the burden is on a party opposing venue to prove that venue is not proper or that it should be changed.⁹⁹ The BVI Liquidator will, therefore, have some latitude, and, so long as the assets are of comparative value, he can decide which he prefers. This may depend on numerous factors, such as the ease of travel to the

⁹⁶ See 28 U.S.C. § 1410.

⁹⁷ *In the Matter of Peachtree Lane Assocs. Ltd.*, 150 F.3d 788, 795-96 (7th Cir. 1998).

⁹⁸ See, generally, *In re Veliotis*, 79 B.R. 844 (Bankr. E.D. Mo. 1987).

⁹⁹ See, e.g., *In re Bell Tower Assocs. Ltd.*, 86 B.R. 795 (Bankr. S.D.N.Y. 1988).

location, the expertise and "user friendliness" of the bankruptcy courts and judges, whether any favorable or hostile creditors are located in the venue, the location of the United States bankruptcy court, and the relative costs associated with different locations.

Here, the BVI Liquidator must decide between New York and Dallas, Texas. Both are easy to travel to, have well respected bankruptcy judges and lawyers, and are fully capable of handling the BVI Liquidator's needs. However, because Fraudsters United is located in Dallas, more than likely any bankruptcy filing by it will have to be in Dallas. Filing the Chapter 15 petition in Dallas would be advantageous because it would mean that only one bankruptcy court will be involved, would minimize duplication of costs and expenses, and would enable the BVI Liquidator to be close and, therefore, available in Fraudsters United's bankruptcy case.

B. PRELIMINARY RELIEF

The BVI Liquidator would next have to retain *capable* bankruptcy counsel in the United States, experienced in complicated and cross-border bankruptcy issues, and then prepare the petition for recognition as well as the supporting documents. A list of creditors would have to be prepared, and the petition for recognition, as well as the notice of hearing scheduled by the court, would have to be properly served.

At this same time, the BVI Liquidator would have to consider whether to seek interim relief from the bankruptcy court. Is the management of Fraudsters United transferring assets, paying certain creditors on a preferential basis, or engaging in ongoing fraudulent activity? Is Fraudsters United's management refusing to cooperate with the BVI Liquidator. Is a lawsuit against the New York bank account, Fraudsters United, or its bank accounts about to go to trial? Is a creditor, or a governmental unit, about to seize assets, or foreclose on them? Does the BVI Liquidator need access to discovery or to witnesses? Does the BVI Liquidator need to have BVI's assets placed under his control urgently, or does he urgently need to take control over its business? These are some of the questions that must be asked and, if any of this kind of relief is urgently required, a motion requesting that relief will have to be filed and the BVI Liquidator will have to prepare to attend a hearing on that motion in person and substantiate the motion with appropriate evidence.

Moreover, if the BVI Liquidator seeks any of this kind of relief, he will have to be prepared to prove urgency and satisfy the rigorous requirements for the issuance of an injunction. A good example of such a situation concerns Yukos Oil, which filed a Chapter 15 petition in New York at the request of its Moscow receiver. That receiver alleged that an officer of Yukos Oil, responsible for a Lithuanian oil rig, was attempting to sell that rig notwithstanding the Moscow court's prohibition, and he also alleged that Yukos' funds on account in the United States were in danger. Since those funds were in the United States, and since the Yukos officer allegedly attempting to sell the oil rig was in the United States, the Yukos receiver commenced his Chapter 15 case. The bankruptcy court issued a temporary restraining order in favor of the Yukos receiver to

enforce the order of the Moscow court in order to preserve the assets of Yukos Oil from unauthorized transfer.

C. RECOGNITION OF THE CHAPTER 15 PETITION

After a hearing before the bankruptcy court, at which the BVI Liquidator may need to be personally present, and depending on whether any objection to recognition of the Chapter 15 petition is filed, the bankruptcy court would recognize Fraudsters' BVI proceedings as a "foreign proceeding" and the BVI Liquidator as the "foreign representative." Under the facts of this Article, Fraudsters is registered in the BVI. Accordingly, because the location of registration is presumed to be the center of a debtor's main interests, the bankruptcy court would recognize Fraudsters' BVI proceeding as a foreign main proceeding – which is important for the BVI Liquidator regarding his authority over Fraudsters United. However, this is only a presumption, and if Fraudsters is only a shell in the BVI and instead transacted all of its business in the United States, it is possible that Fraudsters' proceeding will not be recognized as a foreign main proceeding but only as a foreign nonmain proceeding.

Upon the recognition of the BVI Liquidator's Chapter 15 petition, the court will sign an order to that effect. In the United States, orders signed by judges are usually prepared by the lawyers. This is a great opportunity to present a detailed, effective, and "strong" order to the judge; one that grants the BVI Liquidator maximum authority so that no party can later question whether he has authority to act. At a minimum, the order should contain findings of fact that the BVI proceedings qualify as a "foreign proceeding," that the BVI Liquidator is a "foreign representative," that the BVI Liquidator provided appropriate notice of the Chapter 15 petition and that he has otherwise complied with all procedural requirements, and that no public policy of the United States prevents the recognition of his Chapter 15 petition.

Additionally, however, the order should include detail provisions respecting the BVI Liquidator's authority: that the debtor's assets in the United States are entrusted to his care; that all persons are enjoined from proceeding against the debtor or its assets; that the BVI Liquidator may appear in all other courts in the United States; that such other courts are to grant comity; that the orders of the BVI court appointing the BVI Liquidator and granting him authority are to have full force and effect in the United States; that the BVI Liquidator may file a bankruptcy petition on behalf of Fraudsters United; that all persons are prohibited from transferring assets of Fraudsters without court authority; that the BVI Liquidator is authorized to examine witnesses and obtain any financial records of Fraudsters in the United States; that the BVI Liquidator is authorized to operate Fraudsters' business in the United States; that parties violating the order shall be subject to sanctions and contempt; and any other matter that the BVI Liquidator finds advisable. **Attached as an exhibit to this Article is an example of such an order, recently entered, that the authors believe to be an example of an appropriate, unambiguous, and strong order.**

D. WHAT TO DO WITH FRAUDSTERS UNITED?

Preferably, the BVI Liquidator will already have some plans about what to do with Fraudsters United. He may be contemplating a sale of its business, or of its assets, or he may be contemplating its straight liquidation. A bankruptcy filing for Fraudsters United may be the best way to implement these plans. Even if the BVI Liquidator does not have any plans, a bankruptcy filing by Fraudsters United will buy the BVI Liquidator the time that he will need to analyze options, while preventing adverse creditor actions and potentially adverse actions by the management of Fraudsters United.

Under the facts as assumed, it would make most sense for the BVI Liquidator to file a Chapter 11 bankruptcy case on behalf of Fraudsters United. This may or may not be simple. Hopefully, the order recognizing the BVI Liquidator's Chapter 15 Petition will specifically grant him the authority to do this, but, even if it does not, the provisions of Chapter 15 ought to enable him to file a case on behalf of Fraudsters United.¹⁰⁰ The reason why it would be preferable that the order recognizing the Chapter 15 case specifically grants the BVI Liquidator this authority is because the present management of Fraudsters United, or one or more of its creditors, may contest the BVI Liquidator's ability to cause Fraudsters United to file a voluntary bankruptcy case.¹⁰¹ Additionally, not only should the order recognizing the Chapter 15 petition specifically authorize the BVI Liquidator to file a petition for Fraudsters United, but it should also specifically provide that the BVI Liquidator will have management authority over Fraudsters United during its bankruptcy case, so that the BVI Liquidator can choose between those managers that he finds helpful to Fraudsters United's bankruptcy case, and those that oppose his intentions.

A Chapter 11 bankruptcy case for Fraudsters United would not be simple. It would be costly, since Fraudsters United would have to hire bankruptcy counsel and may have to also pay for the attorneys of a committee of unsecured creditors, if one is appointed. A creditor or other party-in-interest may move for the appointment of a Chapter 11 trustee to manage and run Fraudsters United, if they are uncomfortable with the BVI Liquidator assuming that role, if pre-bankruptcy management remains and is accused of serious malfeasance. The BVI Liquidator may request that a Chapter 11 trustee be installed if he wants to replace management and does not have the resources or expertise to operate the business.¹⁰² The BVI Liquidator may wish to

¹⁰⁰ See 11 U.S.C. § 1511(a)(2) (authorizing foreign representative to file a voluntary bankruptcy case); 1520(a)(3) (authorizing representative to operate the debtor's business).

¹⁰¹ Creditors, parties-in-interest, and the United States Trustee (the President's representative administering the bankruptcy system for a given judicial district) would all have the ability to move to dismiss a Chapter 11 petition based on the lack of authority of the person purporting to file it, and authority to file sometimes leads to highly complex and expensive battles. See 11 U.S.C. § 1112.

¹⁰² Normally, the debtor in a Chapter 11 case manages and operates its assets and business. However, the bankruptcy court has the authority to order the appointment of a Chapter 11 trustee, who supplants and replaces the debtor's management. See *id.* § 1104(a). There are numerous reasons why a Chapter 11 trustee may be appointed, but most often they take the form of "fraud, dishonesty, incompetence, or gross mismanagement of the debtor by current management, whether prior to the bankruptcy filing or after." See *id.* § 1104(a)(1).

request the appointment of an examiner.¹⁰³ The BVI Liquidator would also face many of the same complicated issues faced by debtors in Chapter 11 cases, including: whether Fraudsters United will generate a positive post-bankruptcy cash flow to pay administrative expenses and the costs of the Chapter 11; the potential need for post-bankruptcy financing; the need to obtain court permission to use cash, receivables, and accounts that may be subject to a valid lien (so-called "cash collateral"); motions filed by creditors for relief from the automatic stay so that they can pursue litigation or foreclose on their collateral; if the BVI Liquidator has located a buyer for some or all of Fraudsters United's assets, the need to have the court establish bid procedures and approve the proposed sale; the need to decide which leases and executory contracts to reject and which to assume; and a whole host of other substantive, procedural, and administrative burdens associated with operating a business in Chapter 11.

Immediately upon the filing of a bankruptcy case by Fraudsters United, however, judicial proceedings, collection activities, and the like would stop due to the imposition of the automatic stay. Fraudsters United's Dallas bank account would be protected, and the BVI Liquidator would have the breathing spell needed to preserve Fraudsters United's value and to begin an orderly liquidation or a reorganization. He would also have some period of time before a plan has to be filed (if it is not filed in time, any other creditor would obtain the ability to file his plan) to formulate a strategy not only for Fraudsters United, but also for the synthesis of that strategy with his broader strategies and duties regarding Fraudsters. This would be heavily dependent on the facts of any given case, as is always the case with Chapter 11, such that more specific guidance cannot be given in the scope of this Article, but, together with his powers under Chapter 15 and the flexibility afforded by Chapter 11 for Fraudsters United, it is highly likely that *some* solution would be found, so long as Fraudsters United's post-bankruptcy business is lawful and generated positive cash flow.

Ultimately, a Chapter 11 plan would have to be formulated and proposed,¹⁰⁴ voted on by the creditors, and confirmed by the court – a potentially lengthy and difficult process, but with much give and take, which would afford the BVI Liquidator the discretion to consider various options to formulate a plan that suits Fraudsters United's creditors and also comports with his overall duties regarding Fraudsters. It is in this respect that a Chapter 11 case would be preferable to a Chapter 7 case, because a Chapter 7 case can take much longer, involves the cessation of business, and therefore the loss of going concern value, and follows a strict formula for administration and distribution. For example, a Chapter 11 plan, unlike Chapter 7, would give the BVI

¹⁰³ The bankruptcy court has the authority to appoint an examiner for one or more purposes in a Chapter 11 case. See *id.* § 1104(c). An examiner is an officer of the court and reports to the judge, who may decide that an examiner is appropriate to investigate the debtor's management or business, or to investigate or undertake a complicated and burdensome task that the court does not have the time to address (such as reviewing thousands of pages of invoices submitted by the attorneys for the debtor for interim court approval), in which case the court may rely on the recommendations of the examiner.

¹⁰⁴ Normally, only the debtor has the exclusive right to file a plan during the first 120 days after the bankruptcy case, an exclusive period that may be extended only up to 18 months after the date of the filing of the case. See *id.* § 1121(b).

Liquidator the options of requesting a discharge of Fraudster United's debts, and the imposition of injunctions preventing creditors from pursuing third parties, such as directors, officers, affiliates, and even the BVI Liquidator himself. As another example, if the directors and officers of Fraudsters United were guilty of breaching their fiduciary duty or other misdeeds – especially if insurance was in place to cover the same – the BVI Liquidator could retain control over those claims, instead of letting a handful of creditors take them for themselves, and use the claims and insurance proceeds to fund a plan or for such other purpose as might be proper.

E. FRAUDSTERS UNITED’S CANADIAN BANK ACCOUNT

Fraudsters United’s Canadian bank account presents some of the same initial issues as does Fraudster’s New York bank account. The BVI Liquidator, as the administrator of the Fraudsters United’s bankruptcy estate, should be able to instruct the Canadian bank to transfer the funds to an American account for use by the Fraudsters United’s bankruptcy estate. As with the New York account, this may however become impossible if the account has been frozen or seized, if it is subject to liens, or if it is subject to forfeiture or other actions by the creditors of either Fraudsters or Fraudsters United.

If that becomes the case, the BVI Liquidator will have no choice but to initiate legal action in Canada. While the Canadian account would certainly be property of Fraudsters United’s bankruptcy estate, and the United States bankruptcy court in that case would have jurisdiction over that account, no treaty apparently exists between the United States and Canada such that the Dallas bankruptcy court’s orders could be enforced in Canada without judicial action on the part of Canadian courts. Therefore, the BVI Liquidator will most likely have to resort to Part XIII: *International Insolvencies of the Bankruptcy and Insolvency Act* (S.C. 1997, c.12) of Canada, which vests the jurisdiction in the Canadian bankruptcy court to recognize the powers of a “foreign representative” of a foreign insolvency estate. This procedure is quite straightforward and is frequently used in United States-Canadian cross-border insolvency cases where the United States bankruptcy court is the ‘home court’ of the insolvency proceedings, and it is quite similar to Chapter 15.

With respect to the bankruptcy case of Fraudsters United (as opposed to Fraudsters), the United States bankruptcy court would be the ‘home court.’ The Canadian act defines “debtor” as “an insolvent person who has property in Canada,”¹⁰⁵ which would be the case with Fraudsters United since it has a bank account in Canada, and it defines “foreign proceeding” as “a judicial or administrative proceeding commenced outside Canada in respect of a debtor, under a law relating to bankruptcy or insolvency and dealing with the collective interests of creditors generally.”¹⁰⁶ A “foreign representative” means a person “holding office under the law of a jurisdiction outside Canada who . . . is assigned, under the laws of the jurisdiction outside Canada,

¹⁰⁵ Part XIII: International Insolvencies of the Bankruptcy and Insolvency Act (S.C. 1997, c.12) of Canada, § 267.

¹⁰⁶ *Id.*

functions in connection with a foreign proceeding that are similar to those performed by a trustee, liquidator, administrator or receiver appointed by the court.”¹⁰⁷ Since all of these definitions are met with respect to Fraudsters United, the Canadian court can grant relief, which means that “[t]he court may, in respect of a debtor, make such orders and grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a co-ordination of proceedings under this Act with any foreign proceeding.”¹⁰⁸ Thereafter, the proceedings and results are very similar to Chapter 15, but are outside the scope of this Article with respect to their detail.

¹⁰⁷

Id.

¹⁰⁸

Id. § 268(3).

APPENDIX "A"

Exhibit 1 - Chapter 15 Petition

Exhibit 2 - Amended Order Granting Recognition of Foreign Main Proceeding Pursuant to §§ 1515 and 1517 of the Bankruptcy Code and Granting Related Relief