

Transnational Insolvency – Colorado and the World.

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Introduction

At the beginning of this year, I enthusiastically joined the firm of Coan, Payton & Payne, LLC (“CP2”). I chose this firm because I appreciate the cutting edge business practices and superior teamwork in this firm.

Before I joined CP2, I spent several years working with the Honorable Sidney B. Brooks, Bankruptcy Judge, assisting him in helping countries and courts to establish more coherent ways to deal with transnational insolvencies. With the deepening economic uncertainty in the global economy, I anticipate that transnational insolvency will become much more relevant to our practice areas and to our clients in the next few years. At CP2, we are uniquely fortunate to have two attorneys who specialize in international business law: Paule Maricle and Steve Suneson. Together, as a firm, we have the acumen to deal with the new challenges presented in Colorado, the U.S., and the world.

Humble Beginnings

Almost fifty years ago, the General Assembly of the United Nations made Resolution 2205 (XXI) of December 17, 1966, wherein it created the United Nations Commission on International Trade Law. The charge of the United Nations Commission on International Trade Law was to further “harmonization and unification of the law of international trade and in that respect bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade.” As international trade has expanded in the ensuing five decades, so has the need for cooperation and coordination in the context of business failures and insolvency.

In 2005, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”). With BAPCPA, Chapter 15 was introduced to address “Ancillary and Other Cross-Border Cases.” Chapter 15 was and is intended to facilitate cooperation between the United States and foreign countries in the context of transnational insolvency cases. In large measure, Chapter 15 incorporates the Model Law on Cross-Border Insolvency (“Model Law”) promulgated by the United Nations Commission on International Trade Law (“UNCITRAL”).

What is Chapter 15?

Simply stated, Chapter 15 of the Bankruptcy Code balances the interests, opportunities and rights of various different, sometimes competing, parties impacted by cross-border insolvencies. Chapter 15 was enacted to incorporate the Model Law

to provide an effective way to manage cross-border insolvency cases through five objectives:

- (1) Foster cooperation and communication by and between courts of the United States and foreign courts in cross-border insolvency cases.
- (2) Establish greater legal certainty for trade and investment.
- (3) Establish fair and efficient administration of cross-border insolvencies.
- (4) Better protect and maximize the value of the debtor's assets.
- (5) Promote and facilitate in the rescue of financially troubled businesses, saving jobs and protecting investments.

Chapter 15 is a more formal recognition of court and tribunal proceedings from other countries when the Chapter 15 proceeding is filed here. The process also allows for U.S. bankruptcy proceedings to be recognized in foreign jurisdictions wherein the Model Law has also been adopted. Of key significance is the process allows parties in interest, such as Chapter 7 Trustees, the ability to have access to courts in other jurisdictions. It also allows for administrators in other jurisdictions access to our court systems.

Nevertheless, there are some important qualifications and limitations on the broad powers granted by Chapter 15. For example, there is nothing in Chapter 15 that prevents a United States court from refusing to take action governed by Chapter 15 if the court determines such action is "manifestly" contrary to the public policy of the United States.

Additionally, in making a determination with respect to whether additional assistance should be provided to a foreign representative, the United States court may also look to the stakeholders in the action to ascertain the impact thereon.

Cooperation, Communication and Diplomacy

At the core of Chapter 15 and the Model Law are international cooperation, communication and diplomacy. The law is not perfect, but it opens a door to greater international cooperation and protection of creditors' rights in proceedings that transcend the borders of just one country. As more and more international businesses have a presence in Colorado, it is anticipated that Chapter 15 will have a greater impact in helping administrators from other countries have access to our court systems. Moreover, debtors-in-possession and trustees will have a mechanism by which to have access to jurisdictions where the Model Law has been incorporated.

- For more information on this subject matter I recommend an article the Judge and I published in 2007: Sidney B. Brooks and Robert Lantz, *Transnational Insolvency 101: A New Guide to Cross-Border Bankruptcy Proceedings*, 16 J. Bankr. L. & Prac. 5 Art. 1 (Oct. 2007).