

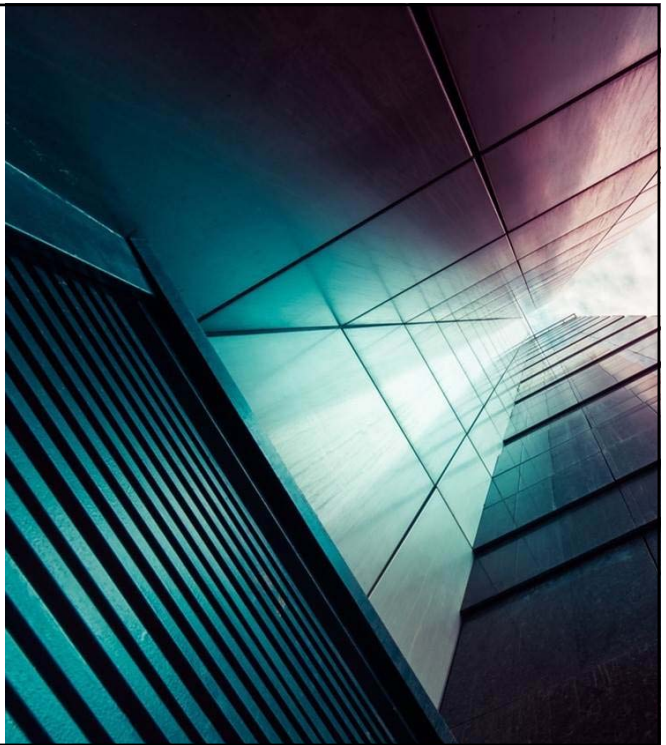
 **NORTON ROSE FULBRIGHT**

**Cross Border Insolvency
Panel: U.S. Chapter 11
and Chapter 15**

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US Bankruptcy Law



Chapter 11: Reorganization

Three primary objectives of chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”):

- (1) to prevent liquidation
- (2) to promote the reorganization and rehabilitation of a financially troubled entity by providing it with protection from its creditors and time to restructure its financial affairs
- (3) to achieve equality of distribution of a debtor’s assets among similarly situated creditors

Impact of Chapter 11 Filing on Business Operations

- Prepetition and postpetition periods are established
- Filing entity automatically becomes “debtor-in-possession” (DIP)
- Management continues to run the business
- DIP does not have unlimited discretion
 - Bound by substantial financial reporting requirements
 - Certain transactions require bankruptcy court approval
 - Ability to use cash is limited
 - Every transaction “out of the ordinary course” of debtor’s business must be authorized by the bankruptcy court
- Payment of prepetition debts is limited and subject to bankruptcy court approval

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The Cast of Characters

United States Bankruptcy Judge

- U.S. federal judge appointed for 14-year term
- May come from any background – not necessarily bankruptcy practitioner
- Has broad equitable authority over many aspects of the case

Debtor

- Drives most of the action (debtor-driven rather than creditor-led process)
- Generally controls the plan process

United States Trustee

- The Office of the United States Trustee is nominally responsible for supervising the administration of a chapter 11 case

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The Cast of Characters (cont'd)

Secured Creditors

- Those creditors whose claims are collateralized by property
- The fees, costs, and expenses of an oversecured creditor's professionals are generally borne by the debtor
- Interest will continue to accrue on an oversecured creditor's claim
- "Ad hoc" groups of creditors

Committee

- One or more representative committees may be appointed by the U.S. Trustee
- Comprised of creditors holding significant unsecured claims against debtor
- Committees monitor and scrutinize the operations of the debtor

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The Cast of Characters (cont'd)

Trustees

- In the case of fraud, dishonesty or gross mismanagement, the bankruptcy court may appoint a trustee to run the business in place of management
- Considered an extraordinary remedy

Examiners

- In large cases, the bankruptcy court will appoint an examiner upon the request of a creditor or other party-in-interest
- The bankruptcy court has the discretion to tailor the examiner's powers to the requirements of a given case

Other parties-in-interest

- Includes lessors, utilities, personal injury claimants, equity security holders, indenture trustees and parties who have contracted with the debtor

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The Automatic Stay

- One of the most fundamental and important protections afforded to a debtor in chapter 11
- The automatic stay stops almost all litigation, collection efforts, lien enforcement actions, and all foreclosure-related actions relating to prepetition claims or events
- The scope of the stay is extremely broad – it applies to virtually every type of action, whether formal or informal, against a debtor or property of the estate
- Designed to provide a debtor with a breathing spell from its creditors and immediate relief from the financial pressures that necessitated the bankruptcy filing
- The automatic stay is not permanent and can be modified by order of the bankruptcy court for cause, after notice and a hearing

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The Automatic Stay (cont'd)

- Several exceptions to the automatic stay:
 - Criminal actions
 - Non-pecuniary governmental actions
 - Actions against non-debtor parties
 - Environmental remediation actions

Relief from the Automatic Stay

- It is not unusual for a debtor's secured creditors to seek relief from the automatic stay
- The bankruptcy court will deny the motion if it finds the secured creditor's interests are adequately protected
- Adequate protection is a concept designed to compensate a secured creditor for a decrease in the value of the secured creditor's property interest arising due to the debtor's continued use of the property during the chapter 11 case
- Whether the protections offered by the debtor constitute adequate protection is left to the discretion of the bankruptcy court

Cash Collateral

- The Bankruptcy Code precludes a debtor from using “cash collateral” for any purpose, without the express consent of the secured creditor or an order of the court
- For this reason, the debtor must segregate, and not utilize or commingle, cash collateral
- A bankruptcy court will generally permit a debtor to use cash collateral when the ability of the secured creditor to recover on its debt will not be jeopardized

Claims Process

- To assert their claims in the bankruptcy court against a debtor, unsecured creditors are not required to take action and may rely on the debtor's schedule of liabilities
- If creditors believe that the debtor's schedules do not properly reflect their claims, they may file proofs of claim setting forth the amount claimed, the basis of the claim, and documentation supporting the claim
- Debtor may contest the proofs of claim by filing objections
- Bankruptcy court then conducts a hearing on the proofs of claim
- Absolute priority rule

Exit Strategies from Chapter 11

A. Plans of reorganization – most large and complex cases take a year or longer, but there are different forms of chapter 11 plans that can impact the timing of the reorganization

1. Prepackaged plans

- The most expeditious form of chapter 11 plan
- The Bankruptcy Code provides that acceptances of a chapter 11 plan solicited and received prior to filing of a bankruptcy petition may be used

2. Pre-negotiated plans

- Prior to filing, debtor negotiates the terms of the restructuring with major creditors
- This procedure expedites the chapter 11 case and typically takes six months to a year from commencement to be confirmed

3. Traditional plans

- The case is commenced without the prior negotiation of a plan

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Exit Strategies from Chapter 11 (cont'd)

B. Selling an operating business in bankruptcy

- Either by selling substantially all of the debtor's assets pursuant to section 363 of the Bankruptcy Code or by confirming a plan of reorganization which provides for such a sale
- 363 sale is preferred by purchasers because it occurs faster
- There are certain drawbacks to 363 – it cannot be used to accomplish a sale of stock and it does not preserve or transfer tax benefits of a debtor (usually this means net operating losses)
- After a sale under 363, net proceeds of the sale can be distributed to creditors under a chapter 11 plan of liquidation or by a trustee after a conversion to chapter 7

Exit Strategies from Chapter 11 (cont'd)

C. Liquidation

- Sometimes liquidation is the only reasonable alternative
- A chapter 7 liquidation commences with the appointment of a trustee who sells all of the debtor's assets in the most expeditious manner possible
- Chapter 11 liquidations are usually favored for large corporations because they enhance recoveries by conducting a more orderly liquidation

Plan Proposal and Confirmation

1. Exclusivity period

- Debtor is given 120 day period during which only it can propose reorganization plans and another 60 days to obtain required acceptances
- This provides the DIP with bargaining leverage

2. Disclosure, solicitation and acceptance

- A plan of reorganization provides for the comprehensive treatment of all claims asserted against the debtor and its property
- To confirm a plan, more than one-half of the creditors in number and two-thirds in amount of each impaired class must favor the plan
- If confirmed, those voting against the plan are still bound

Plan Proposal and Confirmation (cont'd)

3. Cram-down

- Even if one or more impaired classes reject the plan, it may still be confirmed over the objection of the dissenting class or classes
- Section 1129(b) of the Bankruptcy Code provides for the invocation of the cram-down power

4. Confirmation standards

- For bankruptcy court approval, must meet certain tests
- Best interests test: court must find that creditors will receive at least as much under the plan as they would in a liquidation
- Feasibility: court must find that the plan is not likely to be followed by liquidation or further reorganization of the debtor

Plan Proposal and Confirmation (cont'd)

5. Post-confirmation

- Upon confirmation, all property of the DIP will vest in the reorganized debtor
- Except as provided in the plan, all property will be free and clear of all claims of prepetition creditors and equity security holders
- A debtor will generally be free to operate and manage its business without bankruptcy court intervention following confirmation



Selling Assets in Chapter 11



Chapter 11 Asset Sales

Generally, a Debtor will transfer its assets through one of the following:

- Section 363 Sale; or
- Confirmed chapter 11 Plan

What is a Section 363 Sale?

- Section 363 provides that a debtor's assets can be sold "free and clear" of liens, claims and interests
- Many courts interpret this provision broadly to cover most liabilities, including "successor liability" claims
 - *Limitation*: Some courts find that successor-liability claimants must have had some relationship with the debtor or its product
- Notice is critical; without due process, section 363 will not cleanse affected parties' claims

What is a Section 363 Sale? (cont'd)

In addition, Section 363 sales provide buyers and the estate and other advantages

- No fraudulent transfer liability
- Good faith purchaser protections
- Procedural benefits, including accelerated anti-trust waiting period
- Less competition may lead to a better price

What is a Section 363 Sale? (cont'd)

In addition, Section 363 sales provide buyers and the estate and other advantages

- No fraudulent transfer liability
- Good faith purchaser protections
- Procedural benefits, including accelerated anti-trust waiting period
- Less competition may lead to a better price

What is a Section 363 Sale? (cont'd)

The Bankruptcy Code authorizes companies to sell their assets outside the ordinary course of business in a bankruptcy court supervised process

- Courts generally use the “sound business purpose” standard. To make this determination, bankruptcy courts examine a number of different factors, including, among others, (i) the proportionate value of the assets to the estate as a whole, (ii) the amount of elapsed time since the filing, (iii) the effect on any future chapter 11 plan, (iv) the sale price, and (v) whether the assets are decreasing or increasing in value
- The bankruptcy court must approve the bidding procedures, which establish a period during which the debtor market-tests the assets (typically, around 45–60 days), sets forth the requirements for qualified bids, and schedules a date for an auction
- Generally, the entire 363 sale process is approximately 75–90 days from the bankruptcy court's approval of bidding procedures

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Stalking Horse Bidders

A “stalking horse bidder” is often critical for a successful, value-maximizing bankruptcy sale process. A stalking horse bidder is an initial bidder who assumes the role of lead bidder in a Section 363 sale to establish a pricing floor for the debtor’s assets

- **Benefits to the debtor:**
 - Creates a floor bid
 - Creates a negotiated asset purchase agreement or term sheet which can be “shopped” to other potential purchasers
 - Ensures the assets will be sold

Stalking Horse Bidders (cont'd)

- **Benefits to the stalking horse bidder:**
 - Early and/or more complete due diligence of the assets
 - Initial negotiation of the asset purchase agreement that usually becomes the model for other bids
 - Ability to influence bidding procedures and other aspects of the sale process
 - Inclusion of bid protections (such as break up fee, minimum bid increment and expense reimbursement)
 - Stalking horse wins approx. 70% of the time

Stalking Horse Bidders (cont'd)

- **Bidding Protections: Break-Up Fees and Expense Reimbursements**
- **Specific Court Tests**
 - **Business Judgment Test:** whether the debtor's decision to pay a break-up fee is a reasonable exercise of its business judgment (New York)
 - **Best Interest of the Estate Test:** whether a break up fee is actually necessary to preserve the value of the chapter 11 estate (Delaware)
- **Rules of Thumb**
 - **Break-up fees:** between 1% and 3% of proposed purchase price
 - Court will likely approve a reasonable break-up fee if it encourages (and does not deter) bidding

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Qualified Bidders

Although debtors have some discretion to craft specific bidding procedures, generally, a subsequent bid will need to meet the following requirements to be deemed a “Qualified Bidder” and participate in any auction

- Submit an irrevocable offer that is greater than the price proposed by the stalking horse plus the minimum initial overbid increment
- Submit a form of asset purchase agreement or term sheet (or a mark up of the stalking horse’s asset purchase agreement or term sheet)
- Submit evidence of sufficient financing
- Often required to pay a good faith deposit

The Section 363 Auction and Successful Bidder

An auction is held if there is more than one “Qualified Bidder”

- Bids may be increased at the auction, usually subject to a minimum bid increment

Debtor chooses the “highest and best” offer, usually after consulting with creditors’ committee (purchase price is one of the most important factors, but closing risk or the form of payment can also be taken into account)

- The runner-up bidder often keeps its offer open for a period of time after the auction, in the event the winning bidder does not close the deal

Illustrative 363 Sale Timeline

Process Phase	Estimated Timeline
Sale Process	<p>Before Bankruptcy</p> <ul style="list-style-type: none"> • Before chapter 11 filing, a debtor will attempt to identify a stalking horse bidder and negotiate terms of a stalking-horse purchase agreement. • The debtor will work with the stalking horse to develop bidding procedures, draft motions and orders and other sale documents.
	<p>Bidding Procedures</p> <p style="text-align: center;">DAY 1-15</p> <ul style="list-style-type: none"> • A motion for approval of the sale and bidding procedures is filed with the bankruptcy court and the bidding procedures are approved approximately 15 days later, after notice and a court hearing.
	<p>Market Test</p> <p style="text-align: center;">DAY 15-60</p> <ul style="list-style-type: none"> • Potential buyers conduct due diligence in accordance with the bidding procedures. • Potential buyers will submit binding bids by the bid deadline in order to participate in the auction, if any. • The Debtor, in consultation with its professionals and major stakeholders (including any unsecured creditors' committees), will evaluate bids and determine which parties will participate in the auction.
	<p>Auction</p> <p style="text-align: center;">DAY 65-70</p> <ul style="list-style-type: none"> • An auction, if any, will be conducted in accordance with bidding procedures.
	<p>Sale Hearing</p> <p style="text-align: center;">DAY 70-75</p> <ul style="list-style-type: none"> • The winning bid is submitted to the bankruptcy court for approval at a court hearing.
	<p>Closing</p> <p style="text-align: center;">DAY 90</p> <ul style="list-style-type: none"> • The 14-day appeal period runs and the parties may close the transaction.

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Secured Creditor Protections in Chapter 11 Sales

- Generally, debtor may not sell encumbered assets in a Section 363 sale without the consent of the secured creditors if the sale proceeds are less than the value of the secured loans
- Secured creditors will typically consent to a Section 363 sale because a bankruptcy sale will usually yield a higher price for their collateral
- Secured creditors will either receive the proceeds of the sale or have their lien attach to the sale proceeds
- Secured creditors have the ability to “credit bid” for their collateral in a Section 363 sale (up to the full amount of their claim)

Secured Creditor Protections in Chapter 11 Sales: “Loan to Own” Strategies

- The dramatic rise of distressed debt trading over the last 10 years has been one of the most important developments in modern bankruptcy practice
- Distressed debt can be purchased on the secondary market (often at a steep discount to face value) but asserted in bankruptcy at full face value
- Bankruptcy-savvy companies interested in acquiring distressed assets are increasingly purchasing the secured debt of distressed companies with the intention of credit bidding the full value of that debt to acquire the assets

Secured Creditor Protections in Chapter 11 Sales: “Loan to Own” Strategies (cont’d)

Example:

- Secured debt is purchased on the secondary market at 80% of par
- Secured debt is then credit bid at face value
- Credit bidder (if successful) effectively receives an immediate 25% ROI

Comparison of Asset Sale Processes

	<u>Chapter 11 Plan</u>	<u>Section 363 Sale</u>
Process	<ul style="list-style-type: none"> • Disclosure Statement • Solicitation and Tabulation • Confirmation 	<ul style="list-style-type: none"> • Establish bidding procedures • Conduct auction • Court approval
Advantages	<ul style="list-style-type: none"> • Transfer-tax relief • Best successor liability protections • Free and clear/not subject to fraudulent conveyance claims • Clean resolution of estate issues • Assign leases/contracts 	<ul style="list-style-type: none"> • Quick • Easily understood (like an M&A deal) • Do not (usually) have to deal with resolution of claims • Free and clear/not subject to fraudulent conveyance claims • Assign leases/contracts
Disadvantages	<ul style="list-style-type: none"> • Multiple parties must approve • Complexity and lack of speed 	<ul style="list-style-type: none"> • May be subject to attack as <i>sub rosa</i> plan • Generally do not deal with resolution of claims or equity and other chapter 11 plan issues



Financing a Chapter 11 Case



Postpetition Financing

- Financing is critical to a chapter 11 debtor, whether to fund a sale or a plan process. If the debtor has sufficient cash on hand, it can operate using only its lenders' "cash collateral," but more often, a debtor will require additional credit to fund the cost of a chapter 11 case
 - **"Cash Collateral"** under the Bankruptcy Code is defined as "cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest"
 - After a chapter 11 petition is filed, prepetition lenders cannot obtain their collateral or collect their debt; accordingly, prepetition lenders often consent to the use of cash collateral or provide additional credit (called a **"DIP Loan"**) on agreed terms and conditions

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Postpetition Financing (cont'd)

- A DIP loan will typically be negotiated prior to the bankruptcy filing, but must be approved by the bankruptcy court
- DIP lenders are generally paid before any other stakeholder (except for a “Carve-Out” for estate-retained professionals)
- Prepetition lenders may want to serve as DIP lenders because:
 - Prepetition loans may be “undersecured”
 - Additional funds may be necessary to protect going-concern value of the collateral
 - To ensure their claims remain the first in priority
 - Potential to earn higher fees and interest
 - Control over chapter 11 case (i.e., Milestones, Reporting)
 - Good faith protections

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Postpetition Financing (cont'd)

- DIP loans are relatively repayment-secure due to a number of special protections available to DIP lenders under the Bankruptcy Code
 - **Superpriority Claims:** DIP lender's superpriority claims are paid first in a liquidation (subject to limited exceptions for estate professionals). A chapter 11 plan cannot be confirmed unless the DIP loan is fully repaid
 - **DIP Liens:** If a lender is unwilling to lend on solely a superpriority basis, the Bankruptcy Code permits debtors to grant liens on estate property
 - **On Unencumbered Property.** DIP lenders can receive a first lien on the debtor's unencumbered assets

Postpetition Financing (cont'd)

- **Junior Liens.** DIP lenders will also often require junior liens on the debtor's encumbered assets
- **Pari Passu or Priming Liens.** If a DIP lender is not satisfied with the above liens, the Bankruptcy Code permits debtors to grant "priming" liens, which will share priority with, or become senior to, existing liens. Holders of pre-existing liens will likely object to such treatment

Postpetition Financing (cont'd)

- In addition to a DIP lender's priority status, DIP loans often include other extraordinary provisions
 - Payment of Costs
 - Improving Prepetition Collateral Position
 - *Roll Ups*
 - *Cross-Collateralization*
 - Stipulations, Releases, and Challenge Waivers
 - Section 506(c) Waiver
 - Liens on Avoidance Actions

Postpetition Financing (cont'd)

- To obtain court approval, various statutory requirements must be satisfied:
 - **Notice and a Hearing.** Creditors must be given notice and an opportunity to object and be heard by the bankruptcy court
 - **Inability to Obtain Credit on Less Onerous Terms.** The debtor must demonstrate that it made efforts to obtain financing elsewhere on better terms. The debtor's efforts do not have to be exhaustive, just sufficient under the circumstances
 - **Adequate Protection.** For priming DIPs, the debtor must show that the holder of the existing lien on property on which a senior or equal lien is granted is "adequately protected" from any diminution in the value of its collateral caused by the priming of its lien. This requirement is usually difficult to satisfy if the primed lender objects. Adequate protection is a function of the particular circumstances of the case

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Exit Financing

- Adequate exit financing is often necessary to satisfy “Feasibility” standard for confirmation of a Plan
 - Funds from exit financing are generally used to:
 - Pay creditor claims under the Plan; and
 - Refinance existing indebtedness (i.e., the DIP).
- Fund operations post-effective date of the chapter 11 Plan
- Exit financing creates another fee opportunity



Assumption, Assignment, and Rejection of Executory Contracts



Executory Contracts and Unexpired Leases

- Under Section 365 of the Bankruptcy Code, a debtor may “assume” or “reject” executory contracts or unexpired leases
- Contracts are “executory” when there are obligations remaining to be performed by both parties
- Timing:
 - Commercial real property leases where the debtor is lessee require the debtor move for assumption within 120 days
 - All other leases and executory contracts allow a debtor to defer the decision to assume upon confirmation of a reorganization plan, unless the bankruptcy court orders otherwise

Other Considerations

- “Ipso facto” clauses are void
- Any contract provision purportedly modifying a debtor’s rights under a lease or executory contract by virtue of the debtor’s financial condition is rendered unenforceable

Labor Issues

- Legacy labor liabilities are often among the largest claims in chapter 11 proceedings; however, the Bankruptcy Code provides statutory mechanisms for addressing such claims
- Subject to court approval and various statutory requirements, chapter 11 debtors can reject collective bargaining agreements (**CBAs**) and modify retiree health benefits
- Sections 1113 and 1114 of the Bankruptcy Code are important levers for debtors to negotiate critical modifications to existing and future labor liabilities

Labor Issues (cont'd)

- Before rejecting a CBA, the debtor must satisfy the following criteria under section 1113 of the Bankruptcy Code:
 - The debtor must make a proposal to the union based on complete and reliable information;
 - The proposed modifications must be necessary to the reorganization of the debtor;
 - The proposed modifications must treat stakeholders in a fair and equitable manner;
 - The debtor must provide the union with relevant information needed to evaluate the proposal;
 - The debtor must meet at reasonable times with the union before any hearing;

Labor Issues (cont'd)

- The debtor must negotiate in good faith;
- The union must have refused to accept the proposal without good cause;
and
- The balance of the equities must clearly favor rejection of the CBA
- Similarly, section 1114 of the Bankruptcy Code allows for the modification of retiree health benefits (e.g., medical, disability, death benefits, etc.)
- Section 1114 requires a bargaining process similar to the section 1113 process
- The debtor must continue to provide “vested” retiree health benefits unless same are modified in accordance with section 1114
- Retirees are often represented by the applicable unions, however, the bankruptcy court will sometimes appoint an official committee of retirees.



Bankruptcy Related Litigation



Bankruptcy Related Litigation

1. Preference

- A preferential transfer is a transfer made by the debtor while the debtor was insolvent which enables the creditor to receive more than it would have in a chapter 7 liquidation
- Look-back period for preference is usually 90 days, but is extended to one year for transfers to or for the benefit of insiders

2. Fraudulent Conveyance

- A transfer of property by the debtor for which the debtor received less than fair consideration at a time when the debtor was insolvent
- Insolvency is not required when the property transferred is conveyed with the intention of hindering, delaying or defrauding creditors
- Look-back period is two years under the Bankruptcy Code

Bankruptcy Related Litigation (cont'd)

3. Equitable Subordination

- Refers to the power of the bankruptcy court to relegate a claim to a lower priority
- The remedy for a finding that equitable subordination is appropriate is to subordinate the claim below other claims of the same type or, if a secured claimant, order the lien securing the claim be transferred to debtor's estate

4. Recharacterization

- Another equitable remedy which allows representatives of a debtor's estate to recharacterize claims held by affiliates against the debtor to equity

Bankruptcy Related Litigation (cont'd)

5. Substantive Consolidation

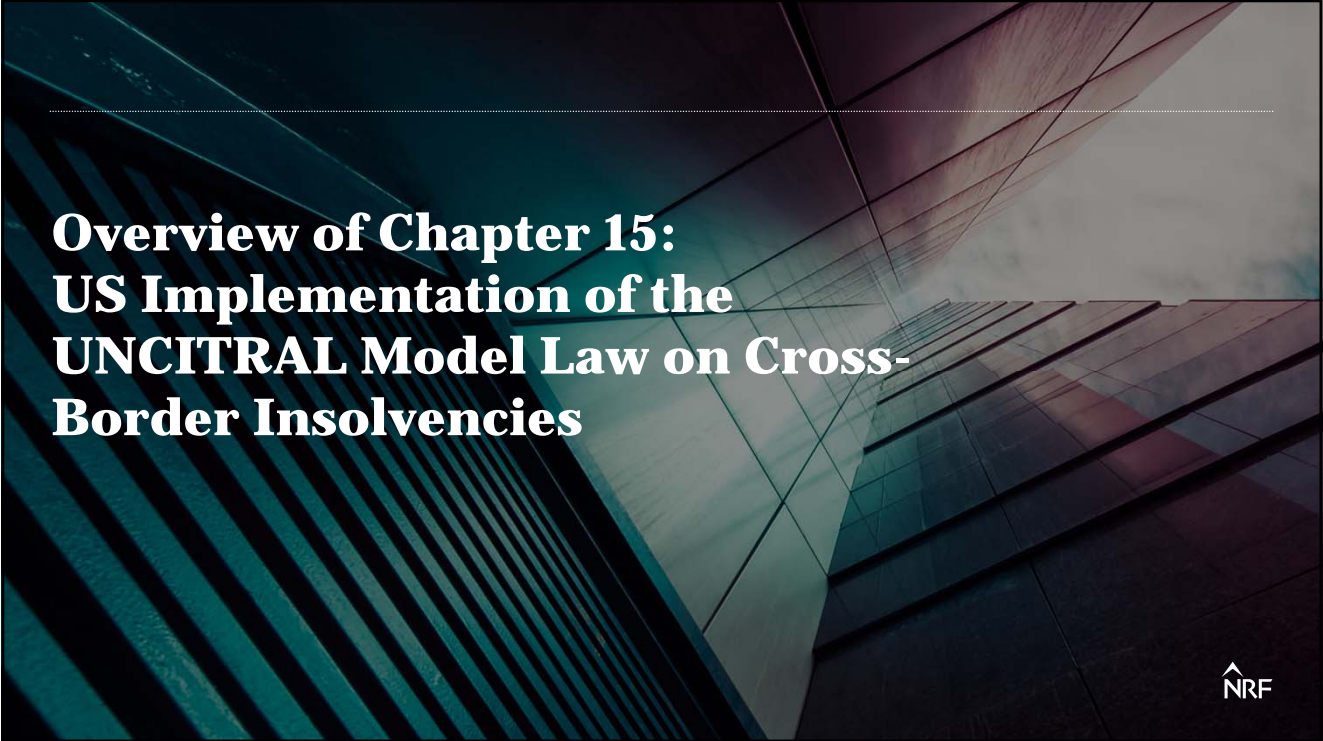
- An equitable remedy which involves the pooling and merging of the assets and liabilities of debtors
- Factors considered include:
 - whether creditors dealt with the debtor entities as a single economic unit and did not rely on their separate identities when extending credit, and
 - whether the affairs of the debtors are so entangled that the consolidation will benefit all creditors of the debtors' estates

6. Lender liability

- When a creditor exercises significant control over its debtor, the creditor could be found liable to the debtor, its shareholders or other creditors
- While often threatening, lender liability claims are rarely successful

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**Overview of Chapter 15:
US Implementation of the
UNCITRAL Model Law on Cross-
Border Insolvencies**



Overview of Chapter 15

- Chapter 15 implements the UNCITRAL Model Law on Cross-Border Insolvency
- Objectives include:
 - Facilitating cooperation between US. and foreign courts; and
 - Promoting the "fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor"
- Recognition of a foreign proceeding may pave the way for the enforcement of a foreign restructuring plan or scheme, depending on circumstances

Key Definitions

- The term “foreign proceeding” means 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
- The term “foreign representative” means a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding

Requirements for Recognition

- A foreign proceeding will be recognized as long as:
 - The foreign proceeding is foreign main or foreign nonmain proceeding;
 - The petition for recognition was filed by a foreign representative; and
 - The petition satisfies all of section 1515's procedural requirements
- Additionally, in the Second Circuit (i.e. New York), a foreign debtor must satisfy section 109(a)'s eligibility requirements.
 - Under section 109(a), a person must reside, or have a domicile, place of business or property in the United States to be eligible to be a debtor

Bases for Recognition: Main Proceeding vs. Nonmain Proceeding

- A foreign main proceeding is defined as “a foreign proceeding pending in a country where the debtor has the center of its main interests” (its “COMI”)
- A foreign nonmain proceeding is defined as a foreign proceeding pending in a country where the debtor has an “establishment”
 - An establishment is “any place of operations where the debtor carries out a nontransitory economic activity.”
 - Presence of assets alone is insufficient

Recognition of Foreign Main Proceeding

- Recognition of a foreign main proceeding triggers certain automatic relief, including a stay enjoining actions against the debtor and its property in the U.S
- Upon recognition, a foreign representative:
 - Has the capacity to sue and be sued in the U.S.;
 - May apply directly for appropriate relief; and
 - **Shall** be granted comity or cooperation by U.S. courts
- Because the determination of whether a foreign proceeding should be recognized as a foreign main proceeding is dependent on the location of a debtor's COMI, establishing COMI is critical

Recognition of Foreign Nonmain Proceeding

- When a nonmain proceeding is recognized, a court *may* (but is not required to) grant relief, including:
 - Relief automatically available to a foreign main proceeding;
 - Entrust the foreign representative with administration and realization of U.S. assets;
 - Discovery; and
 - Other relief that would be available to a trustee, except relief under §§ 522, 544, 545, 547, 548, 550 and 724(a) (which relate to avoidance actions)
- Recognition of a nonmain proceeding also gives the foreign representative access to U.S. courts (the same as in a main proceeding)
- Discretionary relief granted only if the interests of creditors and other interested entities, including the debtor, are sufficiently protected

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How is COMI Determined?

A corporate debtor's registered office is presumed to be its COMI, but this presumption is rebuttable

To determine a debtor's COMI, US courts have considered the following factors, among others:

- The location of the debtor's headquarters;
- The location of those who actually manage the debtor;
- The location of the debtor's primary assets;
- The location of a majority of the debtor's creditors;
- The jurisdiction whose law would apply in most disputes; and
- The debtor's "nerve center," including where the debtor's activities are located and controlled



Collateral in Cross-Border Bankruptcy Cases



Collateral in Cross-Border Bankruptcy Cases

- Chapter 15 does not create a U.S. bankruptcy estate
- Scope of the foreign estate will be governed by foreign law—and U.S. courts will generally defer to determinations regarding contents of the foreign estate made by foreign courts
- This deference creates a risk—what if foreign law sweeps more property into the estate than U.S. bankruptcy law?
- Good news: U.S. concept of property of the estate is already so broad that it would be unusual for a foreign country to have a substantially broader approach
- Foreign law may differ and be broader in some respects

Risks to Pledged U.S.-Based Control Accounts in Cross-Border Cases

- Upon recognition of a foreign main proceeding (or discretionary imposition of the automatic stay upon recognition of a foreign nonmain proceeding or as provisional relief), the automatic stay would prohibit drawing on the account
- As discretionary relief, the foreign debtor could request permission to use funds held in the account, or to repatriate funds held in the account
- The court would be required to determine that U.S. creditors would be “sufficiently protected” before granting such discretionary relief



Speaker Biography





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David Rosenzweig joined the New York office in 1990 and practices in the area of bankruptcy, reorganization and creditors' rights.

Mr. Rosenzweig handles transactional, litigation and advisory work related to chapter 11 cases, non-bankruptcy workouts and restructurings and commercial finance transactions. His experience includes cross-border insolvency proceedings, property acquisitions and dispositions including the purchases of substantially all of the assets of chapter 11 debtors, structuring transactions to minimize the risks associated with future insolvency and bankruptcy proceedings, defense of avoidance actions such as fraudulent conveyance and preference actions and rendering bankruptcy opinions in connection with securitizations and other financings.

He has broad experience representing secured and unsecured creditors, committees, trustees, debtors, equity holders, landlords and purchasers of assets in chapter 11 reorganization cases and non-bankruptcy workouts and restructurings.

Mr. Rosenzweig's recent clients include energy, trading and manufacturing companies, aircraft owners and financing parties as well as real estate and equipment financing companies.



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