Book Review: Ancillary and Other Cross-Border Insolvency Cases Under Chapter 15 of the Bankruptcy Code

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Book reviewed: Hon. Leif M. Clark, Ancillary and Other Cross-Border Insolvency Cases Under Chapter 15 of the Bankruptcy Code

Recent U.S. bankruptcy megacases for such debtors as General Motors, Chrysler Corporation, and Lehman Brothers have emphasized the importance of international cooperation in transnational insolvency cases. Absent cooperation, such entities are likely to suffer a great loss in value, and creditors and shareholders are likely to suffer enormous losses. In contrast, international coordination and cooperation can give substantial assistance in preserving the value of international businesses.

Chapter 15 of the U.S. Bankruptcy Code,1 adopted in 2005,2 is the U.S. version of the United Nations Model Law on Cross-Border Insolvency (Model Law).3 The United Nations Commission on International Trade Law (UNCITRAL) promulgated the Model Law in 1997 to facilitate the coordination of international insolvency cases to reduce the enormous economic losses that can result from the lack of cross-border coordination.4 The Model Law has been adopted by more than 15 countries, including such major trading countries as Canada, Mexico, the United Kingdom, Japan, Korea, Australia, and New Zealand.

Judge Leif Clark’s book, Ancillary and Other Cross-Border


1See 11 U.S.C.A. §§1501 to 1532.


4In the same timeframe, the European Union drafted and adopted its Regulation on Insolvency Proceedings, which accomplishes a parallel (but different) level of cooperation among the EU countries for cross-border insolvency cases within the European Union.
Ancillary & Other Cross-Border Insolvency Cases Under Chapter 15

Insolvency Cases Under Chapter 15 of the Bankruptcy Code, is apparently the first book-length commentary on Chapter 15. It is a very worthy book and provides a highly informative and useful analysis of Chapter 15. The book is well written and benefits greatly from Judge Clark's background and experience in international insolvency matters.

Judge Clark comes to this task with substantial international and comparative insolvency law experience. For a number of years, he has been an advisor to the American Bar Association delegation to the UNCITRAL Working Group V, which drafted the Model Law on which Chapter 15 is based. He served also on the advisory committee for the North American Free Trade Agreement transnational insolvency project. Judge Clark continues to work with UNCITRAL on follow-up issues relating to cross-border insolvency, including the problem of the treatment of international enterprise groups in insolvency proceedings in various countries. In addition, Judge Clark has taught seminars for judges on insolvency law in a number of countries, especially in Eastern Europe.

A lengthy history lies behind the Model Law and its U.S. incarnation in Chapter 15. The history of international cooperation in insolvency matters is overwhelmingly a story of failed dreams. Indeed, in view of this history of failure, the success of the Model Law is remarkable: many major trading countries have adopted it and incorporated it into their domestic legislation. Judge Clark does a masterful job of outlining this background of ashes from which the Model Law has arisen.

Functions of Chapter 15

Much of the reported case law on Chapter 15 focuses on the recognition of foreign insolvency proceedings as either main or nonmain proceedings. Judge Clark devotes 50 pages (nearly half of the book) to the Chapter 15 provisions relating to such recognition (as he should) and does an excellent job of analyzing the relevant statutory provisions and cases.

While the Chapter 15 provisions on the recognition of foreign insolvency proceedings (and the determination of whether a foreign proceeding is a main proceeding or a nonmain proceeding) dominate the case law and literature, Judge Clark properly

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5 Hon. Leif M. Clark, Ancillary and Other Cross-Border Insolvency Cases Under Chapter 15 of the Bankruptcy Code.


7 For example, Judge Clark and I taught a seminar on basic accounting in the insolvency context for Romanian judges in Cluj, Romania in March 1996.

8 See Clark, § 2.
points out that Chapter 15 has three other important functions: the regulation of a U.S. bankruptcy case administrator (trustee or debtor in possession) seeking assistance abroad in connection with a U.S. bankruptcy case (§ 1505); the coordination of foreign bankruptcy cases in one or more countries with a U.S. case filed under Chapter 7 or 11 (§§ 1528 to 1530); and providing the terms for foreign creditors to participate in a U.S. bankruptcy case (§§ 1512 to 1514).9

I especially like Judge Clark’s emphasis on the importance of the provisions (§§ 1525 to 1527) requiring communication and coordination between courts and major players in transnational insolvency cases. These provisions operate independently from the recognition provisions that have been the principal focus of most of the Chapter 15 literature. Judge Clark points out that these provisions require communication and coordination with respect to international insolvency cases, and that communication and coordination are not optional.10 Another important insight is that the use of protocols to coordinate international insolvency cases rests on these statutory provisions.11

Enterprise or Corporate Groups

The coordination of transnational bankruptcy cases for enterprise or corporate groups remains an unsolved problem of international insolvency law. Judge Clark devotes an entire section of his book to this problem.12 The international regime providing for such coordination remains a work in progress (in which Judge Clark is a significant participant).

In my view, the Chapter 15 provisions on communication and coordination have a very important role in the international coordination of insolvency cases for the members of international enterprise or corporate groups. These sections are the principal provisions of Chapter 15 that offer real promise in helping to address the incredibly complex coordination problems that international enterprise groups pose.13

The international megacases such as Lehman Brothers, General Motors, and Chrysler have emphasized the importance of these problems, and the fact that the coordination of such cases remains unfinished work in the arena of international insolvency law.

Organization of the Book

In writing a book on Chapter 15, the author must decide how

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9See Clark, § 3(1)[a][2].
10See Clark, § 11.
11See Clark, § 11(3)[c].
12See Clark, § 14.
13See Bufford, § 14.3.
Ancillary & Other Cross-Border Insolvency Cases Under Chapter 15

To organize the material. An obvious alternative is to organize the discussion section by section, from § 1501 to § 1532. A second alternative is to group the sections together in logical groupings. While Judge Clark discusses each provision of Chapter 15 in substantial detail, he has chosen the logical grouping alternative, which makes it easier to discuss related issues in an organized manner.

However, this organization may make it more difficult for a reader to find the discussion of a particular statutory section. To a substantial extent, a reader will likely look to the table of contents to find a particular subject of interest. However, the editors have mysteriously failed to include all of the sections in the table of contents (or in the index), so some of the discussions may be difficult to find. Here is a list of those missing from the table of contents, and where the discussion of each provision is located:

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<tr>
<th>Code</th>
<th>Book section</th>
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<tr>
<td>1502</td>
<td>4</td>
</tr>
<tr>
<td>1505</td>
<td>3[1][a][ii]</td>
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<td>1508</td>
<td>3[2]</td>
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<td>1531</td>
<td>12[1][a]</td>
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In addition to the Chapter 15 sections that are missing from the table of contents, there are two definitions in the Model Law, the definitions for “foreign proceeding”¹⁴ and “foreign representative,”¹⁵ that Congress has codified in 11 U.S.C.A. § 101 (the Bankruptcy Code definition section). While the book discusses each of

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¹⁴Section 101(23) provides:
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 proceedings the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.

¹⁵Section 101(24) provides:
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
these concepts, the textual definitions are missing altogether, and there are no footnotes with the relevant statutory citations.

**Case Law Included in the Book**

An author always faces the problem that important opinions may be issued after a book has gone to press that would thus be omitted from discussion. This is especially a danger for Chapter 15, which is a whole new statutory provision in need of judicial interpretation.

Indeed, there was an outpouring of published opinions interpreting Chapter 15 in 2007 and the first half of 2008. These opinions focused principally on the recognition of foreign proceedings under §§ 1520 and 1520 and on related provisions bearing on such recognition. Happily, Judge Clark’s publishing deadline permitted him to include all of these cases in his book. There have been relatively few important Chapter 15 opinions published since June 2008. Thus Judge Clark’s book discusses virtually all of the major case law interpreting Chapter 15.

**Practice Pointers**

One of the strengths of Judge Clark’s book is that he frequently gives practical pointers. Here are several examples. Judge Clark states, in interpreting § 1515(b) on the documents required to support recognition of a foreign proceeding, that “prudence suggests using exhibits that are as close as possible to self-authenticating, as that may reduce or eliminate the need for an evidentiary hearing.” While noting that materials in a foreign language must be translated into English and that the statute does not require formal certification of the authenticity or accuracy of the translation, Judge Clark advises, “an affidavit from the translator is probably wise.” Where the statute and rules are inconclusive as to the format of a request for interim relief pending a decision on recognition, Judge Clark advises that the format of such a pleading should resemble a complaint in a

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11 See Clark § 5[2].

12 See Clark § 5[2]. Perhaps Judge Clark should explain this comment, because affidavits are unknown in most of the world.
Ancillary & Other Cross-Border Insolvency Cases Under Chapter 15

To minimize delay, Judge Clark advises that a foreign representative set out in the recognition petition the relief to be sought under § 1521 upon recognition; such a request, he says, would be expected to be made by filing a motion. A foreign representative concerned about possible transfers or encumbrances of property of the debtor within the territorial jurisdiction of the U.S. will want to obtain as broad an order as possible under § 1521(a)(3), Judge Clark suggests, to obtain an an enforceable remedy to deal with such transfers.

Issues for Special Comment

I agree with almost everything that Judge Clark says in interpreting Chapter 15. However, there are four important issues that merit special treatment in this review because Judge Clark treats them (at least somewhat) differently from the way that I treat them in my book. Neither Chapter 15 nor the related statutory provisions has clear directions on any of these issues.

Tertiary Proceedings

Tertiary proceedings are foreign insolvency proceedings that fall outside the ambit of main and nonmain foreign proceedings. The terminology of “main” and “nonmain” is misleading: it gives the impression that the two categories cover the waterfront when in fact they do not. A main foreign insolvency proceeding is one filed in the country where the debtor’s center of main interests (COMI) is located. A nonmain foreign proceeding is one filed in a country where the debtor has an establishment.

This terminology provides no label for foreign proceedings that are neither main nor nonmain. I label these “tertiary” proceedings. While the drafters of the Model Law may have thought that such proceedings are not likely to be important, the short history of Chapter 15 demonstrates that this is not so.

Indeed, U.S. law makes it eminently possible to file a case in the U.S. that a foreign country that has adopted the Model Law must categorize as a tertiary proceeding. The U.S. statutory provision authorizing the filing of a bankruptcy case where the debtor has property in the U.S. (notwithstanding the lack of a COMI or establishment) is the most common grounds for filing a

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19 See Clark § 6.
20 See Clark § 7(2).
21 See Clark, § 7(2).
23 See Bufford § 1.7(A).
U.S. tertiary proceeding. Indeed, there is an extensive body of case law supporting the propriety of such U.S. cases.\textsuperscript{25}

Furthermore, the principal insolvency proceeding for an international debtor may be filed in a country lacking either the debtor’s COMI or an establishment. Such a filing may be desirable where (a) the country of the debtor’s COMI is unsuitable for one of a variety of reasons, and (b) the debtor either lacks an establishment in another country or any such country is also unsuitable for the principal proceeding.\textsuperscript{26}

Judge Clark takes the view that, for such an insolvency proceeding, Chapter 15 bars the foreign representative from appearing in any U.S. state or federal court as a party litigant (with very limited exceptions).\textsuperscript{27} A more reasonable alternative, in my view, is that this bar applies only where a foreign representative fails to obtain recognition of a foreign main or nonmain proceeding. In contrast, a tertiary proceeding, in my view, is beyond the scope of the recognition provisions of Chapter 15 and not subject to this limitation.\textsuperscript{28}

\textbf{Chapter 15 Administrative Orders}

Chapter 15 is notably silent as to what happens after a foreign proceeding is recognized and initial orders are addressed by the court. After granting recognition to a foreign proceeding as either a foreign main proceeding or a foreign nonmain proceeding, Chapter 15 gives the court open-ended discretion to grant “any appropriate relief.”\textsuperscript{29} This is not surprising—the purposes of a Chapter 15 case can vary enormously, depending on the nature of the foreign proceeding and its needs for judicial assistance in the U.S.

\textsuperscript{25}See, e.g., In re Iglesias (finding that $522 bank account was sufficient to support U.S. jurisdiction for a bankruptcy case); In re McTague, 198 B.R. 428, 431–32 (Bankr. W.D.N.Y. 1996) (finding that bank account of $194 was sufficient to support U.S. jurisdiction for a bankruptcy case filed by a Canadian citizen where the debtor had other transactions in the U.S.). But see In re Head, 223 B.R. at 648 (finding that Canadian citizens with insubstantial U.S. ties could not invoke U.S. bankruptcy court jurisdiction to avoid choice of law and choice of forum clauses in contracts with Lloyds of London. The fact that all parties were doing business in the U.S., in the court’s view, was not a sufficient basis for U.S. jurisdiction).

\textsuperscript{26}The factors that make a country unsuitable for filing the principal case for a debtor include the lack of a bankruptcy law or an unsuitable law, the lack of a corps of professionals experienced in handling and administering insolvency cases, and a corrupt judiciary.

\textsuperscript{27}See Clark § 56[1c].

\textsuperscript{28}In contrast to the scope of the recognition provisions of Chapter 15, a tertiary proceeding, in my view, is subject to the cooperation and communication provisions of §§ 1525 to 1527.

\textsuperscript{29}See 11 U.S.C.A. § 1521(a).
ANCILLARY & OTHER CROSS-BORDER INSOLVENCY CASES UNDER CHAPTER 15

However, in my view, a Chapter 15 case should have a measure of judicial supervision as it develops after the recognition order. The nature and scope of such supervision should be tailored to the needs of the particular case.

In comparison, in the last 20 years, U.S. bankruptcy courts have learned that Chapter 11 cases need judicial administration to help them through the bankruptcy system. Similar administration for Chapter 15 cases is also likely to improve efficiency and reduce delays. Indeed, given the open-ended grant of judicial authority for such a case after recognition of a foreign proceeding, a case administrative order, tailored to the needs of the individual case, can be very beneficial.

In addition, the court should consider including in a case administrative order a determination as to which Bankruptcy Code provisions and which bankruptcy rules will be applied to the case (of not mandated or prohibited in advance).

Application of Unspecified Code Provisions and Rules in Chapter 15 Cases

The U.S. Bankruptcy Code has a limited number of specific provisions that make other code provisions applicable in Chapter 15 cases. In addition, the Federal Rules of Bankruptcy Procedure have a few provisions specifically applicable to Chapter 15 cases. This leaves an open question as to the applicability of the other statutory provisions and rules.

I take the position in my book that many Bankruptcy Code sections and rules should be applicable in appropriate Chapter 15 cases and that the applicability of these provisions should be decided on a case-by-case basis. There are some Code provisions, for example, that should be applied in most Chapter 15 cases. There are others that should be applied only sometimes but with important implications when they are applied. There are yet other Code provisions that will rarely be applicable in

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30 A study of 738 Chapter 11 cases filed over a period of six years showed that judicial supervision reduced the time from filing to plan confirmation by 24%. For Chapter 11 cases not headed to plan confirmation, such supervision reduced the time to dismissal by 45%, and the time to conversion to Chapter 7 by 44%. See Hon. Samuel L. Bufford, Chapter 11 Case Management and Delay Reduction: An Empirical Study, 4 Am. Bankr. Inst. L. Rev. 85, 86 (1996).

31 For a discussion of the possible role of a Chapter 15 case management order, see Bufford § 1.8.

32 See Bufford § 1.8.

33 See, e.g., 11 U.S.C.A. §§ 103(a), 109(b)(3), 305(2).


35 See Bufford, ch. 3–5 (Code provisions); ch. 9 (Federal Rules of Bankruptcy Procedure).
Chapter 15 cases. The same reasoning applies to the Federal Rules of Bankruptcy Procedure.

In my view, this is not an issue that should be decided on an ad hoc or retroactive basis. Instead, insofar as foreseeable, the court should decide at the outset (viz., shortly after granting an order of recognition) which statutory provisions and rules should apply in a particular Chapter 15 case, so that the parties in interest can make plans accordingly.\(^{38}\)

For example, Chapter 15 makes no reference to the employment of professional persons (such as attorneys) to represent the foreign representative in the Chapter 15 case. Rather than leave this issue open for determination after the professional work has been completed, the court should decide, upon the issuance of a recognition order, whether the U.S. professionals hired by the foreign representative should have their employment and fees approved by the U.S. court.\(^{37}\) This is an important subject that should be addressed in a Chapter 15 administrative order.

Judge Clark does not address in detail the application of most of the provisions of the Bankruptcy Code to Chapter 15 cases where their application is not specified by statute. He does note that the statutory language that makes certain Code sections applicable in Chapter 15 cases can be interpreted, by negative implication, to exclude the remaining provisions.\(^{38}\) He also argues that § 542 apparently should apply to Chapter 15 cases to bring property into the court's jurisdiction that is in the custody of another at the time of filing the Chapter 15 case.\(^{39}\)

It would be helpful for Judge Clark to address these issues further in future editions of his book and to give us his wisdom (which he clearly has) on these subjects.

**Chapter 15 Examiners**

The role and responsibilities of a Chapter 15 examiner is a mystery in the Chapter 15 text. There is no provision in the bankruptcy statute or the Federal Rules of Bankruptcy Procedure giving any insight into why a Chapter 15 examiner might be appointed or what such an examiner's duties might be. In addition, at this point, there is no reported opinion in a Chapter 15 case where a Chapter 15 examiner has been appointed,\(^{40}\) and thus there is no case law to put flesh on the very bare statutory bones.

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\(^{38}\) See Bufford, § 1.8

\(^{37}\) See Bufford, §§ 4.11–4.15.

\(^{38}\) See Clark § 3.5.

\(^{39}\) See Clark § 7.1. This omission was apparently a typographical error. See Bufford § 5.15.

\(^{40}\) Indeed, I am not aware of any Chapter 15 case where an examiner has been appointed.
ANCILLARY & OTHER CROSS-BORDER INSOLVENCY CASES UNDER CHAPTER 15

While Judge Clark makes occasional reference to a Chapter 15 examiner, he casts no light on the role of such an examiner. 41 His wisdom on this subject in future editions of his book would also be helpful.

Conclusion

I thoroughly enjoyed reading Judge Clark's book. I recommend it highly as a very informed, thoughtful, and well-written source book on the interpretation and application of Chapter 15 to U.S. insolvency cases with foreign dimensions, whether they are filed as Chapter 15 cases or as cases under other chapters of the U.S. Bankruptcy Code.

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41 For a discussion of the possible role of a Chapter 15 examiner, see Bruford, § 1.9.