

CHAPTER 15: ANCILLARY AND OTHER CROSS-BORDER CASES

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Enactment of Chapter 15

Chapter 15 is an entirely new chapter of the United States Bankruptcy Code

- Chapter 15 took effect on October 17, 2005 as part of the Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA”)
- Chapter 15 adopts the UNCITRAL Model Law on Cross-Border Insolvency and replaces former §304, Cases ancillary to foreign proceedings

Enactment of Chapter 15

- It is the sole route for a foreign representative of a foreign proceeding to gain access to courts in the United States other than for the limited purpose of collecting the debtor's accounts receivable
- In addition to governing "inbound" foreign proceedings, it governs the "outbound" authority of the bankruptcy court and its representatives to act in a foreign country
- Title VIII of the BAPCPA contains chapter 15 and related amendments to Titles 11 and 28 of the United States Code

Chapter 15 Eligibility

To be eligible for chapter 15 recognition, a foreign proceeding must meet the definitional elements of §101(23). The foreign proceeding must be:

- A collective judicial or administrative proceeding in a foreign country
- For the purpose of reorganization or liquidation
- Under a law relating to insolvency or adjustment of debt in which the assets and affairs of the debtor are subject to control or supervision by a foreign court

Chapter 15 Eligibility

The foreign representative of the foreign proceeding must be a person or body authorized in the foreign proceeding to administer the case or to act as foreign representative

A definitionally qualifying foreign proceeding is subject to additional eligibility requirements

- The debtor must have either its center of main interests or an establishment in the foreign country

Chapter 15 Eligibility

- A foreign proceeding pending in the country where the debtor has the center of its main interests will be a foreign main proceeding
- A foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment will be a foreign nonmain proceeding
 - A foreign proceeding based solely on presence of assets in the foreign country will not be eligible for recognition

Chapter 15 Eligibility

- A foreign proceeding of an individual whose liabilities are within the threshold for chapter 13 eligibility (\$291,000 unsecured, \$872,000 secured) is ineligible
- A foreign proceeding of a foreign bank which is subject to US regulation is ineligible
- Section 109(a) eligibility requirements (residence, domicile, place of business or property) were not intended to apply in chapter 15; a technical amendment will eliminate ambiguity

Chapter 15 Jurisdiction, Venue and Procedure

Jurisdiction for chapter 15 ancillary cases is found in 28 U.S.C. §1334(a); an amendment to §1334(c) prevents the court from abstaining from a recognition proceeding

Recognition and other matters under chapter 15 are core proceedings under 28 U.S.C. §157(b)(2)(P)

Chapter 15 Jurisdiction, Venue and Procedure

Under 28 U.S.C. §1410, venue for an ancillary case is determined by the following hierarchy:

- The district where the debtor has its principal place of business in the United States
- If none, the district in which there is an action pending against the debtor
- Otherwise, where venue will be consistent with the interests of justice and the convenience of the parties

Chapter 15 Construction

Chapter 15's international origin and implications affect its construction and its limitations

- International obligations of the United States will prevail if they conflict with chapter 15
- The court may decline to take an action under chapter 15 “if the action would be manifestly contrary to the public policy of the United States.”
- In interpreting chapter 15, the court must consider its international origin and the goal of uniform application among adopting countries

Chapter 15 Construction

Chapter 15 supplements the generally applicable Bankruptcy Code definitions with definitions of the following terms: “debtor,” “establishment,” “foreign court,” “foreign main proceeding,” “foreign nonmain proceeding,” “trustee,” “recognition” and “within the territorial jurisdiction of the United States.”

Applicability of Chapters

Chapter 1 of the Bankruptcy Code, GENERAL PROVISIONS, applies to cases under chapter 15. In addition, the following sections apply in a case under chapter 15

- §307, granting standing in chapter 15 cases to the United States trustee
- §362(n), excepting from the automatic stay cases involving certain small business debtors

Applicability of Chapters

- §§555 through 557 and 559 through 562, protecting broad rights under financial contracts from stay avoidance or other limitation in any proceeding under the Bankruptcy Code
- Additional sections apply through the effects of recognition and the relief that may be granted to a foreign representative

Applicability of Chapters

The following provisions of chapter 15 apply in all cases under the Bankruptcy Code

- §1505, empowering the court to authorize a trustee or other entity, including an examiner, to act in a foreign country on behalf of an estate created under section 541
- §1513, insuring that foreign creditors have the same rights as domestic creditors to commence or participate in a bankruptcy case and
- §1514, requiring reasonable notice to foreign creditors including reasonable additional time to file proofs of claim

Applicability of Chapters

The provisions of section 1509 imposing recognition as a condition to access to courts apply whether or not a case is pending under the Bankruptcy Code.

Recognition

Recognition requires a simple, expeditious examination of the eligibility of the foreign proceeding and the credentials of the foreign representative

The filing of a petition for recognition under section 1515 commences a case under chapter 15

Recognition

The recognition procedure of section 1515 is the sole entry point for access by a foreign representative to the State and Federal court systems in the United States (except for the limited purpose of collecting the debtor's accounts receivable)

The decision to grant recognition is not dependent upon findings about the nature of the foreign proceeding as previously mandated by section 304(c)(2)

Recognition

The application for recognition will consist of Official Form 1, the same form of petition employed for commencement of cases under other chapters of Title 11.

- The foreign representative must check two boxes, one indicating the basis for venue, the other whether the case is a foreign main proceeding or a foreign nonmain proceeding

Recognition

- The petition must be accompanied by (1) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative, (2) a certificate from the foreign court affirming the existence of the foreign proceeding and the appointment of the foreign representative, or (3) in the absence of evidence described in (1) or (2), any other evidence acceptable to the court, (all translated into English), (4) a statement identifying all other foreign proceedings of the debtor
- Rule 1007(a) requires a list containing the name and address of all administrators in foreign proceedings of the debtor, all parties to litigation in the US with the debtor and all entities against whom provisional relief is being sought

Recognition

The court is authorized to presume the validity of statements in the accompanying documents, the authenticity of the documents and the fact that, in the absence of evidence to the contrary, the debtor's registered office is the center of its main interests

Recognition

The procedure is similar to that for an involuntary petition and requires service of the petition and a summons on the debtor, any entity against which provisional relief is sought and any other parties as the court may direct. A party in interest may contest the petition.

Recognition

- In addition, a notice of the filing of the petition must be given to the persons against whom provisional relief is being sought, all parties to litigation in which the debtor is a party in the United States and such other entities as the court may direct.

The court shall decide on the application for recognition “at the earliest possible time.”

Relief Available In Chapter 15

Limited relief is available under §1519 on an emergency basis between the time of filing the petition for recognition and the entry of an order granting recognition.

- While the petition for recognition of a foreign proceeding must “be decided upon at the earliest possible time,” there will be a gap between the time of filing the petition and the entry of the order granting or denying recognition
- Provisional relief may include stay of execution against the debtor’s assets, suspension of the right to transfer, encumber or otherwise dispose of the assets of the debtor, discovery and any additional relief that may be available to a trustee other than avoidance powers

Relief Available In Chapter 15

- Delivery of assets to the foreign representative prior to recognition is limited to assets that are perishable, susceptible to devaluation or otherwise in jeopardy
- Police or regulatory actions may not be stayed under §1519 but §105, with its established jurisprudence, applies in chapter 15
- The financial contract exceptions from stay and other interference apply
- Specified relief enters automatically under §1520 upon recognition of a foreign proceeding that is a foreign main proceeding.

Relief Available In Chapter 15

- Upon recognition of a foreign main proceeding, the stay of Bankruptcy Code section 362 takes effect even though the law of foreign proceeding does not provide a stay with ostensibly extraterritorial effect.
- Section 1520 also incorporates section 361 to permit application of the principles of adequate protection under the relevant parts of sections 362 and 363.
- Section 1520(a)(2) automatically applies sections 363 (use, sale or lease of property), 549 (avoidance of post-petition transactions) and 552 (post-petition effect of security interests) to interests of the debtor in property that is within the territorial jurisdiction of the United States

Relief Available In Chapter 15

- A foreign representative of a foreign main proceeding can operate the debtor's business, unless the court orders otherwise, "under and to the extent provided by sections 363 and 552"
- Exceptions to stay include the right to commence an individual action or proceeding in a foreign country to the extent necessary to preserve a claim against the debtor and the right of any party, including the foreign representative, to file a petition to commence a title 11 case, file claims or take actions in such a case

Relief Available In Chapter 15

All types of available relief may be granted under §1521 after recognition of a foreign proceeding, whether main or nonmain

- The menu of relief available under §1521 is broader than that provided automatically but all additional relief is discretionary and must be necessary to effectuate the purpose of chapter 15 and to protect the assets of the debtor or the interests of creditors

Relief Available In Chapter 15

- In addition to the types of relief available provisionally, the debtor's assets may be entrusted to a foreign representative or another person for administration or realization if the court is "satisfied that the interests of creditors in the United States are sufficiently protected."
- Police and regulatory actions may not be stayed under §1521 and the financial contract exceptions apply

Relief Available In Chapter 15

The theme of sufficient protection of affected parties is amplified in §1522, which permits the court to grant relief under sections 1519 and 1521 of the Bankruptcy Code only if the interests of creditors and other interested entities (including the debtor) are sufficiently protected

- The court may impose conditions, including security or a bond, both on relief granted under section 1519 or 1521 or on the operation of the debtor's business under section 1520(a)(3)
- The court may modify or terminate the relief granted under section 1519 or 1521 at the request of the foreign representative or an entity affected by such relief or upon its own motion

Relief Available In Chapter 15

An examiner may be appointed for several purposes: to act in a foreign proceeding on a provisional basis as representative of an estate; to be entrusted on a provisional basis with perishable assets for administration or realization; post-recognition, to be entrusted with assets for administration or realization; to be entrusted with the distribution of all or a part of the debtor's assets located in the United States, to cooperate with foreign courts and representatives and to communicate with foreign courts and representatives

- When the court directs the appointment of an examiner, the United States trustee, after consultation with parties in interest, shall appoint a disinterested person. The bonding requirements contained in section 322 of the Bankruptcy Code apply.

Right of Access to Courts If Recognition Granted

Upon recognition, a foreign representative has the capacity to sue or be sued, can apply directly to a court in the United States and the court **shall** grant comity or cooperation (but not necessarily relief)

- The filing of a petition for recognition or a petition or request under §303 (to commence an involuntary case) or §305 (seeking dismissal or suspension of a case) does not subject the foreign representative to jurisdiction for any other purpose
- The bankruptcy court may require the foreign representative to comply with its orders

Right of Access to Courts If Recognition Granted

- A certified copy of order granting recognition must accompany requests for comity or cooperation
- Recognition is not required for suits to collect or recover a claim that is property of the debtor, such as an account receivable

Upon recognition, a foreign representative is entitled to participate as a party in interest in a bankruptcy case involving the debtor.

Upon recognition, a foreign representative may intervene in proceedings pending in Federal and State courts in the United States in which the debtor is a party.

Right of Access to Courts If Recognition Granted

Upon recognition, a foreign representative may commence an involuntary case or, if the foreign proceeding is a foreign main proceeding, a voluntary case under chapter 7 or 11 of the Bankruptcy Code.

- A certified copy of the order granting recognition must accompany the involuntary or voluntary petition
- Prior to commencement of a case under chapter 7 or 11, the foreign representative must advise the court in which the recognition petition was filed

Right of Access to Courts If Recognition Granted

- The scope of a plenary case filed after recognition of a foreign main proceeding is limited to assets of the debtor that are within the territorial jurisdiction of the United States
- Section 1529 mandates cooperation and coordination between the original chapter 15 case and the case under section 301, 302 or 303. Cooperating may include suspension or dismissal of the plenary case.

Right of Access to Courts If Recognition Granted

Upon recognition of a foreign proceeding, the foreign representative has standing to assert avoidance actions (under sections 522, 544, 545, 547, 548, 550, 553, and 724(a)) in a case pending under another chapter of Title 11.

- The avoidance action under section 1523 can only be brought in a case pending under another chapter; in that case, it will be subject to choice of law and forum determinations

Right of Access to Courts If Recognition Granted

An appearance by a foreign representative to file a chapter 15 petition, to commence a case under another chapter or to seek dismissal or suspension of such a case does not submit the foreign representative to the jurisdiction of any court in the United States for any other purpose

Cooperation and Communication

The first purpose of chapter 15 stated in section 1501(a)(1) is “...to provide effective mechanisms for dealing with cases of cross-border insolvency with the objectives of –(1) cooperation between— (A) courts of the United States, United States trustees, trustees, examiners, debtors, and debtors in possession; and (B) the courts and other competent authorities of foreign countries involved in cross-border insolvency cases”

Cooperation and Communication

- Courts must “cooperate to the maximum extent possible” with foreign courts and foreign representatives and may do so directly, subject to rights of a party in interest to notice and participation. There will not always be a need to cooperate or communicate with a foreign court, particularly if narrow ancillary relief is all that is required.
- Interim Bankruptcy Rules 5012 and 2002(q)(2) specify the time, content and manner of notice required for communication by a bankruptcy court with a foreign court

Cooperation and Communication

- The trustee or other person authorized by the court, including an examiner, must also cooperate to the maximum extent possible with a foreign court or foreign representative and may communicate directly with the foreign court or foreign representative, in both situations subject to supervision of the court but not subject to the notice requirements of Rules 5012 and 2002(q)(2)
- The court can implement such cooperation by “any appropriate means” including the appointment of persons to act at the direction of the court, the coordination of administration and supervision of the debtor’s assets and affairs, and the use of coordination agreements or protocols

Coordination of Concurrent Proceedings

The availability and the effects of a domestic proceeding that is commenced after recognition of a foreign main proceeding are limited. A case under another chapter of the Bankruptcy Code can only be commenced if the debtor has assets in the United States.

- The “subsequent” case must be preceded by notice to the court where the chapter 15 case was filed and will be subject to the mandates for coordination and cooperation
- Jurisdiction is restricted to assets of the debtor that are within the territorial jurisdiction of the United States

Coordination of Concurrent Proceedings

Where the debtor is subject to both a foreign proceeding and a local proceeding, the court must seek cooperation and coordination subject to guidelines based on the sequence in which the cases were filed

- If a case under another chapter is pending when the application for recognition is filed under chapter 15, any relief granted must be consistent with relief granted in the plenary case and no automatic relief under section 1520 will apply even if the chapter 15 case is recognized as a foreign main proceeding

Coordination of Concurrent Proceedings

- If the case under another chapter is commenced after recognition or after the petition for recognition is filed, any relief granted in the chapter 15 case shall be reviewed and modified or terminated if inconsistent with the local proceeding. If the foreign proceeding is a foreign main proceeding, the automatic stay shall be modified or terminated if inconsistent with the relief granted in the plenary case

The court can use section 305 to dismiss or suspend a United States case if the interests of creditors and the debtor would be better served by such dismissal or

Coordination of Concurrent Proceedings

If the representatives of more than one foreign proceeding seek recognition the court shall seek cooperation and coordination but must recognize that a foreign main proceeding will be given primary importance in the United States

- Relief granted to a representative of a foreign nonmain proceeding after a foreign main proceeding has been recognized must be consistent with the foreign main proceeding

Coordination of Concurrent Proceedings

- If a foreign main proceeding is recognized after a foreign nonmain proceeding has been filed or recognized, any relief granted in the case of the foreign nonmain proceeding shall be reviewed and modified or terminated by the court if it conflicts with the foreign main proceeding
- If a foreign nonmain proceeding is recognized after another foreign nonmain proceeding, the court shall grant, terminate or modify any relief granted to facilitate coordination of the proceedings

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- **Areas of Practice**

- Dan Glosband is a partner in the firm's Business Law Department and a member of its Financial Restructuring Practice. Mr. Glosband's primary areas of practice are insolvency and reorganization. He represents secured and unsecured creditors, committees and debtors in workouts and proceedings under the Bankruptcy Code. Mr. Glosband has acted as an adviser to the U.S. State Department and the American Law Institute on international insolvency projects.

- **Work for Clients**

- Mr. Glosband recently represented the lead investors in the proposed Chapter 11 plan of US Airways and its merger with America West and the fiduciaries for the employee stock plan in the Delta case. He also represents CNA Insurance, one of the main insurers of W.R. Grace in its asbestos-driven Chapter 11 case. Other recent engagements included the representation of buyers of assets from debtors in reorganization proceedings in Virginia, Michigan and Ontario.

- In addition, Mr. Glosband recently served as lead counsel to Arthur D. Little, Inc. in Chapter 11 proceedings in the District of Massachusetts, completed the successful reorganization of GC Companies (General Cinema) in its Chapter 11 proceedings in Delaware and was lead counsel to MHI Shipbuilding LLC (the Fore River Shipyard) in Chapter 11 proceedings pending in the District of Massachusetts. He has represented the joint owners of a nuclear plant in reorganization proceedings of other owners and has also represented lenders and debtors in major real estate, retail and technology oriented reorganizations; parties to significant contracts with debtors in reorganization; purchasers of assets from debtors in insolvency proceedings, and defendants in complex Bankruptcy Court litigation.

- **Professional Activities**

- Mr. Glosband was elected to the initial class of the American College of Bankruptcy, where he currently serves as Vice President and a member of the Board of Directors. He is a conferee of the National Bankruptcy Conference, which advises Congress on bankruptcy legislation.
- Mr. Glosband is a former chairman of the Bankruptcy Law Committees for both the Boston and Massachusetts Bar Associations and is a member of the American Bar Association's Business Bankruptcy Committee, where he was chairman of the International Bankruptcy Subcommittee.

- In addition, Mr. Glosband was official liaison of the Creditors Rights and Insolvency Committee of the International Bar Association to the United Nations Commission on International Trade Law project on Cross-Border Insolvency and its ongoing Insolvency Working Group. He served as one of the primary draftsmen of the UNCITRAL *Model Law on Cross-Border Insolvency*. Mr. Glosband also served as one of two primary draftsmen (with Professor Jay Westbrook of the University of Texas Law School) for proposed Chapter 15 of the United States Bankruptcy Code, “Ancillary and Other Cross-Border Cases.”
- Mr. Glosband is listed in *Chambers USA: America’s Leading Lawyers for Business*, *International Who’s Who of Insolvency & Restructuring Lawyers*, *Who’s Who in American Law* and has been listed in every edition of *The Best Lawyers in America*.

- **Publications/Presentations**

- Mr. Glosband’s recent articles include “Chapter 15: US Insolvency Reform Explained” which appeared in the *International Financial Law Review* and “Pathology of Section 363 Sales: Not as Simple as They Look,” which appeared in *The Journal of Private Equity*, *National Law Journal* and *Corporate Counsel Magazine*.

- Mr. Glosband is the author of a number of articles, is a contributing author to the treatise *Chapter 11 Theory and Practice* and has lectured for the Ministry of Justice of the Kingdom of Thailand, banks, private equity funds, the Massachusetts Attorney General and various continuing legal education, bar and accounting groups, including the American and International Bar Associations, the American College of Bankruptcy, the International Insolvency Institute, the American Bankruptcy Institute, the Practising Law Institute, the Massachusetts Society of CPAs and Massachusetts Continuing Legal Education. He is the author of new chapters of *Collier on Bankruptcy 15th Ed.* and *Collier Bankruptcy Practice Guide*, dealing with Chapter 15.
- Mr. Glosband has served on the panel appointed by the First Circuit Court of Appeals to select bankruptcy judges and as a special assistant attorney general for the Commonwealth of Massachusetts.

- **Bar and Court Admissions**

- Mr. Glosband is a member of the Massachusetts and New York Bars and is admitted to practice before the U.S. District Courts in Massachusetts, Connecticut, Vermont and the Southern District of New York, the U.S. Court of Appeals for the First Circuit and the U.S. Supreme Court.

- **Education**

- J.D., Cornell University, 1969
- B.A., University of Massachusetts, 1966

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