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Recent Articles on Chapter 15

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There have been several articles recently published discussing and critiquing the early chapter 15 case law.¹ However, two articles in particular are worth noting. The first is entitled *A Tale of Two Proceedings: 'Turnabout is fair play' in the Yukos U.S. Bankruptcy Cases*, which discusses some of the intriguing issues presented by the Yukos chapter 11 and chapter 15 cases and their implications for future cross-border restructurings.² Addressing *Yukos*, author **Kurt A. Mayr** claims that the bankruptcy court's ability to grant temporary relief under §1519 "demonstrates the breadth and flexibility of the relief available under new chapter 15."³ Additionally, Mr. Mayr explains that the Russian receiver's innovative use of chapter 15's expansive powers, including the temporary injunction on the sale of Yukos's assets, "may likely serve as a model for other contested distressed transactions in the future."⁴

The second, written by **Daniel M. Glosband**, criticizes the *SPhinX* opinion by claiming that the U.S. Bankruptcy Court for the Southern District of New York misinterpreted three fundamental aspects of chapter 15.⁵ Mr. Glosband claims that the court 1) neglected to apply the eligibility requirements for a foreign proceeding to qualify for recognition under chapter 15; 2) discarded chapter 15's purely objective, nondiscretionary standards for recognition; and 3) severed the determination of whether a foreign proceeding is a "foreign main proceeding" or a "foreign non-main proceeding" from its statutory intent

¹ See Theodore Zink & Francisco Vazquez, *U.S. Bankruptcy Code-Chapter 15: The Early Returns*, 20 *Insolvency Intelligence* 17 (March 2007)(discussing the following chapter 15 cases filed in the first year of its application: *United States v. J.A. Jones Construction Group LLC*, *Ephedra Products Liability Litigation*, *Tri-Continental Exchange Ltd.*, *SPhinX Ltd.*, and *Yukos Oil Co.*); see also Silverman, Ronald J. & Seamon, Scott K., "Eurofood" Fight: Decision by EU's highest court offers guidance in area of cross-border insolvencies, 236 *N.Y.L.J.* S1, (col. 1) (Oct. 30, 2006) (discussing chapter 15).

² Mayr, Kurt A., *A Tale of Two Proceedings: 'Turnabout is fair play' in the Yukos U.S. Bankruptcy Cases*, 25 *Am. Bankr. Inst. J.* 24 (July/August 2006).

³ *Id.* at 69.

⁴ See *id.*

⁵ Glosband, Daniel M., *SPhinX Chapter 15 Opinion Misses the Mark*, 25 *Am. Bankr. Inst. J.* 44 (December/January 2007).

as part of the recognition determination.⁶ Furthermore, Mr. Glosband claims that the *SPhinX* opinion “creates a wholly unnecessary, serious and regrettable breach with European case law” on the meaning of the COMI concept.⁷

In addition to the above, several articles have been recently published on chapter 15 itself.⁸ Two of the articles were written by Prof. Westbrook, who is perhaps the most authoritative source on the new code section. In *Chapter 15 and Discharge*, Prof. Westbrook writes that despite the advances of chapter 15 over §304, “many more steps remain before we have a sensible, efficient regime for bankruptcy law in a globalizing world.”⁹ Acknowledging that his article asks more questions than it answers, he says that one of the missing steps is the “extent to which a discharge in Country A will be given effect in Country B,” and specifically the effect in the United States of a foreign bankruptcy discharge.¹⁰ Prof. Westbrook predicts that “[n]o set of issues will be more important to global cooperation in multinational bankruptcies and few will be as difficult.”¹¹

In *Chapter 15 At Last*, Prof. Westbrook exclaims his relief at the long-awaited enactment of chapter 15.¹² This article, perhaps more than any other—and in a relatively quick and painless way—gives the reader the history and basics of chapter 15, as well as some examples of how it will come into play in everyday bankruptcy cases. The scope of chapter 15 is broad:

In general, it applies whenever there is a foreign insolvency proceeding relating to a debtor that is subject to a bankruptcy case of some kind in the United States. Given the broad jurisdiction of U.S. bankruptcy courts, which can be invoked by the mere presence of a lawsuit or an item of property within our borders, the sweep of chapter 15 is very broad. Its scope is enlarged by various provisions adopted as part of the enactment of chapter 15. Obviously, it applies in every bankruptcy of a multinational corporation that is a U.S. corporation or a foreign corporation with U.S. assets or operations. But it also applies in much more down-to-earth situations....¹³

⁶ *Id.*

⁷ *Id.* at 85 (The COMI concept comes from a European insolvency statute originating from Council Reg. No. 1346/2000 of 29 May 2000 On Insolvency Proceedings of The Council of the European Union).

⁸ Although not discussed here, another useful reference is Biery, Evelyn H., Boland, Jason L. and Cornwell, John D., *A Look At Transnational Insolvencies and Chapter 15 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 47 B.C. L. REV. 23 (December 2005).

⁹ Westbrook, Jay Lawrence, *Chapter 15 and Discharge*, 13 AM. BANKR. INST. L. REV. 503 at 504 (Winter 2005).

¹⁰ *Id.*

¹¹ *Id.* at 519.

¹² Westbrook, *Chapter 15 At Last*, *supra* note 6 at 713.

¹³ *Id.* at 715 (citations omitted).

Another interesting article, written by **Michael Fielding**, is *Ancillary Proceedings Under New Chapter 15 of the Bankruptcy Code*.¹⁴ The stated purpose of the article is to “take a first look at the issues a debtor must consider to determine whether to open an ancillary proceeding in the United States under the new law.”¹⁵ The article focuses on the advantages and disadvantages of filing a plenary proceeding, a full bankruptcy proceeding under another chapter of the Bankruptcy Code or an ancillary proceeding under the new chapter 15.

¹⁴ Fielding, Michael D., *Ancillary Proceedings Under New Chapter 15 of the Bankruptcy Code*, NORTON BANKRUPTCY LAW ADVISER, 9 (October 2005).

¹⁵ *Id.* at 9.