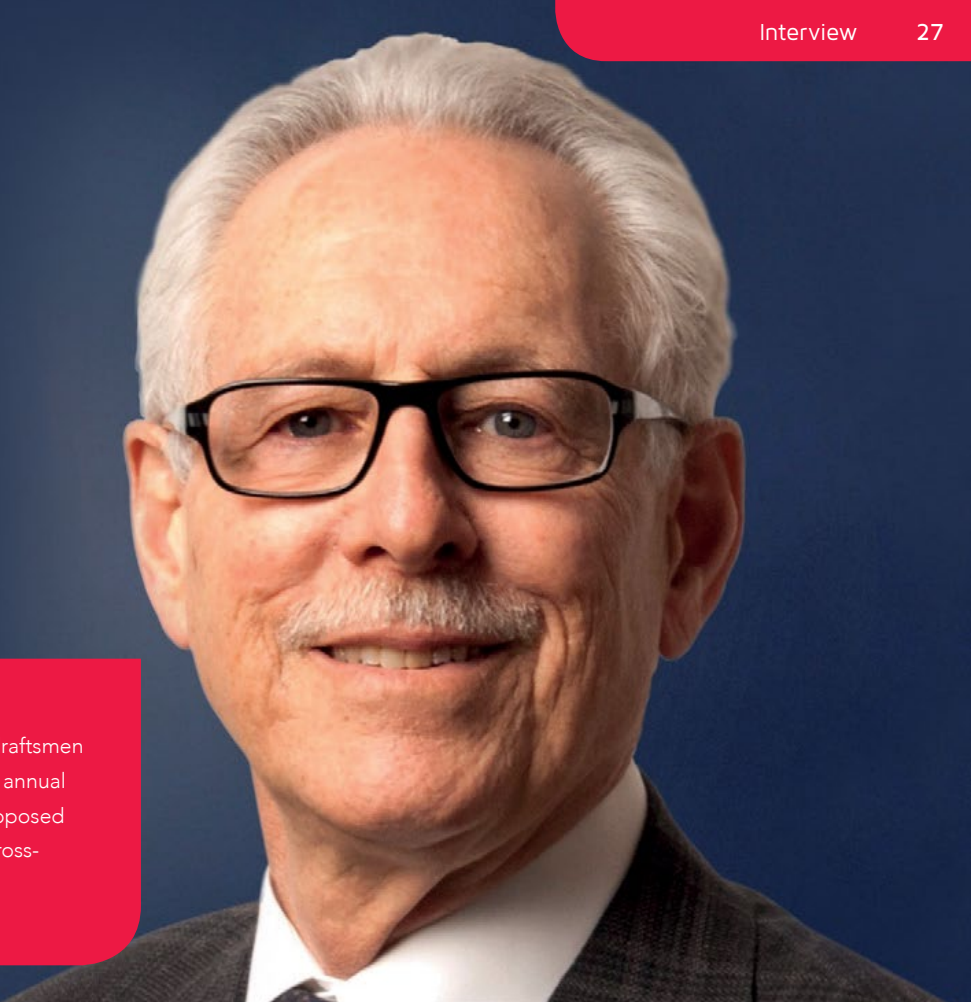
Daniel Glosband: An architect of Chapter 15



GRR sat down with **Daniel Glosband**, one of the primary draftsmen of the US Bankruptcy Code's Chapter 15, at the ABI's 34th annual spring meeting in Washington, DC, to discuss recently-proposed amendments to the Chapter, as well as some significant cross-border recognition decisions of the past year.

Margarita Michaels

Boston-based Glosband is a recently retired Goodwin Procter partner, who now acts as of counsel for the firm. Since the mid-1990s, he has worked on several projects for the harmonisation of international insolvency laws, beginning with his role as a lead delegate for the International Bar Association to the UNCITRAL Working Group that drafted the 1997 Model Law on Cross-Border Insolvency.

In 2005, together with Professor **Jay Westbrook** of the University of Texas, who led the US's delegation to UNCITRAL, Glosband helped draft Chapter 15 to bring the UNCITRAL Model Law into the US Bankruptcy Code. Now, 11 years after the Chapter's enactment, the US's National Bankruptcy Conference (NBC) – a 60-strong group of senior US bankruptcy lawyers, judges and academics of which Glosband is a member – has identified 11 changes and improvements to Chapter 15, which were addressed to the US Congress in a letter this January.

You were the IBA's lead delegate to the UNCITRAL Insolvency Working Group that drafted the 1997 Model Law. What was that experience like?

The process of developing something like the Model Law is circuitous, because a delegate or an observer will speak about one topic; the next person whose country or NGO flag is recognised wants to talk about something else that already came up two days ago; the third person will say something because their government told them to, even though it is pretty irrelevant. You have to go through this process and then intermittently synthesise what has happened into draft language.

The way that synthesis happened for the UNCITRAL Model Law was largely through what was called the small drafting group. There were a limited number of delegations that seemed to take a real interest in this. This small drafting group would meet during coffee breaks and lunch, and at the end of the day.

There were also a few sessions that the UNCITRAL secretariat designated "expert sessions". That group would draft proposed provisions. I was part of this expert group, as was Professor Westbrook, and there were representatives from a number of other countries.

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At the end of each UNCITRAL session, which was a week or 10 days in either New York or Vienna, the secretariat would produce a comprehensive report. This would include what everybody had said during the time, not word for word, but pretty close.

It ultimately turned out to be a process that worked, because you had a chance to listen to everybody and the things that were most problematic would be confronted in the small drafting group. A lot of times the reasons there were disagreements were simple misunderstanding

issues: if you had time to talk somebody, you'd say, "Oh that's what you mean." It was a conceptual as well as a literal language barrier.

The UNCITRAL Insolvency Working Group is still at it, addressing additional topics such as corporate group insolvency and enforcement of judgments entered in insolvency case. I enjoyed it, but it just took too much time to keep doing it. In those days, I wasn't retired and I had to turn in billable hours or not get paid!

Following the birth of the Model Law, you helped draft Chapter 15 to enact it in the US. What challenges, if any, did you face in the drafting process?

The first challenge was trying to fit what was a standalone law into the existing US bankruptcy statute and system. We had to do a lot of adjusting to make the Model Law fit the existing structure. The other challenge was initial work with an advisory committee that had a lot of very capable people, including the late (and highly expert) **Judge Burt Lifland**, but also others who weren't versed in cross-border insolvency. This included representatives of the US departments of justice and commerce and the organisation of state attorneys' general. Ultimately it worked, but we had to bring them with context so that they understood what Chapter 15 was. But once we got past that, everything was done by consensus.

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How well do you think Chapter 15 has fulfilled its purpose over the past decade?

Maybe I'm biased, but I think that in most respects it's worked as we expected – pretty well. The courts have embraced it, with a few exceptions where I think they misread it. I would say most cases go through smoothly, routinely and expeditiously – as they're supposed to – and foreign representatives get the relief that they need, when they need it. In contested cases, it's all the more challenging, but even in most of those, there's been cross-border recognition. There are really just a few examples that I can think of where recognition was denied.

In Re Toft in 2011 was one of these. The way the recognition request was framed in *Toft* the applicant asked the court to enter an order that simultaneously granted recognition and comity to orders in a German proceeding. The orders of the German proceeding would have permitted the liquidators access to the debtor's e-mail, not just through its own servers, but through internet service providers. Enforcing those orders would have violated US law, so the presiding judge said that he couldn't do that because it was contrary to public policy. It takes something that extreme for there to be a denial of recognition.

In February, the National Bankruptcy Conference issued a letter to Congress requesting 11 necessary or desirable revisions to Chapter 15 and to other sections of US law that relate to cross-border insolvency proceedings. Can you summarise the most important changes?

Among the 11 changes, we have proposed a small language fix to say that section 109a of the US Bankruptcy Code does not apply to Chapter 15. This is the debtor-eligibility requirement, which requires the debtor in cases under other chapters of the Bankruptcy Code to have property or a place of business in the US. The US Court of Appeals for the Second Circuit has improperly required application of section 109a to Chapter 15. Debtor eligibility is not an issue under the Model Law so the Second Circuit's findings could create a barrier to foreign proceedings getting recognised – though courts in the Second Circuit have said it doesn't take much property to obtain recognition: just retainer accounts, small balances in US bank accounts or property rights under a US debt indenture. The concern that I have with this contrived property requirement is that it could give rise to arguments that the Chapter 15 petition was filed in bad faith, and that could delay or block recognition. This hasn't happened yet, but it could.

Another one of the changes is the jurisdictional grant in the Bankruptcy Code at section 1334, which permits courts to abstain from cases and begins with the words, "except for cases under Chapter 15". What was intended, when Chapter 15 was added, was simply that the court couldn't abstain from the process of deciding recognition. It wasn't intended to mean that the court couldn't, after issuing a ruling on recognition, then abstain from a question within a case if appropriate.

The Fifth Circuit took this approach in the recent case *In re Firefighters' Pension Fund*, where it held that that a bankruptcy court cannot abstain from a "related to" proceeding in a Chapter 15 case, which the court could do in non-Chapter 15 cases. So we proposed language to fix that.

The National Bankruptcy Conference has also proposed an additional subsection in section 305 of the US Bankruptcy Code to eliminate the need for a tortured analysis if the bottom line of a case is that a US court can't do anything effective, and allow the courts to abstain from the case on that basis. This follows two large Chapter 11 cases, *Fargo* and *Yukos*, which affected significant economic enterprises in other counties and were not consensual; instead they were aggressively opposed by major parties. These were full US Chapter 11 cases that would effect a restructuring that would have to be enforced in another country. The foreign debtors were also in proceedings in those other countries. In essence, the US courts couldn't do anything within the US that could be enforced outside of the US and there was no reason to believe that these Chapter 11 restructurings would be accepted in the other country. In those cases, the courts were required to perform extensive analysis and present elaborate reasoning to support the dismissal of the cases, when the real conclusion was that they couldn't do anything that would be useful and enforceable.

Another small proposed amendment makes clear that, in the context of an avoidance action commenced in a case under Chapter 15 – which would typically be an avoidance action under foreign law – the measurement date for looking back would be counted from the date of the commencement of the foreign proceedings. That's because there could be enough of a time gap between the date of the commencement

of the foreign proceeding and the date of the commencement of the Chapter 15 case that the look-back period would have run out.

The last important change is at what point you measure COMI – the two choices being the date of the commencement of the foreign proceeding or the date of the commencement of the Chapter 15 case. The US courts have come down saying it should be measured as of the date of the Chapter 15 case, which could be long after the company went out of business. The UNCITRAL Model Law imposed the requirement that a foreign proceeding be either a main proceeding or a non-main proceeding, requiring that the debtor have its COMI or an establishment – a significant economic presence – in the foreign country. Essentially it is a protective measure against last-minute forum shopping.

UNCITRAL came up with a clarification in the 2013 Guide to Enactment and Interpretation of the Model Law to confirm that what they had really meant was the debtor's economic presence should be measured as of the foreign petition date. The National Bankruptcy Conference [NBC] proposed adopting a position consistent with UNCITRAL and its view of the Model Law. Adopting this position would create a gap in terms of the ability to recognise cases where there is no longer any place of business at the time of the Chapter 15 case, and where the foreign case was filed in a country where the debtor had no place of business – for example a country where it was incorporated but never conducted any business. If the US adopts that position, there is no immediate resolution for that gap, so it could just disqualify some cases and that's an issue that needs further attention obviously.

The rest is really just clean-up stuff.

How did the changes come about?

The NBC meets at least once a year, sometimes twice a year, and its international aspects committee is – not always, but often – asked to deliver a report at that meeting. So as time goes by we provide, as part of our annual report, a fairly thorough analysis of the things that need correcting and either suggest proposed corrections, or open them up for discussion to try to get input and then develop the correction. Our proposed changes to Chapter 15 have evolved from that kind of a process beginning in 2009: after the statute had been in effect for a few years, we started noticing things that needed fixing. We finally aggregated several years of changes and sent the changes to Congress. Each and every one of the changes went through a very thorough process with the NBC, which is a group of really smart people. There was nothing impromptu about the changes.

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So what are your thoughts on the changes? If they are enacted do you think Chapter 15 will be the "best" embodiment of the Model Law internationally?

That's hard to say, because most of the changes just really fix things that should have been the case already; they're not intended to modify the US's embodiment of the UNCITRAL Model Law, just to make the Model Law work as envisioned and be effective.

What is the likelihood that the changes will be implemented and when do you expect this will happen?

Maybe this year, but a large part of it is just my own personal schedule: while the proposed revisions are with Congress, I and others in the NBC need to follow up. Get back to me after the middle of November and I might have an answer for you!

What do you think were some of the most significant Chapter 15 decisions over the last year and why?

The *Fairfield Sentry* cases concerned two offshore Madoff feeder funds that went into liquidation in the British Virgin Islands. The BVI liquidators of those funds, not too long after the Madoff Ponzi scheme's exposure, brought a few lawsuits in the New York state courts to recover redemption payments – payments to investors in those funds who had submitted redemption requests and been paid before the liquidation began. The liquidators made a variety of common law claims, including unjust enrichment, and started those cases before they filed for Chapter 15 because there is an exception to the recognition requirement for actions to collect debts.

The liquidators then filed for, and were granted Chapter 15 recognition, removed those previous cases and started a whole lot more cases, called the "redeemer actions". The redeemer action cases were delayed by two appeals: one from the bankruptcy court to district court and one against a decision in the BVI, which said that, under BVI law, once the redeemer has submitted a redemption request before liquidation proceedings it becomes a creditor, and the payment to the creditor in this situation wasn't recoverable.

Just recently, after a whole appellate process from the BVI judgment, the Privy Council affirmed the BVI court's holding. Everyone anticipated that would be the end of it, but when it went back in front of the BVI court the judge said: "I affirm you can't bring actions here, but I am not going to rule on the actions in New York." The liquidators are now seeking to pursue the actions they started in New York seven years ago. We don't know whether the bankruptcy court is going to grant comity to the BVI decision, or allow the actions to continue. That is a fascinating case and one to watch.

The other one that is interesting and has a lot of ongoing activity is *Hellas Telecommunications*. It is essentially about the collapse of a bunch of leveraged acquisitions and re-capitalisations. The English liquidators first tried bringing fraudulent transfer claims in a Chapter 15 case, but under the New York state fraudulent transfer statute. They also brought common law claims. The bankruptcy court decided they didn't have standing to bring the fraudulent transfer claims under US law or within their powers as liquidators under English law. On the other hand, the judge didn't throw out their unjust enrichment claims. The bankruptcy court subsequently allowed the liquidators to amend to plead fraudulent transfer under English law and Luxembourg law. In addition, there is litigation pending in a number of other jurisdictions.

So those two, *Fairfield Sentry* and *Hellas*, I think are fascinating ones to follow.

For coverage of Glosband's panel at the ABI Spring Meeting, visit page 32.