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THE DISPUTE OVER EVALUATING CENTER OF MAIN INTERESTS – HOW SIMPLE LEGISLATION COULD SAVE THE U.S. COURT SYSTEM TIME AND MONEY

*John Byrnes**

I. ISSUE

The purpose of this article is to demonstrate a need for congressional intervention within Chapter 15 of the current United States Bankruptcy Code, and to propose language that might accomplish this task.

Once a debtor has filed a petition for recognition of a foreign bankruptcy proceeding, the current code provides no direction regarding the time frame from which courts should evaluate a debtor's center of main interests (COMI). By providing a default procedural posture, however, Congress would be able to end ongoing irregularity between circuits, and allow bankruptcy courts to evaluate such recognition petitions more expediently and efficiently.

HYPOTHETICAL

"Company X" is incorporated in the Netherlands. It has the majority of its assets in the Netherlands, its headquarters is in the Netherlands, and its main operations are carried out in the Netherlands. Company X attempts to establish several offices in the United States because it wants to expand into other markets. To do so it borrows ten million dollars from a U.S. bank. Its U.S. offices thrive within the first year. In fact, these offices begin to surpass the amount of business done in the Netherlands. Fuelled by this success, Company X decides to establish a main office in the United States. It moves the bulk of its operations to the United States, and borrows another twenty million from the U.S. Bank – leaving behind only a few small offices behind in the Netherlands, where it also remains incorporated. Company X also begins to use this business plan to expand into other countries. It takes out loans, similar to the U.S. loan, in each country where it sets up offices.

Three years later, however, with less than ten percent of its U.S. loans paid off, Company X finds itself in fiscal disrepair. Overexpansion, large amounts of debt, and serious mismanagement have run the business into the ground. Its only recourse will be to file for bankruptcy and salvage what liquid assets it has left— the majority of which are located in the United States. Company X, however, is aware that certain bankruptcy provisions in the Netherlands would be more favorable to them than those in the United States. Over the course of several months, the company moves almost all of its management and operations back to its offices in the Netherlands, and finally files for bankruptcy there.

All the while, Company X has been slowly defaulting on each of its loans around the world. The U.S. Bank, as a creditor of Company X, hopes to be able to recover what it can in a U.S. bankruptcy proceeding. Unfortunately for the bank, however, our current

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Bankruptcy Code could make it difficult, if not impossible, for them to recover anything from Company X within the U.S. court system.¹

Background on Bankruptcy in the U.S.

Title 11, “Bankruptcy”, of the U.S. Code makes up what is otherwise known as the United States Bankruptcy Code. Chapter 15 of Title 11, “Ancillary and Other Cross-Border Cases,” instructs U.S. courts on how they should interact with bankruptcy proceedings taking place in foreign courts.² Under 11 U.S.C. § 1515, a foreign debtor may apply for recognition of a foreign insolvency proceeding by filing a petition in U.S. bankruptcy court.³ Subsequently, under 11 U.S.C. § 1517, U.S. Courts have the ability to classify a foreign action as either a “foreign main” or “foreign non-main” proceeding.⁴ To evaluate the petition, one of the things the court must do is determine where the debtor has its center of main interests (hereinafter “COMI”). The purpose of this is to establish the relationship between the debtor’s COMI and the location of the foreign proceeding.⁵ Under 11 U.S.C. § 1502, a foreign main proceeding is one that is pending in the same country where the debtor has its COMI. A foreign non-main proceeding on the other hand is one that is pending in a country where the debtor merely has an establishment.⁶

Various forms of relief become available upon finding of either type of foreign proceeding, such as staying individual actions or suspending the rights of third parties to encumber the debtor’s assets, become available, but will only be applied at the court’s discretion.⁷ If the court finds a foreign main proceeding, however, the debtor becomes entitled to various forms of *automatic* relief within the United States Bankruptcy Code – the effects of which would serve to freeze current actions and block new actions initiated within the U.S. court system.⁸ The determination of a debtor’s COMI therefore, could make the entire difference between a creditor who is able to recover from reachable assets within the United States, and one who must fight for scraps alongside other creditors from around the world.

The current problem is that most U.S. courts are not necessarily evaluating COMI in a way that is fair and balanced. The majority will, by default, look at COMI as it exists at the time the debtor files its petition under Chapter 15, and not as it existed at the time the debtor

¹ 11 U.S.C. § 1520(a)(1) (2012) (stating that finding a foreign main proceeding activates the automatic stay for pending or new litigation).

² 11 U.S.C. §§ 1501-1532 (2012).

³ 11 U.S.C. § 1515(a) (2012).

⁴ 11 U.S.C. § 1517 (2012).

⁵ 11 U.S.C. § 1517(b) (2012).

⁶ 11 U.S.C. § 1502 (2012). Of note, the statute does not consider a bankruptcy proceeding that occurs in a place where the debtor neither has its center of main interests nor an establishment, perhaps implying that such a proceeding would not be eligible for relief within the U.S. court system. *Id.*

⁷ 11 U.S.C. § 1521 (2012).

⁸ 11 U.S.C. § 1520 (2012).

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initiated the foreign bankruptcy proceeding⁹ – two points in time that could be separated by many years.¹⁰

The hypothetical above demonstrates how this could unfairly prejudice a U.S. creditor. When Company X filed for bankruptcy in the Netherlands, if the bulk of its reachable assets *and* the majority of its operation were still in the United States, a U.S. court could have held that the company's COMI was the United States. This means that the court would consider the Netherlands bankruptcy to be, at best, a foreign non-main proceeding. More importantly, this would mean that court would consider the United States to be the appropriate venue for a bankruptcy proceeding regarding Company X's outstanding debt – which is exactly what the U.S. bank wanted.

But because Company X did not default on its loans until *after* it had moved the majority of its operations back to the Netherlands, by the time any bankruptcy proceeding was initiated, or the Chapter 15 petition was filed in the U.S. Courts, the evidence would suggest that Company X's COMI was (and had always been) the Netherlands. This means that a U.S. bankruptcy court, following the current interpretation of the law, could potentially recognize the Netherlands bankruptcy as a foreign main proceeding.¹¹ Subsequently, Company X would be entitled to the automatic stay of civil litigation, debt collection, payment of debts, etc., as laid out in Section 362 of the United States Bankruptcy Code and the U.S. Bank would have to file as a creditor in the Netherlands bankruptcy.¹²

It must be noted that this does not remove any judicial concern regarding fraud. Current interpretations of Chapter 15 indicate that courts should, at their discretion, look at the period of time between the initiation of the foreign proceeding and the filing of the petition to determine if a debtor has attempted to manipulate its COMI in bad faith.¹³

That said, whether Company X's actions in the hypothetical would be considered bad faith by a U.S. bankruptcy court is another matter altogether. It brings up two points that are important to this note. First, allowing for a “look-back” period does not guarantee the prevention of fraud. It requires that the creditor first present fraud as an argument, and then support it with evidence sufficient enough that the court will be compelled to evaluate the matter.¹⁴ But this can be difficult, especially when considering that determining COMI itself is often elusive.¹⁵ In the hypothetical above, the fact that Company X was founded in the Netherlands, incorporated in the Netherlands, and consistently maintained offices in the Netherlands could complicate any determination of its COMI as ever having been in the United States at all.

Second, the idea of the “look-back” period reveals how convoluted and unpredictable the process of evaluating a Chapter 15 petition can be. There are currently two different methods being used by U.S. bankruptcy courts to handle the process. A minority of courts advocate that COMI should be evaluated as it existed when the debtor initiated the

⁹ *In re Ran*, 607 F.3d 1017, 1025 (5th Cir. 2010); *In re Fairfield Sentry Ltd.*, 714 F.3d 127, 130 (2d Cir. 2013).

¹⁰ *See In re Millennium Global Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 71, 75-76 (Bankr. S.D.N.Y. 2011).

¹¹ *See In re Ran*, 607 F.3d at 1021; *see generally In re Fairfield Sentry Ltd.*, 714 F.3d 127.

¹² 11 U.S.C. § 1520 (2012).

¹³ *In re Fairfield*, 714 F.3d at 133.

¹⁴ *Id.* at 139.

¹⁵ *In re Kemsley*, 489 B.R. 346, 354-55 (Bankr. S.D.N.Y. 2013) (evaluating many different factors, not purely financial ones, to find that the COMI of an individual debtor was determined by the location of his children).

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foreign proceeding. The majority of courts, on the other hand, have held that COMI should be determined *only* as it exists once the debtor files a petition for recognition.¹⁶ Interestingly, these two approaches end up functioning in similar ways, and have the common goal of preventing bad faith COMI manipulation. This is fleshed out below in an analysis of two recent appellate cases, *Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, and *In re Millennium Global Emerging Credit Master Fund Ltd.*¹⁷ Notably, the courts have spent an inordinate amount of time justifying their various positions regarding this problem – in fact, in the two holdings analyzed below, they spend nearly as much time debating the issue of *when* to evaluate COMI as they do evaluating COMI itself.¹⁸

The best explanation for why this is happening is that the statute gives no instruction. In fact, it does not even define COMI. Chapter 15 only provides the presumption that despite contrary evidence, COMI is a debtor's registered office or habitual residence.¹⁹ The majority of courts place their reasoning, therefore, around the language of 11 U.S.C. 1517 and its use of the present tense.²⁰ Through this analysis they have come to the conclusion that COMI should be evaluated as at the time the debtor files its petition for recognition.²¹ The minority, however, have used the plain language, origin, and purpose of the statute to conclude that the determination of COMI should involve a broader time frame, originating from the time the debtor initiates the foreign bankruptcy proceeding.²²

II. OVERVIEW OF INTERNATIONAL INSOLVENCY

Chapter 15

In 2005, Congress incorporated Chapter 15, Ancillary and Other Cross-Border Cases, into Title 11 as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”).²³ BAPCPA, signed into law on April 20, 2005 by President George W. Bush, marked the most significant change to the bankruptcy code since 1978.²⁴ Chapter 15

¹⁶ Compare *In re Fairfield Sentry, Ltd.*, 714 F.3d 127 (2013) (holding that a “...debtor’s center of main interests (COMI) should be determined based on its activities at or around the time the Chapter 15 petition is filed...”), with *In re Millennium Global Emerging Credit Master Fund Ltd.*, 458 B.R. 63 (Bankr. S.D.N.Y. 2011) (holding that “[t]he substantive date for the determination of the COMI issue is at the date of the opening of the foreign proceeding for which recognition is sought.”).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ 11 U.S.C. § 1516 (2012).

²⁰ See generally *In re Ran*, 607 F.3d 1017 (5th Cir. 2010).

²¹ *Id.* at 1027.

²² *In re Millennium Global Emerging Credit Master Fund Ltd.*, 458 B.R. 63 (Bankr. S.D.N.Y. 2011).

²³ Bankruptcy Abuse Prevention and Consumer Act (BAPCPA) of 2005, Pub. L. No. 109-8, 119 Stat 23 (2005); Alesia Ranney-Marinelli, *Overview of Chapter 15 Ancillary and Other Cross-Border Cases*, 82 AM. BANKR. L.J. 269, 269 (2008).

²⁴ Rachel Ruser, *Analysis of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA)*, 2 SPNA REV., no. 1, 2006, at 86.

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brought many of the provisions of the United Nations' Model Law on Cross-Border Insolvency (hereinafter "Model Law") within the scope of the U.S Bankruptcy Code.²⁵

Its predecessor was 11 U.S.C. § 304, which had been enacted in 1978.²⁶ This section allowed a representative of a debtor in a foreign proceeding to obtain relief in U.S. courts – the idea being that this would help facilitate foreign bankruptcy.²⁷ Because §304 was limited in scope, and was not the only remedy available to foreign debtors, the procedures U.S. courts employed to evaluate the potential for comity between U.S. and foreign bankruptcy courts was determined on a case-by-case basis.²⁸

Chapter 15, on the other hand, has had a centralizing effect.²⁹ In fact, the official United States Court System website even indicates that Chapter 15 is specifically meant to provide effective methods for dealing with insolvency cases involving more than one country.³⁰ Also, unlike many other statutes in the U.S. code, the first section of Chapter 15 actually enumerates its intended purposes. Section 1501 of the Statute lists five main objectives:

(1) cooperation between [] courts of the United States, United States trustees, trustees, examiners, debtors, and debtors in possession[] and [] the courts and other competent authorities of foreign countries involved in cross-border insolvency cases; (2) greater legal certainty for trade and investment; (3) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor; (4) protection and maximization of the value of the debtor's assets; and (5) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.³¹

Functions of Chapter 15

Both the impact and reception of Chapter 15, from enactment in 2005 to present day, have been largely positive.³² The main purpose of the chapter is to allow a representative of a foreign bankruptcy proceeding to obtain recognition of the foreign proceeding within the United States court system. By doing so, the chapter promotes increased comity between U.S. and foreign courts. It also helps to ensure that U.S. and foreign bankruptcy proceedings

²⁵ UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY (1997), available at http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html; see Ranney-Marinelli, *supra* note 23, at 269.

²⁶ Ranney-Marinelli, *supra* note 23, at 269.

²⁷ *Id.*

²⁸ *Id.* at 269-70.

²⁹ *Id.*

³⁰ *Bankruptcy: Bankruptcy Basics: Chapter 15*, UNITED STATES COURTS, <http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter15.aspx> (last visited Oct. 24, 2014) [hereinafter *Bankruptcy Basics: Chapter 15*].

³¹ *Id.*; see 11 U.S.C. § 1501 (2012).

³² See Ranney-Marinelli, *supra* note 23, at 270.

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and litigations do not overlap unnecessarily.³³ As an extremely particularized area of law, a brief overview of the sections of Chapter 15 pertinent to this note is laid out below – they may be read in conjunction with the statute for a more thorough understanding.

§1501 – Purpose and Scope of Application

This section lists the various objectives of Chapter 15.³⁴ It also indicates the parties to whom the Chapter may apply, including foreign debtors, creditors, and courts. Significantly, it excludes those who do not fit into the definition of “who may be a debtor” for the purposes of a U.S. bankruptcy under 11 U.S.C. § 109.³⁵

§1502 – Definitions

This section defines a “foreign main proceeding” as one that is pending in the same country where the debtor has its COMI. A “foreign non-main proceeding” on the other hand, is one that is pending in a country where the debtor merely has an establishment. This section also defines “recognition” of a foreign proceeding – which is simply the entry of the acknowledging order.³⁶

§ 1504 – Commencement of an Ancillary Case

While only a single sentence, this section provides an important element of unification – one that was absent until Chapter 15 came into existence in 2005.³⁷ It indicates that all foreign debtors, creditors, or courts must go through this procedure, and this procedure *alone*, for recognition. Since 2005, the filing of a petition under section 1515 has been the only way to get U.S. courts to recognize a foreign bankruptcy proceeding.³⁸

§ 1506 – Public Policy Exception

The court does not have to take any action under this chapter if it would contravene the public policy of the United States.³⁹ This section gives the court a certain amount of flexibility and discretion for fairness. Public policy can arise as an issue in many bankruptcy proceedings.⁴⁰

³³ *See id.*

³⁴ 11 U.S.C. § 1501(a).

³⁵ 11 U.S.C. § 1501(c)(1); 11 U.S.C. § 109(b) (2012).

³⁶ 11 U.S.C. § 1502 (2012).

³⁷ 11 U.S.C. § 1504 (2012); *see Ranney-Marinelli, supra* note 23.

³⁸ 11 U.S.C. § 1504.

³⁹ 11 U.S.C. § 1506 (2012).

⁴⁰ *See, e.g., Collins v. Oilsands Quest, Inc.*, 484 B.R. 593, 596-97 (S.D.N.Y. 2012); *In re Millennium Global Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 80 (S.D.N.Y. 2011); *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Inc.*, 374 B.R. 122, 125 (S.D.N.Y. 2007).

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§ 1508 – Interpretation

The court should consider the chapter's international origin in its interpretation. This section indicates the need to promote the application of Chapter 15 in ways that are consistent with similar statutes of foreign jurisdictions.⁴¹ This is significant, because it opens the door for U.S. courts to incorporate foreign law into their decisions. Based on the objectives of the chapter however, such practice does not necessarily seem far-fetched or out of place.⁴²

§ 1509 – Right of Direct Access

This section works in conjunction with Section 1504 and Section 1505. Significantly, it allows a foreign representative to commence an ancillary case by filing a petition for recognition. It delineates the rights of the foreign representative within the U.S. court system, along with procedures for granting orders allowing or preventing comity.⁴³

§ 1511 – Commencement of a Case Under Section 301, 302, or 303

The three listed provisions become available to the foreign representative once the court grants recognition. Notably, 301 and 302 will only be available if the foreign proceeding is a foreign main proceeding.⁴⁴

§ 1515 – Application for Recognition

There is certain documentation that must accompany a petition for recognition. Specifically, it requires valid proof of the existence of the foreign proceeding – such as a certified copy of a decision of commencement or a certificate from the foreign court – and a statement of all known foreign proceedings in which the debtor is involved.⁴⁵

⁴¹ 11 U.S.C. § 1508 (2012).

⁴² 11 U.S.C. § 1501 (2012).

(a) The purpose of this chapter is to incorporate the Model Law on Cross-Border Insolvency so as 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.... *Id.*

⁴³ 11 U.S.C. § 1509 (2012).

⁴⁴ 11 U.S.C. § 1511(a)(2) (2012).

⁴⁵ 11 U.S.C. § 1515 (2012).

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§ 1516 – Presumptions Concerning Recognition

The court will presume a debtor's center of the debtor's main interests to be its "registered office" if a corporation, or "habitual residence" if an individual.⁴⁶ This is significant as a default rule. However, it should be noted that the section does not indicate what is meant by these terms or *how* they should be determined.

§ 1517 – Order Granting Recognition

After notice and a hearing, the court will grant an order of recognition of a "foreign main" or "foreign non-main" proceeding. The court will do so, however, only if the proceeding satisfies the definitions of these terms under Section 1502, and the petition meets all of the requirements of Section 1515.⁴⁷

§ 1520 – Effects of Recognition of a Foreign Main Proceeding

Upon a finding of a foreign main proceeding, various portions of the U.S. bankruptcy code become available to a debtor including the automatic stay under Section 362.⁴⁸

§ 1521 – Relief That May be Granted Upon Recognition

Upon recognition of either type of foreign proceeding, main or non-main, various actions become available at the courts discretion. This includes staying individual actions against the debtor's assets, rights, obligations or liabilities, staying execution against the debtor's assets, suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor, providing for examination of witnesses, and more. It also gives the court the ability to grant any additional relief that might otherwise be available to a trustee, with certain exceptions denoted by §1521(a)(7). It is important to note that, because of Section 1521, the main difference between a foreign main and a foreign nonmain proceeding rests in the ability to receive automatic relief.⁴⁹

§ 1525 – Cooperation and Direct Communication Between the Court and Foreign Courts or Foreign Representatives

While indicated in the purposes of the chapter set out in Section 1501, this section specifically instructs the court to cooperate to the "maximum extent possible" with foreign courts and representatives.⁵⁰

⁴⁶ 11 U.S.C. § 1516(c) (2012).

⁴⁷ 11 U.S.C. § 1517(a) (2012).

⁴⁸ 11 U.S.C. § 1520 (2012).

⁴⁹ 11 U.S.C § 1521 (2012); 11 U.S.C. §1520.

⁵⁰ 11 U.S.C. § 1525 (2012).

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Unanswered Questions – Four Competing Legal Theories

Despite the simple, yet effective procedures laid out in Chapter 15, there are still unanswered questions as to how different parts and provisions function.⁵¹ In fact, the statute leaves the overarching question inherent to any transnational bankruptcy relatively wide open – how should a U.S. court determine the most competent court for the adjudication of a transnational insolvency case?⁵² Prior to the enactment of the Model Law, scholars and legal practitioners posited theories on how this might be achieved that can be grouped into four different categories.⁵³

The first is “universalism.” In a universalist transnational insolvency, a single court is called upon to rule on the bankruptcy of a debtor holding assets in different countries.⁵⁴ The strength of this theory is that it involved a single, all-encompassing proceeding. This benefits both the creditors, who could each take advantage of the settlement in turn, and the debtor, because all creditors would be bound by this single adjudication.⁵⁵ Its strength, however, is also its weakness. A universalist system is fairly unprepared to deal with many of the jurisdictional issues and procedural complexities that arise when a debtor has assets spread out over many countries, and whose creditors are attempting to invoke the laws of various sovereignties.⁵⁶

The second is “territorialism”, which is the most traditional and widely practiced.⁵⁷ It recommends several proceedings, each different and spread among the various countries where the debtor maintains its assets.⁵⁸ While this method would involve several courts each having the ability to adjudicate parallel bankruptcy proceedings (thus adding an unwanted element of complexity), the jurisdiction in each proceeding would be limited to only the assets present in that particular country – commonly known as the “grab rule.”⁵⁹

Under the third approach, “modified universalism,” foreign courts assist the court principally responsible for the debtor’s insolvency through “ancillary proceedings.”⁶⁰ These ancillary proceedings would work in many ways like the “grab rule” above, where jurisdiction only extends to the debtor’s establishment within the territorial boundaries of the foreign countries.⁶¹

The final approach is called “cooperative territorialism.” It posits strict cooperation, but between equal courts. It does not delineate any priority-standing or ancillary link between

⁵¹ Alexandra CC Ragan, *COMI Strikes A Discordant Note: Why U.S. Courts Are Not in Complete Harmony Despite Chapter 15 Directives*, 27 EMORY BANKR. DEV. J. 117, 134 (2010).

⁵² Matteo M. Winkler, *From Whipped Cream to Multibillion Euro Financial Collapse: The European Regulation on Transnational Insolvency in Action*, 26 BERKELEY J. INT’L L. 352, 357 (2008); see Ragan, *supra* note 51.

⁵³ Winkler, *supra* note 52.

⁵⁴ *Id.*; John Lowell, *Conflict of Laws as Applied to Assignments of Creditors*, 1 Harv. L. Rev. 259, 264 (1888).

⁵⁵ *Id.*

⁵⁶ Winkler, *supra* note 52, at 358.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*; Robert K. Rasmussen, *A New Approach to Transnational Insolvencies*, 19 MICH. J. INT’L L. 1, 16 (1997).

⁶⁰ Winkler, *supra* note 52, at 358.

⁶¹ *Id.*; see Rasmussen, *supra* note 59, for a discussion on the grab rule.

their initial competence settings.⁶² For this reason it appears to be in direct contrast to the other three theories.⁶³

The difficulties that arise from the application of these theories originate from the diversity of the international trade system itself; and a truly unified system of international insolvency throughout the world seems unlikely to ever occur.⁶⁴ One attempt at resolving this issue is the UNCITRAL “Model Law” which was enacted in 1997 and provides the earliest example of such unified international regulation. However, like all international treaties, it relies on acceptance by each state in order to take effect.⁶⁵

Importance of Center Of Main Interests

The European counterpart to Chapter 15 is EC Regulation 1346/2000 (hereinafter “EC Regulation”).⁶⁶ The provision acknowledges the need for some form of regulation of cross-border insolvencies within the European Union. At the same time, it recognizes that the “substantive laws” of each sovereign nation can be vastly different from one another, and should be accommodated.⁶⁷ Akin to Chapter 15 and the “Model Law,” the EC Regulation holds the determination of COMI as central to any transnational proceeding, and gives a broad definition of the term.⁶⁸

The definition of COMI is a central element to answering the question of proper venue. Unlike the EC Regulation, Chapter 15 does not define COMI in any express terms. It only provides that “[i]n the absence of evidence to the contrary, the debtor’s registered office, or habitual residence in the case of an individual, is presumed to be the center of the debtor’s

⁶² Winkler, *supra* note 52, at 358.

⁶³ *Id.*

⁶⁴ *Id.* at 359.

⁶⁵ *Id.* at 360.

⁶⁶ Council Regulation 1346/2000, 2000 O.J. (L160) I (EC) [hereinafter EU Regulation].

⁶⁷ *Id.* at 2.

(11) This Regulation acknowledges the fact that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope....The application without exception of the law of the State of opening of proceedings would...frequently lead to difficulties....Furthermore, the preferential rights enjoyed by some creditors in the insolvency proceedings are, in some cases, completely different. This Regulation should take account of this in two different ways. On the one hand, provision should be made for special rules on applicable law in the case of particularly significant rights and legal relationships....On the other hand, national proceedings covering only assets situated in the State of opening should also be allowed alongside main insolvency proceedings with universal scope. *Id.*

⁶⁸ *Id.*

(12) This Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of his main interests. These proceedings have universal scope and aim at encompassing all the debtor’s assets....(13) The ‘centre of main interests’ should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties. *Id.*

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main interests.”⁶⁹ This leaves the bulk of the work in evaluating COMI to the U.S. Court system – not necessarily a bad thing when one considers that COMI is more of an idea than a tangible place or thing. Further, our courts are well equipped to uncover its nuances during the course of a bankruptcy proceeding.⁷⁰ This also maintains the adversarial nature of our court system since the issue will not be considered unless a party provides evidence to rebut the presumption that COMI is the debtor’s registered office or habitual residence.⁷¹

In 2006, the Southern District of New York listed four main factors that could rebut the presumption. These include:

[1] the location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company); [2] the location of the debtor’s primary assets; [3] the location of the majority of the debtor’s creditors or of a majority of the creditors who would be affected by the case; [4] and/or the jurisdiction whose law would apply to most disputes.⁷²

These factors have since been followed by other jurisdictions, including the Fifth Circuit.⁷³

Habitual Residence

In 2013, the District Court for the Southern District of New York also gave a detailed description of how a court might determine the habitual residence of an individual.⁷⁴ In *In re Kemsley*, the court noted that habitual residence implies more than merely a place where an individual happens to be living at a particular time. The individual must have an ongoing intention to stay in the same location for the foreseeable future.⁷⁵

⁶⁹ 11 U.S.C. 1516(c) (2012); see *In re Ran*, 607 F.3d 1017, 1022 (5th Cir. 2010).

⁷⁰ See *In re Kemsley*, 489 B.R. 346, 354 (Bankr. S.D.N.Y. 2013) (“The Court concludes that the COMI analysis for this Debtor appropriately should take into consideration external factors that provide context for his decision to live in one place or another.”) (holding that an individual’s COMI could be established based on the location of his children and evidence of his intent to be with them).

⁷¹ 11 U.S.C. § 1516(c); *In re Ran*, 607 F.3d 1017.

⁷² *In re SPhinX, Ltd.*, 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006) *aff’d*, 371 B.R. 10 (S.D.N.Y. 2007).

⁷³ See *In re Ran*, 607 F.3d at 1023 (“Neither Chapter 15 nor the Model Law on Cross-Border Insolvency describes the factors that may be relevant to a determination of the debtor’s COMI in a case where it is disputed. But, the SPhinX court suggested the following list of non-exhaustive factors to be considered when a debtor’s COMI is in dispute....”).

⁷⁴ *In re Kemsley*, 489 B.R. at 353.

⁷⁵ *Id.*

Habitual residence is a concept implying more than just the place where an individual happens to be living at a particular time and has aspects of an ongoing intention to stay in the same location for the foreseeable future unless and until something might occur to prompt or compel a change (loss of employment, family needs, illness, job opportunities, retirement, other significant life events or perhaps a spontaneous desire to relocate born of a spirit of adventure). *Id.* at 353.

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Interestingly enough, in *Kemsley*, the court went through a thorough and detailed history of Mr. Kemsley's residences both abroad and within the United States.⁷⁶ Through their analysis the court found that Kemsley's main decisions regarding where to live were all based around the well-being of his children. The court concluded that his COMI therefore, was directly related to the location of his children, as opposed to any business-related endeavor.⁷⁷ In its reasoning, the court indicated that habitual residence may be considered similarly to domicile for personal jurisdiction, which is indicative of a "meaningful connection to a jurisdiction."⁷⁸

Impact of a Foreign Main Proceeding

If a debtor's COMI is determined to be in a country other than the U.S., a bankruptcy proceeding taking place in that country would be considered a foreign main proceeding by the courts.⁷⁹ As previously stated, Section 1502 defines a foreign main proceeding as "[a] foreign proceeding pending in the country where the debtor has the center of its main interests..."⁸⁰

Section 1515 describes the procedures and requirements by which a foreign representative may file a petition for recognition of a foreign proceeding.⁸¹ If a petition meets the proper requirements, a U.S. Court may then grant an order under Section 1517 recognizing the foreign proceeding.⁸² Once this occurs, the debtor may invoke various other provisions of the U.S. Bankruptcy code, including provisions under Title 11 designed insulate assets from actions arising within the U.S.⁸³

Among these is the debtor's ability to invoke the automatic stay under section 362.⁸⁴ The automatic stay allows the foreign debtor to essentially freeze or prevent any other actions it has against it, including lawsuits, liens, property disputes, assessments and collections, forced payment of debts, or even United States Tax Court proceedings.⁸⁵ Senate Report No. 95-989 notes that,

[t]he automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his

⁷⁶ *In re Kemsley*, 489 B.R. at 352-353.

⁷⁷ *Id.* at 363.

⁷⁸ *Id.* at 353 ("The term habitual residence...connotes... a home base where an individual lives, raises a family, works and has ties to the community.").

⁷⁹ 11 U.S.C. § 1502 (2012); *see* 11 U.S.C. § 1517(b) (2012).

⁸⁰ 11 U.S.C. § 1502 (defining a foreign main proceeding).

⁸¹ 11 U.S.C. § 1515(a) (2012) (outlining the procedure and requirements for a foreign representative to be able to apply for recognition of a foreign proceeding).

⁸² 11 U.S.C. § 1517(a) (outlining the procedure and requirements for the court to grant an order recognizing a foreign proceeding as either a main or nonmain proceeding).

⁸³ 11 U.S.C. § 1520 (2012) (stating the provisions of Title 11 that may be invoked once the U.S. Court recognizes a foreign main or nonmain proceeding).

⁸⁴ *Id.*

⁸⁵ 11 U.S.C. § 362 (2012); *but see* 11 U.S.C. §1521 (2012) (stating that upon recognition of a foreign proceeding, whether main or nonmain, a stay may be authorized as is deemed necessary by the court); *see also In re Fairfield Sentry, Ltd.*, 714 F.3d 127, 132 (2012) ("A discretionary stay is also available under Section 1521, regardless of whether a foreign main proceeding is recognized.").

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creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.⁸⁶

In a sense, the determination of COMI plays gatekeeper to a significant amount of relief from creditors seeking action within the U.S. Court system. The only exception is laid out in Section 1506, which provides that the court may refuse to take any action that would be directly contrary to public policy.⁸⁷

However, the Southern District of New York has ruled that this section should be interpreted restrictively, and applied only to actions that violate the most fundamental policies of the United States.⁸⁸ As such, the provision does not provide any inordinate refuge for creditors making public policy arguments.⁸⁹

When all is said and done though, the potential implications that Chapter 15 (especially Section 1520) may have for U.S. creditors, should not be blown out of proportion. In many cases the recognition of a foreign main proceeding will simply serve to indicate that the "...reasonable interests of creditors and the maximization of value...generally support the court's deference to such proceeding."⁹⁰ In addition, Chapter 15 does not expressly mandate such across-the-board deference, and the recognition of a foreign main proceeding is not necessarily binding on "choice of law" determinations.⁹¹

The overall decision to recognize a foreign proceeding as "main" has limited specified consequences under Chapter 15.⁹² First of all, it should be considered that many of the types of relief available to main proceedings are also available to nonmain proceedings.⁹³ But more importantly, it must be noted that Chapter 15 preserves the court's ability to condition the foreign representative's capacity to operate the business and dispose of the debtor's assets under Section 1520(a)(3).⁹⁴

⁸⁶ S. Rep. No. 95-989 (2012); 11 U.S.C. § 362.

⁸⁷ 11 U.S.C. § 1506 (2012).

⁸⁸ Diane Davis, *2nd Circuit Clarifies Center of Main Interests-Bankruptcy Law Resource Centre*, KRYSGLOBAL (Apr. 22, 2013), <http://krysglobalusa.com/2013/04/2nd-circuit-clarifies-center-of-main-interests-bankruptcy-law-resource-centre/>; *In re Millennium Global Emerging Credit Master Fund Ltd.*, 474 B.R. 88, 95 (Bankr. S.D.N.Y. 2012); *In re Fairfield Sentry Ltd.*, 2011 U.S. Dist. LEXIS 105770, at *24 (S.D.N.Y. Sept. 15, 2011) ("[C]ourts have agreed that Congress's use of the word 'manifestly' requires the statute to be interpreted restrictively."); *aff'd sub nom. Morning Mist Holdings Ltd. v. Krys*, 714 F.3d 127 (3d Cir. 2013). In adopting Chapter 15, Congress instructed the courts that the exception provided therein for refusing to take actions "manifestly contrary to the public policy of the United States" should be "narrowly interpreted," as "[t]he word 'manifestly' in international usage restricts the public policy exception to the most fundamental policies of the United States." *In re Ephedra Prods. Liab. Litig.*, 349 B.R. 333, 336 (Bankr. S.D.N.Y. 2006) (alteration in original).

⁸⁹ *In re Fairfield Sentry*, 2011 U.S. Dist. LEXIS 105770, at *24.

⁹⁰ *In re SPhinX, Ltd.*, 351 B.R. 103, 116 (Bankr. S.D.N.Y. 2006) *aff'd*, 371 B.R. 10 (S.D.N.Y. 2007).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*; 11 U.S.C. 1520(a)(3) (2012) ("[U]nless the court orders otherwise, the foreign representative may operate the debtor's business and may exercise the rights and powers of a trustee under and to the extent provided by sections 363 and 552 [11 U.S.C. §§ 363 and 552]").

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The biggest issue regarding the administration of such proceedings still arises from the fact that each country has its own set of insolvency rules.⁹⁵ Regardless of recent efforts to bring foreign courts together, and help them operate in conjunction with one another, potential forum shopping incentives on the part of both creditors and debtors still exist. The bulk of the proceeding still revolves around how to properly deal with a debtor's assets (as it should), but almost as much time is spent simply trying to figure out which court has the proper authority to do so.⁹⁶

III. CURRENT DISAGREEMENT AMONG U.S. COURTS

Establishing COMI

We now come to the main focus of this article. Among various U.S. Courts, and bankruptcy attorneys in general, the debate over the point in time from which courts should evaluate a debtors COMI rages on. Again, the question is whether COMI should be evaluated as it existed at the time of the filing of the foreign proceeding, or at the time of the filing of the Chapter 15 petition.⁹⁷ The two recent bankruptcy cases explained below illuminate the reasoning and differences between each school of thought. The first deals with the bankruptcy of one of the major feeder funds of the Bernie Madoff Ponzi scheme, located in the British Virgin Islands.⁹⁸ The court's holding indicates that COMI should be evaluated from the time of the Chapter 15 petition.⁹⁹ The second case regards a petition for the recognition of a Bermuda liquidation proceeding.¹⁰⁰ It holds that COMI should be evaluated from the initiation of the foreign proceeding.¹⁰¹ It should be noted in addition that each case involves a petition for recognition of a foreign *main* proceeding.¹⁰²

Morning Mist Holdings Ltd. v. Kryz (In re Fairfield Sentry Ltd.)

Most of the recent case law on this matter suggests that COMI should be measured as at the time of the filing of the Chapter 15 petition. In *Morning Mist Holdings Ltd. v. Kryz (In re Fairfield Sentry Ltd.)* (hereinafter "*Morning Mist*"), the court evaluated this issue as it

⁹⁵ Rasmussen, *supra* note 59, at 6.

⁹⁶ See, e.g., *In re Kemsley*, 489 B.R. 346 (Bankr. S.D.N.Y. 2013); *In re Gerova Fin. Group, Ltd.*, 482 B.R. 86 (Bankr. S.D.N.Y. 2012); *In re Fairfield Sentry Ltd.*, 714 F.3d 127 (2d Cir. 2013); *In re Ran*, 607 F.3d 1017 (5th Cir. 2010); *In re Betcorp Ltd.*, 400 B.R. 266 (Bankr. D. Nev. 2009); *In re SPhinX, Ltd.*, 351 B.R. 103 (Bankr. S.D.N.Y. 2006), *aff'd*, 371 B.R. 10 (S.D.N.Y. 2007). In each of the above cases the court spends significant time and deliberation supporting its choice to either recognize or deny recognition of the existence of a foreign proceeding. *Id.*

⁹⁷ Brett Miller, *United States: Second Circuit Determines The Relevant Date For Determining A Chapter 15 Debtor's "COMI"*, MONDAQ (June 12, 2013), <http://www.mondaq.com/unitedstates/x/246274/Insolvency+Bankruptcy/Second+Circuit+Determines+The+Relevant+Date+For+Determining+A+Chapter+15+Debtors+COMI>.

⁹⁸ *In re Fairfield Sentry Ltd.*, 714 F.3d 127, 130 (2013).

⁹⁹ *Id.* at 137.

¹⁰⁰ *In re Millennium Global Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 65 (Bankr. S.D.N.Y. 2011), *aff'd*, 474 B.R. 88 (S.D.N.Y. 2012).

¹⁰¹ *Id.*

¹⁰² *Id.* at 63; *In re Fairfield Sentry Ltd.*, 714 F.3d 127.

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regarded one of the largest “feeder funds” that invested with Bernard L. Madoff Investment Securities LLC.¹⁰³ Sentry was organized as an International Business Company under the laws of the British Virgin Islands. It invested with Madoff Investment Securities from 1990 until Bernard Madoff’s arrest on December 11, 2008. By 2008 it had invested almost 95% of its assets, totaling over \$7 billion, into the Ponzi scheme.¹⁰⁴

As one of its central arguments, plaintiff *Morning Mist* appealed the bankruptcy Court’s, and subsequently district court’s, decision that COMI is determined at the time of the filing of the Chapter 15 Petition.¹⁰⁵ Instead, they contended that the court should have looked at Sentry’s entire operational history. However, the court affirmed the decision of the lower courts. Its reasoning went through several steps, evaluating “[1] the text of the statute; (2) guidance from other federal courts; and (3) international sources.”¹⁰⁶

Regarding the statutory text, the court gave weight to the fact that Section 1517 says a “foreign proceeding shall be recognized...as a foreign main proceeding if it is *pending* in the country where the debtor *has* the center of its main interests.”¹⁰⁷ The court reasoned that the use of present tense within the language of the statute is an indicator that COMI should be determined at the time the Chapter 15 petition is filed.¹⁰⁸

It supported its position with Justice Sotomayor’s holding in the Supreme Court case *Carr v. United States*, a criminal case where the defendant was charged with failing to register under the Sex Offender Registration and Notification Act.¹⁰⁹ One of the central issues in *Carr* was whether the language of the statute covered various preenactment actions, such as travel.¹¹⁰ In her decision, Sotomayor emphasized the significance of using verb tense in statutory interpretation. She cited to the Dictionary Act, which states that words in the present tense should be read to include the future as well as the present.¹¹¹ Accordingly, she reasoned this implies that the present tense “...generally does not include the past.”¹¹² The *Morning Mist* Court in turn held that, “[a] foreign proceeding ‘is pending,’...only after it has been commenced. Under the text of the statute, therefore, the filing date of the Chapter 15 petition should serve to anchor the COMI analysis.”¹¹³

The *Morning Mist* Court then looked at how other federal courts have addressed the issue. The vast majority of federal courts that have addressed the question found that COMI should be “...considered as at the time the Chapter 15 petition is filed.”¹¹⁴ To support its position, the *Morning Mist* Court cited to the Fifth Circuit decision from *In Re Ran*.¹¹⁵

Every operative verb is written in the present or present progressive tense. . . . Congress’s choice to use the present tense requires courts to view the COMI determination in

¹⁰³ *In re Fairfield Sentry Ltd.*, 714 F.3d at 130.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 133.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*; 11 U.S.C. § 1517(b) (2012) (emphasis added).

¹⁰⁸ *In re Fairfield Sentry Ltd.*, 714 F.3d at 133.

¹⁰⁹ *Carr v. United States*, 560 U.S. 438, 442 (2010).

¹¹⁰ *Id.* at 439.

¹¹¹ *Id.* at 438; 1 U.S.C. § 1 (2012).

¹¹² *Carr*, 560 U.S. at 438.

¹¹³ *In re Fairfield Sentry Ltd.*, 714 F.3d at 134.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

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the present, i.e. at the time the petition for recognition was filed. If Congress had, in fact, intended bankruptcy courts to view the COMI determination through a look-back period or on a specific past date, it could have easily said so.¹¹⁶

Beyond this, the Court considered holdings indicating that looking at a company's full operational history would be both difficult, and not necessarily effective for determining a single COMI.¹¹⁷ Again, they cited the Fifth Circuit decision in *Ran*. “[A] meandering and never-ending inquiry into the debtor’s past interests could lead to a denial of recognition in a country where a debtor’s interests are truly centered, merely because he conducted past activities in a country at some point well before the petition for recognition was sought.”¹¹⁸

The Court also noted that the Fifth Circuit’s decision allowed for the possibility of looking at a broader time frame to prevent any bad-faith COMI manipulation.¹¹⁹ It adopted this notion into its own holding and stated, “[t]o offset a debtor’s ability to manipulate its COMI, a court may also look at the time period between the initiation of the foreign liquidation proceeding and the filing of the Chapter 15 petition.”¹²⁰

Because of the international origins of Chapter 15 – and congressional instruction under Section 1508¹²¹ – the *Morning Mist* Court evaluated various international interpretations.¹²² Again, however, the focus of the discussion revolved around verb tense. In this case, the court looked at the UNCITRAL Guide, which indicated that the concept of COMI was drawn from the European Union Council Regulation enacting the Convention on Insolvency Proceedings (hereinafter “EU Regulation”).¹²³

According to the EU Regulation, COMI corresponds to the place where business is conducted on enough of a regular basis to be identifiable by third parties.¹²⁴ From this, the *Morning Mist* Court noted that the EU Regulation was, like Section 1517, also written in the present tense. At the same time, the phrase “regular basis” could otherwise indicate a broader time frame.¹²⁵

However, the EU Regulation diverges from Chapter 15. Specifically, in the EU there is no need to file a petition for recognition between member states - as one would under Section 1515.¹²⁶ For this reason, the *Morning Mist* Court determined that correlation to the EU Regulation was an unfitting means of interpreting of Chapter 15.

¹¹⁶ *In re Ran*, 607 F.3d 1017, 1025 (5th Cir. 2010).

¹¹⁷ *In re Fairfield Sentry*, 714 F.3d at 134.

¹¹⁸ *In re Ran*, 607 F.3d at 1025.

¹¹⁹ See *In re Fairfield Sentry Ltd.*, 714 F.3d at 135 (“Lastly, we note that this case does not involve a recent change of domicile by the [debtor] in question. A similar case brought immediately after the party’s arrival in the United States following a long period of domicile in the country where the bankruptcy is pending would likely lead to a different result.”) (quoting *In re Ran*, 607 F.3d at 1026).

¹²⁰ *In re Fairfield Sentry*, 714 F.3d at 133.

¹²¹ *Id.*; 11 U.S.C. § 1508 (2012) (“In interpreting [Chapter 15], the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions.”).

¹²² *In re Fairfield Sentry Ltd.*, 714 F.3d at 136.

¹²³ *Id.*

¹²⁴ See EU Regulation, *supra* note 66, at ¶ 13 (“The ‘centre of main interests’ should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.”).

¹²⁵ *In re Fairfield Sentry Ltd.*, 714 F.3d at 136.

¹²⁶ See *id.*; 11 U.S.C. § 1515(a) (2012).

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Beyond this, the *Morning Mist* Court looked to several European cases that evaluated COMI. It noted that these cases also showed concern about possible COMI manipulations during the course of a bankruptcy.¹²⁷ Overall, however, the court held that “international sources are of limited use in resolving whether U.S. courts should determine COMI at the time of the Chapter 15 petition or in some other way.”¹²⁸

Following such analysis, the *Morning Mist* Court held that COMI should be determined based on the debtor’s activities around the time the Chapter 15 petition is filed.¹²⁹ However, a court may also “...consider the period between the commencement of the foreign insolvency proceeding and the filing of the Chapter 15 petition to ensure that a debtor has not manipulated its COMI in bad faith.”¹³⁰

In re Millennium Global Emerging Credit Master Fund Ltd.

There are, however, exceptions to the Second Circuit’s reasoning in *Morning Mist*. One such exception is *Millennium Global*, in which the Bankruptcy Court of the Southern District of New York dealt with the Chapter 15 petitions filed by joint liquidators - Millennium Global Emerging Credit Master Fund Limited and Millennium Global Emerging Credit Fund Limited, a master fund and a feeder fund respectively.¹³¹

In its analysis, the Bankruptcy Court for the Southern District of New York stated that while some authority supported using the Chapter 15 filing date as the date for determining COMI, such action was not actually required by the plain words of the statute, and would in fact produce an inconsistent result.¹³² Like *Morning Mist*, the *Millennium Global* Court also cited to *In Re Ran*, noting its holding regarding the verb tense of the statute.¹³³ But *Millennium Global* came to the opposite conclusion, stating that the court failed to justify their assumption as to why the statute refers to the filing of the Chapter 15 petition. Indeed, the statute could just as easily be referring to the filing of the foreign proceeding.¹³⁴

Moreover, the *Millennium Global* Court pointed out that in a Chapter 15 filing, the U.S. case is only ancillary to the foreign proceeding. In fact, in that case the Chapter 15 filing took place three years after the filing of the liquidation in Bermuda. The *Millennium Global* Court therefore held that the appropriate date for determining COMI was the date the foreign proceeding opened.¹³⁵ The date for the petition of recognition on the other hand, was a “[...] mere matter of happenstance.”¹³⁶

¹²⁷ *In re Fairfield Sentry Ltd.*, 714 F.3d at 136-37 (citing Case C-341/04, *In re Eurofood IFSC Ltd.*, 2006 E.C.R. I-3813; *In re Stanford Int’l Bank Ltd.*, [2010] EWCA Civ 137, [54]-[56] (appeal taken from Eng.)).

¹²⁸ *In re Fairfield Sentry Ltd.*, 714 F.3d at 137.

¹²⁹ *Id.*

¹³⁰ *Id.* (regarding striking a balance between the statutory text and international interpretations that focus on the “regularity and ascertainability” of a debtor’s COMI).

¹³¹ *In re Millennium Global Emerging Credit Master Fund Ltd.*, 458 B.R. 63 (Bankr. S.D.N.Y. 2011), *aff’d*, 474 B.R. 88 (S.D.N.Y. 2012).

¹³² *Id.* at 72.

¹³³ *Id.*; see also *In re Ran*, 607 F.3d 1017, 1025 (5th Cir. 2010).

¹³⁴ *In re Millennium Global Emerging Credit Master Fund Ltd.*, 458 B.R. at 72.

¹³⁵ *Id.*

¹³⁶ *Id.*

In reaching its holding the *Millennium Global* Court also looked to interpretations of the purpose of Chapter 15 and choice of the term “center of main interests itself” – specifically, they focused on its interchangeability with the term “principal place of business.”¹³⁷ In *In Re Tri-Continental Exchange Ltd.*, the Bankruptcy Court of the Eastern District of California relied on a paper by Jay Lawrence Westbrook, one of the drafters of both the UNCITRAL Model Law and Chapter 15 and noted that the Guide to Enactment of the UNCITRAL Model Law On Insolvency explains, to some extent, the concept of COMI.¹³⁸

When observed in terms similar to principal place of business, it is clear that the date of filing of the foreign proceeding must be the time at which to evaluate COMI. After that date, in fact, a debtor cannot technically be even said to have a place of business, or management.¹³⁹

Beyond this, the *Millennium Global* Court, similarly to *Morning Mist*, also looked to the EU Regulation for guidance.¹⁴⁰ Again, under the EU Regulation, members of the Union automatically recognize foreign proceedings from the date of their opening.¹⁴¹ Unlike, *Morning Mist*, however, the *Millennium Global* Court was able to make a connection between the EU Regulation and Chapter 15.¹⁴² Specifically, it held that Chapter 15 is meant to incorporate the Model Law into the U.S. Code. The Model Law in turn adopted the term “center of main interests” from the EU Regulation. The court reasoned that if the EU Regulation does not require filing a recognition petition, it could have only contemplated COMI to be evaluated at the time the foreign proceeding was opened.¹⁴³

The *Millennium Global* holding also contemplates *In Re Ran*'s determination that evaluating the entire history of a company could be counterproductive.¹⁴⁴ The court reasons that looking at the date the foreign proceeding is opened does not invite a “meandering and never-ending inquiry” as is suggested in *In Re Ran*.¹⁴⁵ But use of the date of the Chapter 15 filing could lead to the possibility of forum shopping, “...as it gives prima facie recognition to a change of residence between the date of opening proceedings in the foreign nation and the chapter 15 petition date.”¹⁴⁶

¹³⁷ *Id.*

¹³⁸ *Id.*; *In re Tri-Continental Exchange Ltd.*, 349 B.R. 627, 634 (Bankr. E.D. Cal. 2006) (stating that the term ‘center of main interests’ “generally equates with the concept of a ‘principal place of business’ in United States law.”); Jay Lawrence Westbrook, *Chapter 15 at Last*, 79 AM. BANKR. L. J. 713, 719-20 (2005).

Chapter 15 was drafted to follow the Model Law as closely as possible, with the idea of encouraging other countries to do the same. One example is use of the phrase “center of main interests,” which could have been replaced by “principal place of business” as a phrase more familiar to American judges and lawyers. The drafters of Chapter 15 believed, however, that such a crucial jurisdictional test should be uniform....*Id.*

¹³⁹ *In re Millennium Global Emerging Credit Master Fund Ltd.*, 458 B.R. at 72-73.

¹⁴⁰ *Id.* at 73.

¹⁴¹ Council Regulation 1346/2000, On Insolvency Proceedings, 2000 O.J. (L160) 7.

¹⁴² *In re Millennium Global Emerging Credit Master Fund Ltd.*, 458 B.R. at 73.

¹⁴³ *Id.* at 74; *Bankruptcy Basics: Chapter 15*, *supra* note 30; see also UNCITRAL Model Law on Cross-Border Insolvency, *supra* note 25, at page 28-29.

¹⁴⁴ *In re Millennium Global Emerging Credit Master Fund Ltd.*, 458 B.R. at 74-75.

¹⁴⁵ *Id.* at 75.

¹⁴⁶ *Id.*

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IV. MOVING FORWARD

Need for Congressional Intervention

It is clear from the above that there are merits to both the *Morning Mist* and *Millennium Global* decisions.¹⁴⁷ The real question is, are they actually that different? Perhaps not. Both, in fact, require the court to evaluate COMI as it was at the time the debtor initiates the foreign proceeding.¹⁴⁸ The only difference is that under *Morning Mist*, the court does so under the guise of preventing bad faith on the part of the debtor.¹⁴⁹ But would the courts not want to prevent fraud in every case? Assuming the evaluation itself was not flawed, each method should produce a nearly identical finding of the debtor's COMI.

Therefore, the truly negative impact of the debate lies in how much time U.S. Courts have spent having it. The courts take almost as much time justifying *how* they chose to evaluate COMI as they do simply evaluating the debtor's COMI.¹⁵⁰ The stage is ripe for intervention.

If Congress amended 11 U.S.C. § 1517 to provide clear guidance, the courts should be able to operate more efficiently.¹⁵¹ This would allow creditors and debtors to enjoy more consistent and predictable bankruptcy proceedings – at least in so far as this element of the Chapter 15 petition was concerned. It is important to remember, after all, that the time from which the courts evaluate COMI is not even the main issue. The central question is whether the bankruptcy proceeding is taking place in the same country as debtor's COMI or, alternatively, in a country where the debtor has an establishment.¹⁵²

The true question then, is how should Congress set the standard? Currently, all courts are in relative agreement that it would be bad policy to allow debtors to manipulate their COMI in bad faith.¹⁵³ Insolvent debtors should not be able to forum-shop foreign jurisdictions with more favorable bankruptcy laws.

At the same time, the courts would be even more heavily burdened if they had to evaluate the full history of a debtor's COMI. Both *Morning Mist* and *Millennium Global* contemplate this.¹⁵⁴ *Morning Mist* asserts that such practice would be heavily burdensome.¹⁵⁵ *Millennium Global* indicates such in depth evaluation is simply unnecessary to a fair determination of COMI.¹⁵⁶ Clearly, some limitation needs to be set.

¹⁴⁷ See generally *In re Millennium Emerging Credit Master Fund Ltd.*, 458 B.R. 63; see generally *In re Fairfield Sentry Ltd.*, 714 F.3d 127 (2d Cir. 2013).

¹⁴⁸ *Id.*

¹⁴⁹ *In re Fairfield Sentry Ltd.*, 714 F.3d at 137.

¹⁵⁰ See generally *In re Millennium Global Emerging Credit Master Fund Ltd.*, 458 B.R. at 72-73; see generally *In re Fairfield Sentry Ltd.*, 714 F.3d 127.

¹⁵¹ See 11 U.S.C. § 1517 (2012).

¹⁵² *Id.*

¹⁵³ *In re Millennium Global Emerging Credit Master Fund Ltd.*, 458 B.R. at 74-75; *In re Fairfield Sentry, Ltd.*, 714 F.3d at 132.

¹⁵⁴ See *In re Fairfield Sentry Ltd.*, 714 F.3d at 134; see *In re Millennium Global Emerging Credit Master Fund Ltd.*, 458 B.R. at 74-75.

¹⁵⁵ *In re Fairfield Sentry Ltd.*, 714 F.3d at 134.

¹⁵⁶ *In re Millennium Global Emerging Credit Master Fund Ltd.*, 458 B.R. at 73.

Proposal

Currently, 11 U.S.C. § 1516 provides, “§ 1516. Presumptions concerning recognition...(c) In the absence of evidence to the contrary, the debtor’s registered office, or habitual residence in the case of an individual, is presumed to be the center of the debtor’s main interests.”¹⁵⁷

The following language is offered for inclusion:

(d) Absent evidence which leads to a compelling reason to determine otherwise, for the purposes of a petition for recognition under Section 1515 of this title the court will presume to determine a debtor’s center of main interests as it existed at the time the debtor initiated the foreign proceeding for which recognition is currently being sought.

Incorporating such language into the presumptions of Chapter 15 will allow for a fair, yet more efficient analysis of the debtor’s COMI. Specifically it will enable the courts to cease their ongoing debate, and default to evaluating COMI as it existed at the time the debtor went into bankruptcy. Simultaneously, it will allow the debtor or creditor in the foreign proceeding to supply evidence that could lead the court to evaluate COMI differently. Then, depending on how “compelling” such evidence is, the court has the ability to break the presumption.

V. CONCLUSION

As it regards a petition for recognition of a foreign proceeding under Chapter 15, the current Bankruptcy Code provides no direction regarding the time frame from which courts should evaluate a debtor’s center of main interests. Congress has the power to end the irregularity between circuits through a small addition of language to the code. Such intervention would allow bankruptcy courts to evaluate such petitions far more efficiently.

By conducting a default evaluation of COMI as it exists at the time the debtor filed for bankruptcy overseas, and allowing debtors and creditors opportunity to argue that COMI should be evaluated differently, the Court will be able to get a more realistic picture of where a company’s assets have been. This, in turn, will allow them to make a more expeditious and reasonable conclusion as to the most appropriate venue for bankruptcy.

Evaluating COMI in this way will better serve as a failsafe to minimize forum shopping. It will also ensure that the default evaluation of COMI focuses on a definitive moment – the debtor’s entrance into bankruptcy – as opposed to the arbitrary point at which the debtor happened to file under Chapter 15. By functioning as a presumption, as opposed to an outright rule, however, both debtors and creditors would have the ability to provide reasonable evidence that might defeat it. The overall approach to determining COMI would become more holistic and efficient.

¹⁵⁷ 11 U.S.C. § 1516(c) (2012).