Chapter 15 of the U.S. Bankruptcy Code: An Invitation to Forum Shopping?

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ABSTRACT

Chapter 15 of Title 11 of the United States Code (the Bankruptcy Code), which incorporates the Model Law on Cross Border Insolvencies (the Model Law)[1] formulated by the United Nations Commission on International Trade Law (UNCITRAL), became law in the U.S. on April 20, 2005,[2] and took effect on October 17, 2005. It replaces §304 of the Bankruptcy Code,[3] enacted in 2000, and continues the practice of providing assistance to assure the economic and expeditious administration of foreign insolvency proceedings.[4] Chapter 15 establishes new rules and procedures applicable to international insolvency cases that are expected to have a markedly broader impact than Code §304. The reactions to Chapter 15 have been mixed. Its supporters include Professor Jay Lawrence Westbrook, who wrote an article entitled "Chapter 15 at Last"[5] to "celebrate its arrival." Its detractors, led by Professor Lynn LoPucki, argue that Chapter 15 will open the door to virulent international forum-shopping to the detriment of creditors and stakeholders of insolvent multinational companies around the world.[6] Others have expressed varying degrees of cautious optimism and pessimism about the impact of Chapter 15.[7] Many of the issues involved in the debate are bound with the critical statutory concept of the center of main interests (COMI) of the debtor, introduced for the first time into U.S. law by Chapter 15. This article will answer the charge that Chapter 15 is an invitation to international forum shopping and will argue that the inherently flexible COMI concept can and should be utilized by the courts to address forum shopping concerns in international insolvencies. It will also demonstrate how the traditional principles of international comity in recognizing foreign judgments may be applied within the statutory framework of Chapter 15 in order to provide a critical safeguard against forum shopping.

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INTRODUCTION

It is a truism to say that insolvencies or reorganizations involving large multinational conglomerates can present extremely complex international legal problems. These include intriguing choice of forum and choice of law issues, as well as questions about the role of international comity and standards, all of which present rich and challenging areas of research and practice for the international bankruptcy student or lawyer.[8] Differences between the insolvency laws of various states, compounded by parochial and nationalistic sentiments, inevitably cause conflicts and delays that often prevent successful restructurings of multinational companies. International bankruptcy law, however, faces a dearth of defined legal structures, either formal or informal, to deal adequately with these issues. It is the general sentiment in the international bankruptcy community that "many more steps remain before we have a sensible, efficient regime for bankruptcy law in a globalizing world."[9]

Chapter 15, and the Model Law on which it is based, is a right step in that direction. It does not, however, provide a working definition of COMI, beyond the refutable presumption that the jurisdiction in which the debtor's registered office is located is the debtor's COMI.[10] Nonetheless, upon the determination or recognition by a U.S. court of a foreign proceeding as having been filed in its COMI, it is designated as a "foreign main proceeding,"[11] and the foreign representative of the debtor is automatically granted wide powers to administer the debtor's U.S. estate, including the automatic stay under §362 of the Bankruptcy Code. Does this encourage forum shopping? How does the COMI test work? What is the basis for the charge that Chapter 15 is an invitation to rampant forum shopping? How may Chapter 15 be improved? What, if any, is the role of international comity to play in these issues?

Given that Chapter 15 is still in its infancy, these issues have not been fully explored by the courts. The courts will be expected to flesh these issues out in future cases but will not be asked to do so in a vacuum, as valuable guidance from the principles established in previous U.S. decisions arising under Code §304 and international civil litigation is available to them. They will also be informed by international insolvency decisions from other jurisdictions, notably those arising under the European Union Regulation on Insolvency Proceedings[12] (the EU Regulation). Further, a considerable body of literature has been created by academics and practitioners between Chapter 15's introduction as part of a comprehensive reform in 1998 and its enactment in 2005, explaining how the rules are supposed to work and their underlying principles.[13] The rulings in *In re SPhinX, Ltd.*,[14] and more recently, *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*,[15] discussed further below, are demonstrative of the ability and willingness of the courts to develop the jurisprudence in this area. This article will also draw on these materials in exploring the issues and questions posed above. Part I will outline the structure and main features of Chapter 15 and set the stage for the rest of the discussion. Part II will outline the two major competing philosophies underlying international insolvencies, "Universalism" and "Territorialism." These philosophies underpin the disagreements of the commentators over the latitude of forum shopping in Chapter 15, which is the subject of the main discussion in Part III of Forum Shopping in Chapter 15.

PART I: STRUCTURE AND MAIN FEATURES OF CHAPTER 15

THE OBJECTIVES OF CHAPTER 15

Chapter 15's declared purposes are "to provide effective mechanisms for dealing with cases of cross-border insolvency" consistent with the objectives of (1) cooperation between U.S. and foreign courts and related functionaries; (2) greater legal certainty for trade and investment; (3) fair and efficient administration of cross-border cases in a way that protects the interests of all interested parties; (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.[16] Inherent in these objectives is the "universalist" ideal that a multinational bankruptcy should be a unified global proceeding administered by a single court assisted by courts in other countries.[17] Indeed, Chapter 15 is said to "represent an embrace of universalism by the United States, a course already charted by most American court decisions in multinational cases and anticipated by the adoption of §304 of the Bankruptcy Code in 1978."[18] Chapter 15 applies whenever there is a foreign insolvency proceeding relating to a debtor that is subject to a bankruptcy case of some kind in the U.S. Its potential scope is thus very broad. The long reach of the U.S. bankruptcy courts' jurisdiction, which can be triggered simply by the presence of a lawsuit or asset within U.S. borders,[19] means that Chapter 15 applies in all bankruptcies of multinational corporations incorporated in the U.S. or with U.S. assets or operations.[20]

CHANGES FROM THE PRIOR LAW

Chapter 15 centralizes every aspect of the international practice of bankruptcy in the U.S. It provides guidelines for concurrent proceedings and applies in the following situations: (1) where a foreign court or "foreign representative" seeks the assistance of U.S. courts in connection with a "foreign proceeding" (subchapter III); (2) where a U.S. court seeks the assistance of a foreign court with respect to a pending Chapter 11 debtor (subchapter IV); (3) where a foreign proceeding and a Chapter 11 case are pending concurrently (subchapter V); or (4) where creditors or other interested persons in a foreign country have an interest in requesting the commencement of, or participation in, a Chapter 11 case in the U.S.[21]

Under the prior law, in the paradigmatic case of a multinational company with U.S. assets facing insolvency proceedings in a foreign bankruptcy court, the foreign representative[22] of the debtor could do either one of two things in the U.S. bankruptcy system. The foreign representative could file a related bankruptcy case under Chapter 7 or Chapter 11 of the Bankruptcy Code in the U.S., invoking the full panoply of bankruptcy powers and rights under the Code. Alternatively, the foreign representative could commence a limited bankruptcy proceeding ancillary to a foreign case under Code §304. This would not have been a bankruptcy case or recognition of the foreign proceeding as such but was rather a set of procedures by which the foreign representative of a debtor could obtain relief in the U.S. courts, if certain statutory criteria[23] were satisfied. Typically, such relief took the form of an injunction halting lawsuits and creditor seizures of U.S. assets, or a turnover of property of the foreign estate or its proceeds to the foreign representative, in order to facilitate the resolution of the whole case in the foreign court. The U.S. bankruptcy system, in other words, granted no formal status to foreign proceedings.

By contrast, under the new Chapter 15 regime, a foreign representative commences an ancillary case by specifically petitioning the U.S. bankruptcy courts for recognition of a foreign proceeding. The language of Code §1511 makes clear that the foreign representative can only commence a full-fledged U.S. bankruptcy case upon obtaining recognition of the foreign proceeding under Chapter 15, unlike the previous practice under §304. In this way, Chapter 15 is the gateway to the U.S. bankruptcy system for a foreign representative. The applicant must also demonstrate his or her authority as a foreign representative by filing official papers from the foreign court together with a disclosure of all proceedings involving the same debtor pending in other countries.[24]

THE CENTER OF MAIN INTERESTS OR "COMI" OF THE DEBTOR

The court must next determine whether the foreign proceeding is either a "main" or "non-main" proceeding. This classification recognizes that more than one bankruptcy or insolvency proceeding may be pending against the same foreign debtor in different countries. A foreign proceeding will be recognized as a foreign main proceeding if it is pending in the country where the debtor has its COMI and as a foreign non-main proceeding if it only has an establishment (conducts business or owns assets) in the foreign country.[25] The debtor's registered office or habitual residence (in the case of an individual) is presumed, unless there is evidence to the contrary, to be its COMI. The COMI concept is crucial to the framework of Chapter 15, because the recognition of a proceeding as a foreign main proceeding or a foreign non-main proceeding has markedly different effects.

EFFECTS OF RECOGNITION OF A FOREIGN MAIN PROCEEDING UNDER CHAPTER 15

Upon recognition of the foreign insolvency under Chapter 15 as a foreign main proceeding, a number of key provisions of the Bankruptcy Code *automatically* come into force,[26] and other provisions may also be deployed in the bankruptcy court's discretion by way of "additional assistance" to the foreign bankruptcy case.[27] The most important of automatically triggered provisions is the § 362 automatic stay preventing creditor collection efforts or foreclosure of prepetition debt with respect to the debtor or its assets located in the U.S.[28] The major difference between a full-stay (i.e., issued in a regular U.S. bankruptcy case) and the stay automatically triggered by the recognition of a foreign main proceeding is that the latter's effect is limited to the territorial jurisdiction of the U.S. The debtor is also restricted in its ability to use, sell, or lease its U.S. property outside the ordinary course of its business under Code § 363. Code § 552 applies to limit the ability of prepetition creditors to take a security interest in property acquired postpetition so that such property is available to provide postpetition financing. The foreign representative can operate the debtor's business and exercise the rights and powers of a trustee under and to the extent provided by Code §§ 363 and 552, as well as seek the avoidance of unauthorized postpetition transfers of property of the estate under Code §549.[29] The foreign representative can also commence an involuntary or a voluntary full-fledged U.S. bankruptcy case under the Code but only if the debtor has assets in the U.S.[30]

The automatic grant of all these provisions, subject to the public policy exception in Code §1506, to the foreign representative of a recognized main proceeding in the U.S. is a dramatic change from the discretionary nature of relief under former §304(b). Under former §304(c), the grant of relief to a foreign representative was guided by a number of factors to ensure the "economical and expeditious administration of such estate," to be consistent with: (1) just treatment of all creditors; (2) protection of U.S. claim holders against prejudice and inconvenience in the processing of claims in the foreign proceeding; (3) prevention of preferential or fraudulent dispositions of property; (4) distribution of proceeds substantially in accordance with the U.S. Bankruptcy Code; (5) considerations of international comity; and (5) where an individual is concerned, the provision of an opportunity for a fresh start[31]. These considerations with respect to the grant of relief to foreign proceedings no longer have a role to play insofar as the automatic effects, outlined in the preceding paragraph, of the recognition of a foreign main proceeding are concerned. The U.S. bankruptcy courts may decline to grant any of the automatic remedies to a foreign main proceeding outlined in the preceding paragraph "if the action would be manifestly contrary to the public policy of the United States,"[32] a ground for refusal that would apply only in the rarest of cases. The foreign representative of a foreign non-main proceeding in Chapter 15, by contrast, is not entitled to the automatic provisions of Code §1520.

The foreign representative of a foreign main proceeding can also seek relief beyond the Code §1520 provisions, under §1521. Unlike §1520, the provisions of §1521 are applicable to foreign non-main proceedings as well. These include additional injunctions against creditor activity (e.g., staying an action, proceeding or execution against the debtor and its assets, or suspending the right to transfer, encumber or dispose of any assets of the debtor), discovery, and importantly, the turnover of assets for distribution in the foreign proceeding.[33] The grant of these remedies does not require that U.S. creditors enjoy the same rights, priorities, or realizations that would result in a U.S. full bankruptcy case, because no meaningful international cooperation would be possible otherwise.[34] Rather, the court would grant them only if the interests of the creditors and other interested entities, including the debtor, are substantially protected, and may condition such relief on appropriate conditions that may include giving security or filing a bond.[35] This "sufficient protection" formulation drastically truncates the former §304(c) inquiry and gives the U.S. court considerable discretion to fashion and limit relief depending on the circumstances of the case, but it is anticipated to be exercisable "in the context of a deep and long-standing commitment to cooperation and deference in pursuit of universalist results to the extent practical."[36] The §304(c) factors, however, have not been written out of the Code completely. They now appear in §1507 as factors for the court to consider only when asked to grant "additional assistance" to a foreign representative not provided for specifically by Chapter 15 (for both main and non-main proceedings). Given these substantial changes, the significance of the case law applying the old §304(c) factors in the scheme of Chapter 15 is a pertinent issue for a court deciding a case under Chapter 15 to consider and will be discussed in greater detail in Part III of this article.

CONCURRENT PROCEEDINGS AND COOPERATION WITH FOREIGN COURTS

Chapter 15 expressly contemplates the possibility of parallel full-fledged bankruptcy cases in the U.S. (which the foreign representative can file for upon recognition under either Chapters 7 or 11) and foreign proceedings elsewhere. In such situations, Chapter 15 requires that any relief granted in aid of the foreign proceeding under its provisions should be consistent with the relief granted in the full-fledged U.S. bankruptcy case, but, at the same time, it commands cooperation and coordination with the foreign proceeding.[37] This is supposed to work in practice as follows: If the U.S. bankruptcy case is commenced by the foreign representative subsequent to the foreign case, any relief that the court may have already granted to the foreign representative in the foreign proceeding, whether main or non-main, may be modified or terminated by the court if it is inconsistent with the relief granted in the U.S. bankruptcy case.[38] If the foreign proceeding is recognized as a main proceeding, then the U.S. proceeding is limited to the assets of the debtor located in the U.S.[39] If the U.S. case was filed before the foreign proceeding, the relief granted to the foreign representative must be consistent with the relief granted in the U.S. bankruptcy case. Here, even in the case of a foreign main proceeding, relief under Code §1520 (such as the automatic stay) will not apply if such relief is inconsistent with the first-filed U.S. bankruptcy case.[40]

I anticipate that these provisions will raise difficulties in practice, as it is not clear exactly what "inconsistent" means, and the determination of this may be difficult in the absence of specific choice of law rules in Chapter 15 that would enable the courts to ascertain which country's bankruptcy laws should take precedence. If the U.S. case was filed first and the U.S. is determined to be the COMI of the debtor (i.e. the foreign proceedings are non-main), then U.S. laws may defensibly be applied to the foreign non-main proceeding for "consistency" with the U.S. case. The same cannot be said with equal confidence when the U.S. case is filed first but the U.S. is not the COMI.[41] More difficult problems with concurrent proceedings may arise where there are proceedings in two or more foreign states and applications for recognition of a foreign main proceeding are made to a U.S. court. If no determination of a foreign main proceeding has been made, the U.S. court has to first make a determination as to which proceeding is the main proceeding (based on the debtor's COMI) and grant relief "consistent" with the foreign main proceeding.[42] The U.S. court could also hold that the U.S. is the debtor's COMI and that both foreign proceedings are non-main proceedings. If one or both foreign proceedings purport to have been recognized by their respective forums as being the main proceeding, the U.S. court will have to decide whether it will recognize one of them as the location of the debtor's COMI, since the scheme of Chapter 15 does not contemplate the possibility of there being two foreign main proceedings. These anticipated difficulties also serve to highlight the importance of the COMI test, explored in greater detail below.

DUTY TO COOPERATE WITH FOREIGN COURTS TO THE MAXIMUM EXTENT POSSIBLE

The final aspect of Chapter 15 to be mentioned here is the imposition of a duty upon the U.S. courts to cooperate with foreign courts in administering the worldwide case. Courts are directed to "cooperate to the maximum extent possible with foreign courts or foreign representatives," either directly or indirectly through the trustee of the estate.[43] U.S. judges are specifically authorized to communicate directly with foreign judges and representatives and to request information or assistance directly from them.[44] The ability of U.S. courts to communicate directly with foreign courts and representatives is crucial to the general principle of cooperation in international cases but does not, unfortunately, provide any quick or easy answers to the array of difficult questions raised by the issues highlighted above.

PART II: UNIVERSALISM VERSUS TERRITORIALISM

TWO COMPETING APPROACHES TO INTERNATIONAL INSOLVENCIES

The two dominant models for addressing international insolvency issues are universality and territorialism. Territorialism, also known as the "grab rule," is the traditional approach to international insolvency and involves (1) the seizure of assets by the courts of the jurisdiction in which those assets are found at the time of the bankruptcy filing; and (2) the distribution of those assets to local claimants according to local rules, with "little regard for proceedings or parties elsewhere"[45] or for the debtor (assumed in this article to be a multinational company facing insolvency) as a whole. This approach is justified by the argument that "local creditors had legitimate expectations that any financial crisis would be resolved applying local policies and preferences."[46] Underlying this argument is the pessimistic view that "local claimants will not receive their fair share of the assets in a foreign insolvency,"[47] and hence, the forum in which any assets are found should protect the interests of a debtor's local creditors. Universalism, in contrast, envisions "a single legal regime to all aspects of a debtor's affairs on a worldwide basis"[48] and is based on the thinking that (1) bankruptcy is a collective proceeding that must extend to all of a debtor's assets and its stakeholders; (2) a globalizing world requires a global bankruptcy regime; and (3) in order to accomplish the optimal use and distribution of assets in international cases, coordination of laws and courts of different jurisdictions is necessary to accomplish the optimal use and fair distribution of assets to stakeholders.[49]

The consensus among the majority of experts is that universalism (or some form of it) is the right long-term approach. A variety of benefits are identified, including a more efficient ex ante allocation of capital,[50] reduced administrative costs from the reduction of the number of proceedings, and the facilitation of reorganizations. These benefits are anticipate to result in greater liquidation values, and an overall increase in the clarity and certainty for all the parties in interest involved in an international insolvency case. Territorialism, in contrast, is said to destroy value by increasing transaction costs due to the duplicative nature of full-blown parallel proceedings in every country where assets are located, hindering reorganization efforts. Territorialism is also said to engender conflicts and distrust between jurisdictions and courts, resulting in greater uncertainty to creditors and less efficient ex ante allocations of capital. The haphazard distribution results arising from the application of different laws in different countries under territorialism also run a substantial risk of violating the fundamental bankruptcy mantra of treating similarly situated creditors equally.[51]

CHAPTER 15—THE EMBRACE OF MODIFIED UNIVERSALISM BY THE U.S.

By enacting Chapter 15, I believe that the U.S. bankruptcy system has rightly embraced universalism. The universalism of Chapter 15 is a modified one. The pure form of universalism envisages a single-court, single-law resolution of international insolvency cases. There would be one main insolvency case for each business entity that would administer all of the entity's assets worldwide—it would be governed by a single law governing the substantive rights of the parties in interest, and one set of procedural rules that would provide for its commencement, administration, and closing. This is recognized to be an unattainable ideal at the present time. Closer to reality is modified universalism, which is "tempered by a sense of what is practical at the current stage of international development."[52] Proponents of modified universalism seek solutions that come as close as possible to the ideal of a single-court, single-law resolution. They share the view, with advocates of pure universalism, that there should be a single main case for an international insolvency in the home country of the debtor, governed for the most part by the laws of the home country. Modified universalism, however, recognizes that the main case may need support through secondary or ancillary cases in other countries where assets are located or where local court support is otherwise needed. It also recognizes that the substantive rights of the parties in interest in an insolvency case may differ substantially depending on the country where the insolvency case is filed. However, it seeks to reduce the resulting inconsistencies to the greatest extent possible. This thinking underlies many of the key features of Chapter 15.

Just as proponents of universalism have tempered their unrealistic idealism in modified universalism, the supporters of territorialism have retreated from its most extreme "grab-rule" approach to one of "cooperative" territorialism. Under this view of territorialism, the bankruptcy administration of a multinational's assets and operations within a given country is to be governed by the laws of that country. Each court would appoint an administrator, and, when international cooperation is needed, it would occur by agreement through treaty, convention, or on an ad hoc basis with courts in other jurisdictions in order to achieve mutual benefit in each case. Examples of such cooperation would take the form of establishing procedures for the replication of claims in various jurisdictions, sharing distribution lists to make sure that no creditor receives more than full payment on its claim, jointly selling assets when advantageous, or seizing and returning assets that have been the subject of avoidable transfers.

CHAPTER 15'S ALLEGED SUSCEPTIBILITY TO FORUM SHOPPING

Detractors of Chapter 15 have argued that cooperative territorialism is preferable to modified universalism because modified universalism schemes like Chapter 15 hinge on the "fatally flawed" concept of a home country (or COMI). These critics argue that multinational companies do not have home countries or a COMI in any meaningful sense, and, since no one has yet figured out a way to assign them, the implementation of such schemes will serve to encourage international forum shopping and competition to "run out of control" to the detriment of stakeholders.[53] In their view, it is therefore better to leave the "territorially-based system for international cooperation already in place"[54] since "the great advantage of territoriality over universalism is that territoriality requires no cooperation beyond that which already occurs."[55] It is difficult to see how this approach confers advantages on the existing international insolvency framework, considering the presence of jurisdictions like Japan that traditionally have had little or no cooperation with other jurisdictions in insolvency matters.

Chapter 15 and the philosophy of modified universalism towards international insolvency that it represents is now the law in the U.S., and it is therefore of practical importance to examine the claim that it sets up a scheme particularly susceptible to forum-shopping. This criticism does not rest on the inherent nature of Chapter 15's underlying philosophy of modified universalism, since it has been acknowledged that a single court having effective worldwide jurisdiction over each multinational company's bankruptcy case, standing on its own, would be an improvement in the system.[56] Rather, the attack revolves around criticisms of the COMI concept in Chapter 15. The attack and my defense of the COMI concept will be the central focus of Part III of this article.

PART III: FORUM SHOPPING IN CHAPTER 15

THE RISKS OF FORUM SHOPPING

Forum shopping in international insolvency arises from the strategic and tactical options available to distressed multinational companies with one or more "connecting factors" to different jurisdictions. Rational actor theories indicate that a distressed multinational corporation, if given the option, will always seek out a jurisdiction with insolvency laws that offer it the most protection from its creditors in order to achieve the greatest flexibility and power in negotiations. Conversely, it is not surprising that creditors would generally prefer a predictable jurisdiction in which management is divested of control of the business, creditors' rights are strictly enforced, and distributions are made to creditors as quickly as possible (although creditor groups might, from time to time, prefer management to remain in control to preserve the going concern value of the business). In thinking about forum shopping, there is a distinction to be kept in mind between choice of law and choice of forum. The choice of forum in international insolvency is often assumed to lead to the application of the forum's local bankruptcy law to the case before it, since traditionally each national court only thought to apply its local bankruptcy law, although theoretically it could apply choice-of-law analyses in order to apply the bankruptcy law of another country. Apart from the objective of attaining substantive results arising from the application of a forum's bankruptcy law, forum shopping may also be motivated by less important reasons of convenience (e.g., location of witnesses, language, etc.).

In alleging that Chapter 15 will lead to the spread international forum shopping, Professor LoPucki has this to say:

> In a universalist system, case placers would be free to choose the bankruptcy systems that gave them and their companies the greatest advantage over other parties to the bankruptcy cases. The case placers could choose countries whose laws left even corrupt managers in control, barred criminal prosecutions of top managers during bankruptcy cases, lowered the priorities of hostile creditors while raising the priorities of friendly ones, or provided benefits we cannot yet even imagine. If no countries yet have such laws, aspiring bankruptcy havens will enact them.[57]

Professor LoPucki appears to be taking issue equally with the existence of forums with the described qualities as well as the ability of so-called case placers to *choose* a forum as a result of Chapter 15. Nonetheless, corruption aside, the distributive results upon the application of different bankruptcy laws can lead to drastically different results in a debtor's insolvency. The facts in the case of *In re Treco*[58] are illustrative. The debtor filed for bankruptcy in the Bahamas. At the same time, it had $600,000 on deposit with a bank in New York, which secured a debt of over $4 million. Under U.S. law, a secured creditor would generally have first priority, and the U.S. bank would be entitled to the $600,000. Bahamian law, on the other hand, accords administrative expenses priority over secured creditors. Since the administrative expenses in that case amounted to close to $8 million, the U.S. bank was unlikely to see any returns if Bahamian law applied. On the assumption that a forum is likely to apply its own domestic bankruptcy law, there are clear advantages for different stakeholders to prefer some forums over others to govern a debtor's insolvency.

Notwithstanding this, the practice of forum shopping, loosely defined as the ability of a party to choose a forum for some real or perceived advantage over its adversaries, cannot be said to be a phenomenon introduced into U.S. international bankruptcy practice by Chapter 15. Even under previous Code §304, a local creditor who was capable of defeating a §304 petition by appealing to the factors in §304(c) essentially had the choice of litigating under the law of the foreign jurisdiction or opposing the §304 petition and litigating under American law.[59] Creative lawyers have found, and will always find, ways to place cases in forums favorable, real or perceived, to their clients. Presumably, however, if there is one real COMI for each debtor, forum shopping would only be a bad thing if it allowed the debtor to file for insolvency in a forum that is not situated in its COMI in order to avail itself of strategic advantages to the detriment of stakeholders' rights and expectations and to have that forum recognized as the controlling proceeding. If the debtor files for insolvency in its COMI and it is recognized as such, "forum shopping" is a non-issue. A debtor may also "forum shop" by filing for insolvency in a forum which is not its COMI and have it recognized under Chapter 15 as a foreign non-main proceeding with limited effects. This would also be unobjectionable. Hence, the real question presented by the present discussion about forum shopping in the context of Chapter 15 is whether it enables multinational debtors to somehow influence the court to recognize a forum other than its actual COMI as the foreign main proceeding. This is the sense in which the term forum shopping will be used hereinafter.

THE BENEFITS OF FORUM SHOPPING IN CHAPTER 15

If the debtor is able to influence the determination of its "COMI" under Chapter 15 (for convenience I will use quotation marks to refer to false COMIs), that forum of its choice would be granted foreign main proceeding status in the U.S. and other Model Law jurisdictions without reference to criteria such as those formerly set forth in Code §304(c), outlined above. This recognition would automatically trigger the range of relief in Code §1520, including the automatic stay, available to the foreign representative with respect to the debtor's assets in the territorial jurisdiction of the U.S. The grant of the range of relief available in §1520 is non-discretionary. The foreign representative may then choose also to commence a U.S. bankruptcy case with respect to those assets or apply to the U.S. court for other relief set out in §1521, including a turnover of those assets to the "COMI" for distribution in the foreign proceeding. The relief which may be granted under the provisions of §1521, unlike those in §1520, is discretionary. However, as mentioned above, the U.S. bankruptcy courts are no longer *required* to take cognizance of the factors laid out in former Code §304(c). Rather, the short formulation requiring that the court be "satisfied that the interests of creditors in the United States are sufficiently protected" leaves much greater room in the exercise of such discretion. If the prediction by Professor Westbrook that U.S. courts will exercise this discretion "in the context of a deep and long-standing commitment to cooperation and deference in pursuit of universalist results to the extent practical"[60] proves accurate, the scenario whereby a U.S. court refuses a foreign representative's §1521 application, especially if the foreign proceeding has already been recognized as a foreign main proceeding, will occur rarely.

Under the scheme set up by Chapter 15, a debtor facing insolvency clearly has much to gain through the designation of the debtor's "COMI" in a jurisdiction friendly to its purposes outside of the U.S. It can cherry-pick between (a) having its U.S. assets governed by U.S. bankruptcy law by filing for a U.S. bankruptcy case pursuant to §1511(a)(2); and (b) foreign law at the "COMI" by applying for a turnover of assets under §1521. All the while, the debtor would continue enjoying the protections and powers granted by the provisions in §1520. The foreign non-main proceeding, on the other hand, does not enjoy the automatic protections of §1520 and will be limited to filing an involuntary U.S. bankruptcy case, which is notoriously difficult to initiate.[61]

I offer the following framework for analysis in dealing with the question as to whether Chapter 15 will lead to rampant forum shopping. First, I will examine and assess of the available formulations for a COMI test, in light of the charge that the COMI test is "intentionally vague and practically meaningless."[62] I will argue that a flexible, multifactor COMI test can and should be applied as the best test available to prevent forum shopping in Chapter 15. Second, I will highlight some of the proposals in the literature on how the COMI test, and Chapter 15 generally, may be improved. Third, I will pose the "who decides" question with respect to the COMI decision. Here, I will argue that the application of traditional international comity principles developed in the international insolvency context under Code §304 are consistent with the language of the relevant statutory provisions in Chapter 15 and will function as a critical safeguard against forum shopping.

THE RAISON D'ÊTRE OF THE COMI TEST

As mentioned previously, the concept of COMI was introduced into U.S. law for the first time by Chapter 15. This concept originated in the EU regulation and reflects the notion that greater deference should be granted to a proceeding pending in the principal place of a debtor's business than to one pending in a jurisdiction where the debtor has a secondary level of activity. This is a movement away from the "domicile" concept utilized under the old U.S. Code §304, the application of which resulted in the much criticized ruling in the *National Warranty Insurance* case.[63] In that case, all of the debtor's businesses, its headquarters, employees, and virtually all of its creditors were in the U.S., but the debtor itself was incorporated in the Cayman Islands. Shortly before bankruptcy, its management transferred most of its remaining assets to the Caymans and opened a provisional liquidation there. The Cayman liquidators sought to block any actions in the U.S. by filing a §304 application, which was granted on the basis that the Caymans proceeding was held in the country of incorporation of the debtor which was also its "domicile" for the purposes of §§101(23) and 304. The prevention of such plainly unsatisfactory outcomes was the raison d'être for the creation of the COMI test.

A MULTIFACTOR FLEXIBLE COMI TEST

Under Code §1516(c), the debtor's registered office (or place of incorporation) is presumed to be its COMI in the absence of evidence to the contrary. While this is helpful, the lesson to be learned from the *National Warranty Insurance* case must be that this presumption should certainly not be read as dispositive, since it is not uncommon for a company to incorporate in a jurisdiction purely for tax reasons and to have no substantive operations or employees there. Chapter 15, however, offers no other attributes to assist in the determination of COMI, and its open-ended language leaves the inquiry to the discretion of the court. Apart from place of incorporation, there are three other main attributes of a multinational corporate debtor acknowledged in the writings and jurisprudence that may assist in the determination of its COMI—the debtor's headquarters, the location of its operations, and the location of its assets. The debtor's headquarters (or nerve center) and the location of its operations tests are familiar to U.S. law as two equal parts that inform the determination of a corporation's "principal place of business"[64] for the purpose of, among others, ascertaining if a U.S. federal court has diversity jurisdiction over a case.[65] The "nerve center" test identifies the state in which the corporation performs its executive and administrative functions, and the "place of operations" test determines the one state in which corporate activity is significantly greater than any other state.

These tests can be usefully utilized in the international insolvency context as factors to be considered in the determination of a debtor's COMI. The difference, and corresponding difficulty, of using these tests in the context of Chapter 15 is that the search in Chapter 15 is for one single COMI. In contrast, in the context of personal or diversity jurisdiction, a corporation could be amenable to jurisdiction in more than one state. It is not inconceivable for a multinational corporation to have, for example, a "nerve center" in one country and its "place of operations" in yet another. In such a case, a court would have to look to other factors to break the tie. It could look to the location of its assets, since those of some large public companies such as an oil exploration companies consist principally of hard, tangible assets. It could come back to the country of incorporation. It could also look at the location of its creditors and other stakeholders. The most important attribute about a multi-factor COMI test is that no one single factor is controlling, and thus it is inherently flexible. This aspect of this multi-factor flexible approach, which was applied in two cases I discuss in greater detail below, was acknowledged by the U.S. Bankruptcy Court in the Southern District of New York:

> The Bankruptcy Code does not state the type of evidence required to rebut the presumption that the COMI is the debtor's place of registration or incorporation. Various factors, singly or combined, could be relevant to such a determination: the location of the debtor's headquarters; the location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company); the location of the debtor's primary assets; the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes.[66]

THE STRENGTHS AND DRAWBACKS OF FLEXIBILITY

In a relatively simple scenario like that presented in the *National Warranty* case, the fact that the debtor's headquarters, employees, businesses, and creditors were all in the U.S. would have easily rebutted the presumption that its place of incorporation in the Caymans was its COMI. This was the situation facing the case of *BRAC Rent-A-Car International*,[67] a case decided by the London High Court of Justice under the EU Regulation. The English court held that a Delaware incorporated company that had no history of trading in the U.S., which conducted all its operations in the U.S., had its COMI in the U.K. Likewise, the European Court of Justice has held that the COMI presumption may be overcome "particular[ly] in the case of a 'letterbox' company not carrying out any business in the territory... in which its registered office is situated."[68] However, the fact remains that, in a complex case, it is not inconceivable that the application of some or all of the tests mentioned above to a multinational debtor could point a court to two or more different jurisdictions as equally qualified candidates for the debtor's COMI. The failure of the Bank of Commerce and Credit International (BCCI) provides a ready example. BCCI was founded by Saudis and incorporated in Luxembourg with operations and subsidiaries in many countries. Its traditional headquarters were in London, along with most of its central administration. Before filing for bankruptcy, its official headquarters were relocated to Saudi Arabia, but its central administrative operations remained in London. BCCI filed for bankruptcy in Luxembourg, and the Luxembourg proceeding was recognized as a main proceeding throughout the world. Under the multi-factor COMI analysis, if a firm similar to BCCI were to file for insolvency in London, Saudi Arabia, or some other country where it does the bulk of its business, how would a court determine where it has its COMI?

It may be the rare case that points a court to a number of jurisdictions with equally plausible claims to being the debtor's COMI. But where may the U.S. courts look to for guidelines to make a determination in such an instance? One obvious source would be the EU Regulation. The preamble of the Regulation states that the COMI "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." However, this itself does not define what constitutes "administration" or "interests," although these terms probably bear some similarity to the notions of "headquarters" and "places of operations" under the American "principal place of business" test discussed above. By including the phrase "ascertainable by third parties," the EU Regulation's preamble suggests that a debtor's COMI should be a place that parties can foresee from their dealings with the company. This, in principle, is correct. A debtor's COMI should be a place that is ascertainable to third parties, as "justice requires a certain and predictable place where a person can be reached by those having claims against him."[69] However, there is an element of circularity here, since the whole point of the COMI inquiry is to ascertain where this "certain and predictable place" is. The cases decided under the EU Regulation emphasize that the presumption based on the location of the registered office can be rebutted by pointing to objective facts ascertainable by outsiders such as creditors, usually the performance of "head office functions" in another country. Apart from the risk of rigidifying the COMI inquiry if courts start to look at just a few circumscribed factors to rebut the presumption of COMI-status arising from incorporation, would it be practical to expect individual creditors dealing with a multinational debtor to have considered not only the debtor's place of incorporation, but also the functional realities of its business affairs in determining the commercial or financial risk of dealing with it?

The fact that there will be difficult cases does not mean that the COMI analysis should not be undertaken, given the obvious inadequacy of relying upon just the one or two factors of incorporation and "principal place of business" in isolation. Courts can and should embrace the COMI test and apply a flexible balancing approach based on a multi-factor inquiry with an eye on a nonexclusive list of different attributes of the multinational corporation debtor, some of which are outlined above. The COMI analysis, the ultimate purpose of which is to uncover the real COMI, cannot and should not be applied in a one-size-fits-all fashion. A flexible, multi-factor approach to determining COMI would be in line with the civil law "real seat" theory of jurisdictional competence where functional realities and other factors have a bearing on where the COMI is found to be located, upon which it was originally based. Further, the adoption of a flexible approach as to COMI under Chapter 15 would allow U.S. courts to achieve consistency with the jurisprudence articulated under former §304 and the underlying principles therein, some of which are fundamental to U.S. law. Indeed, the COMI test has been applied by the courts in the EU as requiring them to decide each case based on its specific circumstances.[70] This flexible, multi-factor approach in determining COMI was exactly the approach that the U.S Bankruptcy Court for the Southern District of New York adopted in the following two cases: *In re SPhinX, Ltd.*[71] and *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*[72]

THE *SPHINX FUNDS* CASE

The SPhinX Funds (the Funds) bought and sold securities that tracked a hedge fund index and were established as Cayman Islands entities but were managed by a Delaware corporation located in New York. The Funds' trades were executed by another New York entity, Refco Capital Markets Ltd., while its corporate administration was conducted by another unrelated entity in New Jersey. Apart from the tax advantages claimed from their Cayman Islands domicile, the Funds had close to nothing to do with the Caymans except the maintenance of records to meet incorporation and regulatory requirements. All of the Funds' assets were in the U.S., and its clients were located throughout the world. Allegations of fraud upon the entity responsible for executing the Funds' trades sparked a series of events, including the settlement of a preference action brought by Refco (which itself filed for Chapter 11 in the U.S.) against the Funds, which certain investors in the Funds had opposed. The Refco settlement was approved over their objection, and an appeal was taken. The opposition then caused the Funds to be put into voluntary liquidation in the Cayman Islands. Liquidators were appointed, who sought recognition of the Cayman Islands winding-up proceedings as foreign main proceedings in the U.S. bankruptcy court.

The U.S. bankruptcy court determined that the Funds did not have its COMI in the Caymans. In reaching its decision, it looked at recent foreign court decisions under the Model Law and the EU Regulation and concluded on the facts that the important objective factors in the case pointed to the SPhinX Funds' COMI being located outside of the Cayman Islands. Among these, the court explained, was the absence of any of the substantive connecting factors outlined above to the Cayman Islands, including the fact that all of the administration of the Funds business and operations (including board meetings) were conducted outside of the Caymans, the fact that no managers or employees of the Funds were in the Caymans, as well as the fact that most, if not all, of the Funds' creditors and investors were located outside of the Caymans.

In reaching its decision, the court observed that these factors alone *may* not categorically preclude recognition of the Cayman liquidation as a foreign main proceeding because the Funds' investors, who comprised the vast majority of the stakeholders in the Cayman proceedings, did not object to the Chapter 15 petition seeking recognition, and the Cayman liquidators were the only parties ready to perform winding up.[73] The court nevertheless refused to recognize the Cayman proceedings as foreign main proceedings, as it perceived that the primary purpose of the Chapter 15 petition was not to assist in the efficient administration of the Cayman proceedings, but to frustrate the Refco settlement by obtaining a §362 stay of the appeal (which would have issued automatically under Code §1520 if recognition of foreign main proceeding status was given to the Cayman liquidation). The court found this "improper." According to the court, "staying the appeal would have the same effect as overturning the [Refco settlement] without addressing or prevailing on the merits." The liquidators' underlying strategy, was held to have "tainted" their request for recognition as well as the investors' consent to the Chapter 15 petition, "giving the clear appearance of improper forum shopping."

The flexible approach t first formulated by the court in *SPhinX* has been criticized by some commentators, among them one of the draftsmen of the Model Law and Chapter 15.[74] One criticism is that "Chapter 15 substituted a simple, objective standard for recognition in place of the subjective requirements of former §304, which was repealed," and the court, in its "subjective musings... summons the ghost of §304 [and takes into account factors that are] wholly irrelevant to a recognition decision." The determination of whether a foreign proceeding is main or non-main "should be based on objective considerations," and no "flexible, subjective considerations should apply to the decision to enter or decline an order of recognition."[75] U.S. courts should, on this view, look first at the location of the debtor's registered office as its COMI, which may be rebutted only by pointing to objective facts ascertainable by third parties, as per EU Regulation case law. Another commentator has praised the *SPhinX* decision for "its pragmatism and its emphasis on achieving the best commercial outcome for stake-holders" but fears that the "approach in SPhinX, although correct, is likely to provide a green light to sophisticated debtors and creditors to forum shop with ever increasing regularity."[76] This same commentator is also of the view that the downside with this flexibility of approach "makes credit-risk assessment for financiers and other creditors very difficult, given the lack of certainty in its application."[77]

THE CORRECT APPROACH TO DETERMINING COMI

Notwithstanding the above, it is my view that the flexible, multifactor balancing approach first adopted in *SPhinX* is correct in principle, and U.S. courts should not shrink from applying it in attempting to ascertain the COMI of a multinational corporation in insolvency. The pragmatic and flexible approach employed by the bankruptcy court in *SPhinX* is consistent with Chapter 15's intended purpose as a vehicle for coordinating the efficient and expeditious administration of a foreign debtor's assets while safeguarding the commercial expectations of stakeholders. The language in Code §1516(c) in no way limits the court to so-called "objective facts" in its determination of COMI, and the court should be allowed to take into account all relevant factors in order to reach the right result. Weight should be given to the expectations of creditors and third parties dealing with the debtor based on the performance of "head office functions," but the ossification of this consideration as the means of rebutting the presumption in §1516(c) could easily lead to a similar result like that in the National Warranty Insurance case. Further, the "guideline" from the EU Regulation that the COMI should be ascertainable by third parties involves some circularity since it ultimately involves the court making the determination in its discretion as to where that "certain and predictable" place is located. Given this, the court should be free to look at other indicia relating to the debtor's operations, businesses, and relationships with stakeholders in order to determine the location of a debtor's COMI.

The court, however, should not be completely free to look at all other subjective factors regardless of their relevance to the determination of COMI. The courts will have to separate the relevant subjective factors from the irrelevant ones. There were two subjective factors taken into account by the *SPhinX* court: (1) the fact that the Funds' investors did not oppose the Chapter 15 petition; and (2) the court's perception that the petition was filed with the "clear intention" to forum shop. With respect to (1), it is believed that this should have been irrelevant. A debtor's COMI is the debtor's COMI regardless of whether its creditors have an ex post facto view as to whether it is a favorable forum for their claims in the event of the debtor's insolvency. This is conceptually different from their reasonable expectations were as to where the debtor's COMI is located at the time of the formation of their relationship, which is relevant to the court's determination of COMI. Factor (2), in contrast to factor (1), should be relevant to a determination of the debtor's COMI. Evidence that the debtor had been trying to change the balance of factors in favor of a particular forum, or was not filing a petition for recognition of a foreign main proceeding in good faith but for strategic advantage, may rightly be taken into account if such actions raise the suspicions of the court, particularly since the debtor itself may fairly be presumed to have greater knowledge of its businesses, operations and interests.

THE *BEAR STEARNS* CASE

The most recent *Bear Stearns* ruling of the U.S Bankruptcy Court for the Southern District of New York reinforces the views expressed above. Until August 30, 2007, the *SPhinX* decision was the only U.S. decision dealing in detail with the determination of a debtor's COMI under Chapter 15. The *Bear Stearns* ruling adds significant detail to the jurisprudence relating to Chapter 15, and will undoubtedly be welcomed by the international bankruptcy community.

The *Bear Stearns* case involved two hedge funds (the Bear Stearns Funds) incorporated as Cayman Islands exempted limited liability companies, with registered offices in the Cayman Islands. They invested in a wide variety of securities including asset and mortgage-backed securities and were administered by a Massachusetts corporation. The Bear Stearns Funds' investment manager, and all or nearly all of their assets, were located in New York. A significant devaluation of their asset portfolios triggered by the sub-prime mortgage crisis in May 2007 led to the margin calls from many of their trade counterparts, which were not met. This resulted in the issuance of default notices by those counterparties and the exercise of their rights to seize or sell Bear Stearns Funds' assets that had been the subject of repurchase agreements or had been pledged as collateral. Winding-up petitions were then filed by the Bear Stearns Funds in the Cayman Islands, and joint provisional liquidators of the funds appointed by the Grand Cayman Court. The liquidators filed Chapter 15 petitions in New York on the same day seeking recognition of the Cayman proceedings as foreign main proceedings.[78]

The court denied the related petitions and held that the foreign proceedings neither qualified as foreign main proceedings nor foreign non-main proceedings (discussed in Part III) under Chapter 15. Judge Lifland held that the evidence clearly indicated that "each of the Funds' real seat and therefore their COMI is in the United States, the place where the Funds conduct the administration of their interests on a regular basis and is therefore ascertainable by third parties, and more specifically, is located in this district where principal interests, assets and management are located."[79] Insofar as this was a "letterbox" company case with all the objective factors pointing towards the COMI of the debtor being in the U.S., this was a relatively easy determination taken to avoid a *National Warranty*-type outcome. Notwithstanding this, the *Bear Stearns* decision is a significant contribution to the COMI-determination jurisprudence for the following three reasons.

First, in explicitly subscribing to the "real seat" theory,[80] the *Bear Stearns* decision represents the commitment of the U.S. courts to find the debtor's COMI and not settle on second-best alternatives. It also represents an endorsement of the multi-factor flexible approach towards the determination of a debtor's COMI. As mentioned above, the single most important attribute about the multi-factor COMI test is its inherent flexibility and the fact that no one single factor is controlling. The true spirit of the real seat theory will require courts to take both objective as well as subjective facts into account, as long as these are relevant to the determination.

Judge Lifland's elaboration on the standard and burden of proof required to rebut the presumption of debtor's COMI being its place of incorporation in §1516(c) is the second significant contribution of the *Bear Stearns* decision. Judge Lifland held that the "ultimate burden" of proof to rebut any "contrary evidence" is on the foreign representative, and made clear that the presumption of COMI arising from incorporation is a weak one, one which does not have "special evidentiary value" and was only included for "speed and convenience of proof where there is no serious controversy."[81] It was acknowledged that the "Bankruptcy Code does not state the type of evidence required to rebut the presumption that the COMI is the debtor's place of registration or incorporation."[82] Judge Lifland cited the *SPhinX* decision and provided a non-exhaustive list of the relevant objective facts, many of which informed the decision in the case before him, but did not preclude the possible relevance of other subjective factors to the inquiry.[83] Judge Lifland, moreover, took cognizance of the fact that "there apparently exists the possibility that prepetition transactions conducted in the United States may be avoidable under U.S. law."[84] This would be a subjective reason for the debtor to file outside of the U.S. and is akin to the court's recognition in the *SPhinX* case that the petition there was filed with the "clear intention" to forum shop. I have argued why this is right.

Finally, but not least, the *Bear Stearns* decision is an illustration of the courts' ability to weed out the irrelevant factors from the COMI determination process. I argued (on the basis of the real seat theory) above that the court in *SPhinX* should not have paid attention to the fact that none of the creditors of the Funds objected to the application for foreign main proceeding status in the U.S. Judge Lifland held in *Bear Stearns* that this was a factor that should have been irrelevant, though perhaps for the slightly different (but completely legitimate) reason that this might lend to the impression that the court was merely a "rubber stamp."[85]

DOES THE FLEXIBLE COMI TEST MAKE CHAPTER 15 SUSCEPTIBLE TO FORUM SHOPPING?

Will the multi-factor flexible approach advocated above for the determination of a debtor's COMI invite and deliver success to forum shopping? May anything be done within the rubric of Chapter 15 to safeguard the exercise of courts' discretion in the determination of COMI? The respective answers to these questions are "not necessarily" and "yes" respectively.

The skepticism of those who oppose the flexible approach, as well as those who oppose universalism generally, is based in part on the speculation that multinational corporations will be able to forum shop with much greater ease under the scheme of Chapter 15. It is believed that they can and will do so by manipulating their corporate structure and holdings in order to influence the location of their COMI. It is said, for example, that "however universalists define a multinational's home country, the multinational can change it."[86] Some examples of a number of "simple ruses" of how this can be done are given: (1) the debtor can incorporate a new holding company and transfer all its stock and its subsidiaries' stock to the holding company; (2) it can hire management executives in a particular country and declare that country as its headquarters; or (3) move its assets and operations through acquisitions and divestitures, strategically dissolving subsidiaries or making calculated distributions to stakeholders before filing for insolvency.

The contrary view, adopted here, is that the utilization of these types of tactics is difficult and highly unlikely except at the margins, because the economic and legal consequences of such actions far exceed the impact of a bankruptcy court's determination of the COMI of the debtor. "Ruse" number (3), for example, could have a fundamental impact on the business model of the company. Integrating or disintegrating a corporate group could expose the surviving business to liability by removing the protections of the separate legal entities and result in unexpected regulatory consequences, such as taxes.[87]

More fundamentally, it is not seen how the utilization of these "ruses" are particular to the flexible COMI analysis and/or a universalist approach to international insolvencies. The ruse of incorporating a new holding company or declaring a country to be the debtor's headquarters in order to forum shop would, on the contrary, be much more effective under an inflexible approach that looks only to either the country of incorporation or the official headquarters of the business in fixing its COMI. Also, under a territorial system, the goals of forum shopping can be accomplished much more simply by moving the assets of a single company to a favorable 'grab rule' jurisdiction or forum. Debtors' attempts to forum shop hence stand a greater chance of success if courts are restricted in their discretion to grant or refuse relief using a multi-factor test. In contrast, under the flexible multi-factor approach, a court empowered to consider the entire picture would be better placed to detect any suspicious activity. Courts should therefore be allowed, and encouraged, to examine the aggregate conduct of the debtor across time and space, as part of the multi-factor COMI analysis to weed out forum shopping cases. This is not to say, however, that forum shopping will not exist under the flexible approach. It should be adopted simply because it is the better approach between the two.

ROOM FOR IMPROVEMENTS TO THE COMI DETERMINATION IN CHAPTER 15

It is not denied that there is room for improvement within the framework of Chapter 15. Language may be written into the provisions of Chapter 15 to ensure adherence to procedures and to reduce the reliance upon the intuition of bankruptcy judges that a petitioner is forum shopping. Chapter 15 is not perfect; it can and should be improved. Apart from advocating a regression to some form of territorialism, the opponents of universalism and Chapter 15 have not added much value to the discourse about the way ahead. The same may not be said about its supporters. For example, the following areas of improvement were outlined by U.S. bankruptcy judge Samuel Bufford,[88] all of which are consistent with the continued use of the flexible multi-factor COMI test utilized by the U.S. Bankruptcy Court in the Southern District of New York.

First, Judge Bufford has emphasized the need to pay attention to the procedures governing the critical COMI decision, including steps to ensure that such a decision is not made until all the parties in interest have received notice of the COMI hearing and an opportunity to be heard on the issue. This was lacking in some of the EU Regulation cases decided in other jurisdictions discussed by commentators, where the COMI decision was typically made as part of the "first day order" package.[89] U.S. courts should be particularly mindful not to reach a COMI determination too early in the piece, given the possibility of constitutional challenges under the due process clause of the Fifth Amendment. As we have seen, the result of such a determination under Chapter 15 is substantial, as it determines the country where the main case will proceed and which country's laws will, for the most part, govern the rights of creditors and other interested parties in the case. Although a constitutional challenge may certainly be raised by parties before a U.S. court under the Fifth Amendment if a COMI hearing does not comport with due process requirements, for the sake of certainty and benefit of foreign parties unfamiliar with U.S. constitutional norms, Chapter 15 should have a provision that sets out the procedures applicable prior to a COMI determination by a U.S. court. These procedures would be triggered whenever a debtor asserts a certain jurisdiction is its COMI, and should also extend to a party seeking the recognition of the COMI determination of a foreign court. They should address who gets notice, the procedure for creditors from other jurisdictions to intervene in the proceedings, and the length of time that it takes to get to a decision as well as the procedure to take an appeal on the COMI question. Such procedures would vastly improve the quality of the evidence presented to the court on the COMI question, which would in turn have a direct bearing on the correctness of the result.

Second, under Chapter 15 in its present form, there is no look-back or residency period relevant to the determination of COMI. This gives the recognizing court complete flexibility as to the relevant period of time to consider in making its decision on COMI. Judge Bufford concedes (in the context of the EU Regulation and the Model Law) that the lack of specificity in this regard could lead to the manipulation of COMI in some cases and recommends a residency rule that would specify a minimum period of time during which the COMI must be located in a relevant venue to qualify to open a main insolvency case there. This would be much like the methodology under U.S. bankruptcy law of determining the law applicable to individuals for the purposes of claiming state exemptions under 11 U.S.C.A. §522 or the venue rules (28 U.S.C.A.1403) under the Federal Rules of Civil Procedure. This will also be consistent with the flexible, multi-factor COMI test, which encourages the court to look at the aggregate conduct of a debtor across time and space within manageable guidelines. The period of time to be spent by a debtor in a jurisdiction in order for it to qualify as its COMI will be a necessary, but not sufficient, factor in the COMI inquiry. Any time period adopted should be long enough to make it "unlikely that a potential debtor will change its COMI on the eve of bankruptcy to invoke the jurisdiction and laws of a country different from where it has traditionally conducted its business."[90]

Finally, Chapter 15 does not give any guidance on how a court should determine the COMI of a multinational company structured as a corporate group of companies. The largest of these groups are often composed of hundreds of corporations, and the commentators appear to agree that it is necessary to administer economically integrated group members together in the COMI of the integrated group while administering economically independent group members separately in their respective COMIs. Indeed, the flexible multi-factor approach to COMI is consistent with, and probably requires, this inquiry. The decision as to which companies should be integrated for the purpose of COMI should be made early in the insolvency case and with ample notice and opportunity for parties in interest to be heard. Since Chapter 15 does not presently address this issue, Judge Bufford's suggestion to modify the COMI definition to provide that the corporate group venue decision be based on the collective COMI of all the legal entities that operate together as an integrated economic unit is well made and should be adopted. Where a company is not integrated into the group as a single economic unit, the court should make the decision as to its COMI separately. The determination of which companies within the group are economically integrated versus those that are independent would require the court to decide each case on its own facts. As Judge Bufford has pointed out, this decision is similar in scope and difficulty to a decision that courts must now make in defining a relevant market for the purposes of antitrust litigation and is admittedly a complex inquiry. There will be close calls, but the case law has developed a host of guidelines for its application, and judges are already routinely called upon to make these decisions.

THE "WHO DECIDES" QUESTION AND CONSIDERATIONS OF COMITY

The flexible, multi-factor approach to determining COMI adopted by the U.S. Bankruptcy Court in the Southern District of New York is correct and should be continued. However, a COMI decision, once reached by a court is really only one half of the equation in measuring the likelihood of Chapter 15's susceptibility to forum shopping. The other half has to do with how, and whether, a court's COMI decision is to be respected and recognized by courts as such, in all the other jurisdictions to which the debtor has some form of connection. This will be referred to as the "who decides" question. Without a principled approach to the recognition and enforcement of a foreign COMI decision, the universalist scheme contemplated by the adoption of the Model Law will have little effect, since any given number of courts may independently decide that their jurisdiction is the COMI. When this happens and no overarching mechanism exists to decide which court's COMI determination prevails, the resulting confusion is not unlike that in a territorialist system. The possibility of this occurring may be a function of the flexible, multi-factor test, since there is no rigid criteria to which all courts can conform to and reach the same result wherever applied. Further, since the Model Law/Chapter 15 does not contain any choice of law rules, different enacting jurisdictions will undoubtedly approach the COMI determination differently. Nonetheless, this is not fatal to Chapter 15, as there are pragmatic and principled ways by which the issues presented by the "who decides" question may be prevented or resolved.

The "who decides" question is where Chapter 15's overriding objective of cooperation between courts will be most severely tested. Traditional considerations of international comity can and should continue to have a role of great normative importance in answering many of the questions that surface here. Comity was explicitly listed as a matter for consideration under old Code §304(c) but continues to be relevant in the context of Chapter 15 since it is recognized as a principle of broad application in U.S. jurisprudence. Comity has been defined as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws."[91] More recently, comity has been discussed by the First Circuit at length and regarded not as a rigid obligation but as a "protean concept of jurisdictional respect."[92] On this broad definition of comity, the factors enumerated in former Code §304(c) may be seen as aspects of the notion of comity in the international insolvency context.[93]

The comity issues that arise in international insolvencies are distinctive; they have generated a rich body of case law under §304(c) and elsewhere[94] and are of particular relevance, especially in a universalist system, because they allow for a consideration of the international insolvency regime as a whole in addition to the interests of individual states in a manner advantageous to all affected jurisdictions.[95] At the same time, a U.S. court can assure itself that the foreign proceeding at issue comports with fundamental notions of fairness and due process.[96] In general, comity is accorded to foreign (insolvency) proceedings in a foreign court that abides by fundamental standards of procedural fairness, but withheld when the proceedings themselves or their results violate the U.S. laws or public policy, or when their acceptance would be contrary or prejudicial to the interests of the U.S.[97] Building into the Model Law and/or Chapter 15 the procedural safeguards discussed in the preceding section would help a foreign COMI decision pass procedural muster required by this aspect of international comity.

CONSIDERATIONS OF COMITY AND CHAPTER 15

Given the structural changes that have taken place, what is the role of international comity and its discretionary factors in the U.S. approach to international insolvencies within the scheme of Chapter 15? The answer is: "a continuing and extremely important one." It was previously observed that the old Code §304(c) factors, which included international comity, are no longer relevant to the automatic grant of relief pursuant to Code §1520 upon the recognition of a foreign main proceeding in Chapter 15. The former §304(c) factors now appear to be formally relevant only to the grant of "additional assistance" under §1507. A distinction, however, must be made between the automatic grant of relief *upon* recognition and the actual grant of recognition of a foreign main proceeding. As to the former, the §304(c) discretionary factors are no longer relevant to the automatic effects of a foreign main proceeding pursuant to §1520. As to the latter, i.e. recognition of a foreign court's determination of COMI, most of the discretionary factors in former §304(c), insofar as they are subsumed within the application of the principles of international comity in the international insolvency context, can and should retain importance in the scheme established by Chapter 15. I explain the reasons for this below.

THE DETRACTORS AND THEIR ASSUMPTIONS

The allegation of Chapter 15's susceptibility to forum shopping by its detractors does not ultimately rest on any inherent quality of universalism or the flexible COMI test discussed above. Rather, it rests upon a deep distrust of courts, particularly foreign ones. This may be seen in the following passage:

> Judge Bufford assumes that judges will be unbiased in the face of overwhelming evidence that they will not be. In a universalist world, judges would be under pressure from their own governments to keep control of multinational companies whose reorganizations or liquidations have substantial domestic impact. In havens, such as Bermuda, the Cayman Islands or Delaware, it would be policy to claim as many big cases as possible. Using an "economic integration" test, imaginative, biased judges could retain control over substantial portions of the companies whose cases were filed with them. In the period before filing, the courts of more than one country would stand ready to take overlapping portions of any given

> case, again giving the case placers choices among courts. To attract cases, the courts—and in the case of international bankruptcy, the governments—would have to offer the case placers a better deal than was offered by competing courts and governments. The bankruptcy courts and governments of the world would be locked in a race to the bottom… [w]ith venue the subject of what amounts to an auction at the time of bankruptcy.[98]

This distrust is not altogether surprising considering the territorialist mindset from which it originates. It operates in tandem with the mistaken assumption that Chapter 15 operates on a "first in time prevails" approach to the recognition of foreign COMI determinations, to lead the opponents of universalism to the conclusion that the adoption of Chapter 15 will encourage rampant and unbridled forum shopping. According to Professor LoPucki, under the Model Law (and by implication Chapter 15), "the venue decision of the first court to open proceedings is binding on other courts," which "is not a peculiarity of the EU system but, rather, a general principle by which courts have long operated."[99] Professor LoPucki envisages that debtors will choose their court, those courts will hold quick hearings, and invariably declare themselves to be the home country courts. Those proceedings will then be entitled to automatic recognition in other countries. These conclusions labor under a number of questionable assumptions.

The first questionable assumption is that courts everywhere will try to grab cases and sacrifice due process standards in order to "win at least a share of the world's multibillion dollar bankruptcy industry for themselves."[100] This charge impugns the integrity of judicial systems almost everywhere without any regard to the principles of international comity. The "overwhelming evidence" for this charge appears to be based more on pessimistic conjecture and the outcomes of a few cases rather than the hard, factual evidence needed to bolster such a serious charge. It has been pointed out to the contrary that the great majority of transnational insolvency cases involving multinational debtors are considered to have been venued in the correct country.[101] This goes some distance to rebut the speculation that court systems everywhere are engaged in a race to the bottom for insolvency-related work. Importantly, an inconsistency in the critics' argument against Chapter 15 also shows up here: if courts everywhere are indeed as corrupt and self-serving as they are made out to be, what makes them think that these same courts will cooperate on an ad hoc basis in a system of (cooperative) territorialism?

In reality, there will be the occasional bad "COMI" decision (from either a procedural or substantive point of view) by courts, foreign or domestic. It is also plausible that there are jurisdictions which are improperly motivated by considerations that the detractors of universalism have referred to. It may perhaps be a sanguine view that these decisions and jurisdictions are the exception rather than the general rule. This brings us to the critics' second assumption that the "first in time prevails" rule applies equally to a COMI decision in the context of Chapter 15. Such a rule is inadequate and arbitrary in the context of Chapter 15, and a principled answer to the "Who Decides?" question can provide an important safeguard against forum shopping, or the so-called race to the bottom, in such circumstances.

THE "FIRST IN TIME PREVAILS" RULE DOES NOT AND SHOULD NOT BE APPLIED IN CHAPTER 15

The "first in time prevails" rule is, contrary to Professor LoPucki's assertion, a peculiarity of the EU Regulation and cannot be transplanted mechanically in the context of Chapter 15 for a number of fundamental reasons. First, the EU Regulation is operating against the background of three critical agreements governing judicial jurisdiction as well as the recognition and enforcement of judgments among Member States of the European Union (EU)—the Brussels and Lugano Conventions (the Conventions), the former having largely been replaced by Council Regulation 44/2001 (the Regulation).[102] The Conventions were designed to produce a high degree of jurisdictional certainty by prescribing a series of permissible and forbidden jurisdictional bases, while the Regulation provides that, in recognizing the judgment of another EU Member State, the enforcing court may not consider jurisdictional or substantive issues.[103] As a consequence of the Regulation, EU Member State judgments are enforceable freely throughout the EU, in much the same fashion as U.S. judgments are enforceable under the Full Faith and Credit Clause of the Constitution. Although the scope of the Conventions and the Regulation exclude bankruptcy and insolvency proceedings, the same underlying philosophy applies to the EU Regulation. This is reflected in the language of Article 16.1 of the EU Regulation, which provides that "Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 *shall* be recognized in all the other Member States from the time that it becomes effective in the State of the opening of proceedings." The preamble of the EU Regulation also states that the "decision of the first court to open proceedings should be recognized in the other Member States without those Member States having the power to scrutinize the courts decision." Viewed from the perspective of the European Union's overarching goal of European integration and the statutory language used, the application of the "first in time prevails" rule in the context of the EU Regulation is certainly defensible.

In contrast to the EU Regulation, the language in the Model Law and Chapter 15 with respect to recognition of a foreign main proceeding (which must include the foreign court's COMI decision) does not lead naturally at all to the conclusion that automatic recognition would be granted to a foreign COMI determination. Under Model Law Article 15, enacted in Code §1515, the foreign representative will have to apply to the court for recognition of the foreign proceeding. Admittedly, the structure for recognition set up by §1515 requiring the accompaniment of the petition for recognition with certain documents makes the procedure largely objective and mechanical. This is in contrast to former Code §304 which required no formal step of recognition and focused immediately instead on the enumerated factors that the court should consider in deciding whether to grant discretionary relief. Under Chapter 15, the court is also entitled to presume certain matters concerning recognition pursuant to §1516 (e.g., the authenticity of documents submitted by the foreign representative). Finally, Code §1517(a) obligates the court to grant recognition to the foreign proceeding if the requirements therein are met.[104]

Notwithstanding these provisions obligating formal recognition of the foreign proceeding, such recognition is conditional upon the foreign proceeding being capable of formal recognition under the Chapter 15 scheme. The foreign proceeding must be either a foreign main proceeding (where the debtor has its COMI) or a foreign non-main proceeding (where the debtor has an establishment). The characterization of the foreign proceeding as "foreign main proceeding" or "foreign non-main proceeding" is part of the definitional requirement of "recognition" in Code §1502(7). The logical conclusion must be that if the foreign proceeding is neither in its COMI nor in a jurisdiction where it has an establishment, no recognition of the foreign proceeding is due, as was the result in the *Bear Stearns*. Such a debtor is not left without recourse, as it may still commence an involuntary case under Chapter 7 or 11 of the Code by a foreign representative of the estate pursuant to Code §303(b)(4), which does not require that the foreign proceeding be recognized.[105] There is no formal language in the statute that supports an inference that a grant of recognition to a foreign determination of COMI is mandatory. Instead, the language of §1517(b) reserves a role in the determination of the COMI of the debtor to the recognizing court. Code §1517(b)(1) provides that 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." Code §1517(b)(2) likewise provides that the foreign proceeding shall be recognized as a foreign non-main proceeding if it is pending where the debtor has an establishment. The recognizing court must first determine that the foreign proceeding is in the debtor's COMI or in a jurisdiction where the debtor has an establishment. This reading of §1517 and the scheme for the recognition of a foreign proceeding under Chapter 15 is supported by the following passage written by Daniel Glosband, one of the draftsmen of the Model Law and Chapter 15:

> In addition, since foreign proceedings are eligible for recognition only if they meet the definitional requirements of either a foreign main proceeding or a foreign non-main proceeding, there can be no recognition without the *concomitant* determination of qualification as a main proceeding or a non-main proceeding: If the foreign proceeding is not pending in a country where the debtor has its COMI or where it has an establishment, then the foreign proceeding is simply not eligible for recognition under chapter 15. As emphasized in the legislative history, recognition is a one step process that includes the *designation* of the foreign proceeding as main or nonmain...A petition under §1515 must *show* that proceeding is a main or a qualifying nonmain proceeding in order to obtain recognition under this section.[106]

Indeed, this was a key holding by Judge Burton R. Lifland in the recent *Bear Stearns* decision. The petitioners in *Bears Stearns* argued that since they had complied with all the requirements of Code §1515, they were entitled to an entry of an order recognizing the foreign proceedings as a foreign main proceeding under Code §1517(b)(1) and the appropriate relief. Rejecting this argument, Judge Lifland held that "recognition under section 1517 is not to be rubber stamped by the courts," and that he had to "make an independent determination as to whether the foreign proceeding meets the definitional requirements of sections 1502 and 1517 of the Bankruptcy Code."[107] Citing a portion of the above passage with approval, Judge Lifland emphasized that "a simple recognition of a foreign proceeding without specifying more (i.e., nondeclaration as to either "main or nonmain") is insufficient as there are sufficient eligibility distinctions and consequences" and that the foreign proceeding "must be coded as either main or nonmain." Notably, this was the same line of thinking of Judge Robert Drain in the *SPhinX* case, where he indicated that even if the Cayman court had made a finding as to the COMI of the SPhinX Funds, he would not have been bound by that finding.[108]

There is, however, one noteworthy distinction between the approach taken by Judges Drain and Lifland towards the recognition of a foreign nonmain proceeding. In the *SPhinX* case, although Judge Drain denied the debtor's application to be classified as a foreign main proceeding, he nevertheless granted foreign nonmain proceeding status to the Cayman Islands proceeding on the basis that "no negative consequences would appear to result from recognizing the Cayman Islands proceedings as nonmain proceedings."[109] In *Bear Stearns*, Judge Lifland applied the statutory definition of the "establishment" requirement in §1517(b)(2), being a local place of business (in the foreign jurisdiction) where pertinent "*nontransitory* economic activity" is conducted. Finding no such pertinent nontransitory economic activity on the facts,[110] Judge Lifland rejected both of the petitioners' applications for recognition of the Cayman Islands proceedings as either main or nonmain foreign proceedings under Chapter 15. In so doing, he took notice of the Cayman Islands' statutory prohibition against "exempted companies" engaging in business in the Cayman Islands except in furtherance of their business otherwise carried on outside of the Cayman Islands.[111] What then must the petitioner show in order to assist the court in its designation of the foreign proceeding as a foreign main or non-main proceeding? In relation to the latter, time will tell whether Judge Drain's or Judge Lifland's view will prevail in the cases. It is, however, the view here that Judge Lifland's approach sits more coherently with the legislative scheme established by Chapter 15 of classifying a foreign proceeding as either a main or nonmain proceeding before recognition is warranted, for the reasons above. Also, Judge Lifland's approach requires the court to engage in a more rigorous but fact-specific inquiry (without sacrificing flexibility) to link the foreign proceeding to the debtor in a concrete way, in contrast to Judge Drain's much lower "lack of any negative consequences" standard.

With respect to a foreign main proceeding, the petitioner must show either (a) directly to the court that the foreign proceeding is held in the debtor's COMI; or (b) that the foreign court's determination of COMI is worthy of recognition and enforcement. The factors relevant to (a) and the standard/burden of proof necessary to rebut the presumption of COMI in §1516(c) have already been discussed at length above. It is in relation to (b) that many of the fundamental considerations of international comity in the international insolvency context, developed in the jurisprudence generated under former Code §304(c), can and should continue to be of value and relevance. The application of these considerations of international comity in a principled fashion in the context of Chapter 15, balancing the need for a "commitment to cooperation and deference in pursuit of universalist results" against the hazards of forum shopping, will provide a critical safety valve to its effective operation.

FACTORS RELEVANT TO THE RECOGNITION OF A FOREIGN COMI DETERMINATION

The locus classicus of the basic approach to the recognition of foreign judgments in the U.S. was set out almost a century ago in the case of *Hilton v Guyot*,[112] in which international comity was recognized as the source of authority for such recognition to be granted:

> The extent to which the law of one nation, as put in force within its authority, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call "the comity of nations." Although the phrase has been often criticized, no satisfactory substitute has been suggested. "Comity", in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.[113]

Based on this principle of comity, *Hilton* fashioned a rule of general common law governing when U.S. federal courts should enforce foreign judgments:

> [W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.[114]

All of these factors are of general application and can be usefully utilized as guidelines in the decision whether to recognize a foreign court's COMI determination. The comity analysis in the arena of international insolvencies and former Code §304 has also generated a rich body of case law reflecting these basic principles which can and should continue to be of importance and relevance in the present context.

In general, under former Code §304 (the guidelines of which were used with flexibility by the courts[115]), comity was accorded to foreign insolvency proceedings if they did not violate the laws or public policy of the U.S. and if the foreign court abided by fundamental standards of procedural fairness.[116] Comity was only withheld when its acceptance would be contrary or prejudicial to the interests of the U.S.[117] In the insolvency context, the courts generally required only that the foreign forum have subject-matter jurisdiction, recognize fundamental creditor protections, and provide fair treatment to all claim holders.[118] There would be no difficulty or inconsistency at all in utilizing these requirements prior to the recognition of a COMI determination of a foreign court—the reasons for adopting the requirements of what Judge Posner has termed "international due process" are in the same vein as the reasons for the procedural improvements suggested by Judge Bufford to the COMI determination in Chapter 15 and/or the Model Law. Pending these improvements, the adoption of these requirements at the recognition stage will provide an important checking mechanism with respect to foreign COMI decisions from both Model Law and non-Model Law jurisdictions.

Under the jurisprudence generated under Code §304, the courts did not expect that the insolvency laws of a foreign country would be identical to those of the U.S.; they merely could not be repugnant to U.S. laws and policies.[119] This approach should likewise be applied in the context of recognition of the foreign COMI determination to acknowledge the fact that the flexible COMI test is inherently subjective, and a foreign determination of COMI should enjoy at least a presumption of validity if the foreign court comports with "international due process" standards. Such presumption of validity as to the COMI determination may be rebutted by a showing that the foreign court failed to consider proper or relevant factors in its COMI decision. This requirement for recognizing the foreign COMI determination should not be read as permitting the court to second-guess the substance of the decision simply because it disagrees with the conclusion, as it would be against the spirit of universalism and international cooperation in international insolvencies contemplated by Chapter 15. Rather, it should be aimed at preventing a repeat of manifestly incorrect outcomes like that in the *National Warranty* case and would be limited to a review of the factors taken into account (or not taken into account), much like the abuse of discretion standard of review utilized by appellate courts.[120]

Lest it be thought that a complete transplantation of all the principles developed under the umbrella of "international comity" in the case law under former §304 is being advocated here for the purposes of recognizing a foreign COMI decision, it must be stated otherwise. For example, under former §304, although a foreign insolvency system need not provide the entire arsenal of weapons and defenses given by the U.S. bankruptcy system in order to qualify for comity,[121] a court may legitimately take into account certain factors as providing indicia of fairness in what is essentially an assessment of the foreign insolvency laws in deciding what relief it will grant to the foreign representative. It may consider whether the liquidators appointed by the foreign court are considered fiduciaries and are held accountable to the court, whether all the assets of the debtor are marshaled before one body for centralized distribution, and whether there are provisions for an automatic stay and the lifting of such a stay to facilitate the centralization of claims.[122] These factors are not relevant to the consideration of the recognition of a foreign COMI determination under the modified universalist scheme established under Chapter 15, which makes a conceptual distinction between the COMI determination and the effects of such determination. The whole point of recognizing a COMI determination under Chapter 15 is to enable the U.S. court to cooperate with the foreign main proceedings (through the automatic effects of Code §1520 and "additional relief" under §1521[123]) "in the context of a deep and long-standing commitment to cooperation and deference in pursuit of universalist results to the extent practical."[124] Any assessment of the foreign insolvency law which would apply if such law were to be applied by the law of the debtor's COMI would be wholly premature at the recognition of the determination of COMI stage, and run against the grain of Chapter 15's overriding objectives.

Finally, it is important to highlight that the proposed approach for recognition (or nonrecognition) of a foreign COMI determination is not meant to skip the first step of the recognition requirement of the foreign proceeding as either a main or nonmain proceeding pursuant to Code §1517. Rather, it is to be built into the framework for such recognition, and offers the court an alternative to deciding the issue de novo in appropriate cases. Judge Lifland rightly pointed out in *Bear Stearns* that "section 304 did not have a recognition requirement as a first step."[125] However, he also held that "the jurisprudence developed under section 304 is of no assistance in determining the issues relating to the presumption for recognition under chapter 15."[126] This second statement should not be read too widely to foreclose any recognition of a foreign COMI determination by U.S. courts, as this would be dangerously close to a territorialist mindset. Rather, it should be read to apply only to the court's own determination of COMI using the flexible, multifactor COMI test. In the event of conflicts, the court's own determination that the foreign proceeding is neither a main nor nonmain proceeding should prevail over a contrary foreign determination in a clear cut *National Warranty*-type case. The courts will undoubtedly be put to the test in more difficult cases, but far from being a "rubber stamp" approach to the foreign COMI determination, a decision that the foreign proceeding is worthy (or not) of recognition in the U.S. would itself be an independent determination.

CONCLUSION

The adoption by the U.S. of Chapter 15 is an important step in the right direction towards the universalist ideal for international insolvency law. Despite its critics, Chapter 15 cannot be said to be inherently susceptible to forum shopping. The inclination on the part of debtors to forum shop cannot be attributed to either universalism or Chapter 15. On the contrary, there is every reason to belief that forum shopping is much easier and more effective under a territorialist system.

The application of the flexible, multi-factor COMI test employed by the bankruptcy court in the Southern District of New York is consistent with Chapter 15's intended purposes of promoting international cooperation, coordinating the efficient and expeditious administration of foreign debtors' assets, and safeguarding the commercial expectations of stakeholders. The decisions in *SPhinX* and *Bear Stearns* reflect the versatility of the new procedures under Chapter 15. Even more importantly, it demonstrates the ability and willingness that bankruptcy judges possess to fashion relief that is appropriate under the circumstances.[127] By requiring the examination of a debtor's aggregate conduct, the flexible multi-factor approach to COMI under Chapter 15 is considerably more sophisticated than its rigid domicile-based predecessor under former Code §304 and equips the courts more effectively to weed out international forum shopping cases. This is not to deny that there are potential drawbacks to the flexible approach, including the risk of paralysis in the most complicated of scenarios. However, it is believed that these would remain the exception rather than the general rule.

The endorsement of a flexible COMI approach would require a certain amount of faith in the courts and judges that the detractors of Chapter 15 seem to lack. Although the *SPhinX* decision was not perfect and has been variously critiqued, the factors taken into account by the *SPhinX* court in its COMI determination were largely appropriate and relevant (with the exception of the assent of creditors to the "COMI" in that case). There are potential areas for improvement within the scheme of Chapter 15 through the adoption of procedural safeguards to ensure the integrity of a COMI determination. However, there is no present need to throw the barely two-year-old baby out with the bathwater. The risk of paralysis may also be mitigated by the development of principles to assist in ascertaining the COMI of economically integrated corporations within corporate group structures. Many more cases involving the determination of COMI will come before the courts, and these cases will allow for the further development of the jurisprudence in this area.

The fear that Chapter 15 will introduce rampant forum shopping may be ultimately traced to a fundamental distrust of foreign courts. This fear is neither warranted nor rational and does not deserve any place in the international insolvency arena or, indeed, any other arena. It is falsely propped up by the mistaken assumption that a "first in time prevails" rule applies to the "who decides" question posed above. Here, the relevant considerations of international comity, many of which were developed in the context of international insolvencies by the courts under former Code §304, can and should play a crucial role in providing a safeguard against the phenomenon of international forum shopping. Well-developed traditional principles are available here and may be applied to the recognition and enforcement of foreign determinations of COMI consistently within the scheme of Chapter 15, without sacrificing the overriding objectives of international cooperation and mutual deference underlying its approach to international insolvencies.

NOTES

1. H.R. Rep. No. 109-31, at 105-07 (2005).

2. The Model Law was incorporated into the Bankruptcy Code as part of the comprehensive bankruptcy reforms implemented under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub.L. No. 109-8, 119 Stat. 23.

3. 11 U.S.C.A. § 304 allowed an accredited representative of a debtor in a foreign insolvency proceeding to commence a limited "ancillary" bankruptcy case in the U.S. for the purpose of enjoining actions against the foreign debtor or its assets located in the U.S.

4. 11 U.S.C.A. § 1501.

5. Jay L. Westbrook, Chapter 15 at Last, 79 Am. Bankr. L.J. 713 (2005).

6. Lynn M. LoPucki, Global and Out of Control?, 79 Am. Bankr. L.J. 79 (2005); Lynn M. LoPucki, Universalism Unravels, 79 Am. Bankr. L.J. 143 (2005).

7. Samuel L. Bufford, Global Venue Controls Are Coming: A Reply to Professor LoPucki, 79 Am. Bankr. L.J. 105; Cf. Chris Mallon, Insolvency: Bankruptcy Blunder, Legal Week (September 28, 2006).

8. See generally Elizabeth Warren & Jay L. Westbrook, The Law of Debtors and Creditors 835–72 (5th ed. 2006).

9. Jay L. Westbrook, Chapter 15 and Discharge, 13 Am. Bankr. L. Rev. 503 (2005).

10. 11 U.S.C.A. § 1516(c).

11. 11 U.S.C.A. § 1502(4) defines this as "a foreign proceeding pending in the country where the debtor has the center of its main interests."

12. Council Regulation (EC) NO. 1346/2000.

13. See The American Law Institute's Principles of Cooperation Among the NAFTA Countries (2003) (hereinafter the Principles). The Principles were developed specifically for use among the NAFTA countries, but the ALI concluded they should also be applied generally in multinational bankruptcy cases in U.S. courts. The Principles can be used to fill in a number of important details not addressed by Chapter 15. One example of an interstitial issue not covered specifically in Chapter 15 is a conflict of stays between U.S. and Canadian bankruptcy courts, and the result may turn on an interaction between the provisions of Chapter 15 and the Principles.

14. In re SPhinX, Ltd., 351 B.R. 103, 47 Bankr. Ct. Dec. (CRR) 17, 56 Collier Bankr. Cas. 2d (MB) 1176 (Bankr. S.D. N.Y. 2006), aff'd, 371 B.R. 10 (S.D. N.Y. 2007).

15. In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 2007 WL 2479483 (Bankr. S.D. N.Y. 2007).

16. 11 U.S.C.A. § 1501.

17. See the French Cour de Cassation decision in Banque Worms v Epoux Brachot, Cass. 1e civ., 19 Nov. 2002, Bull. Civ. I, No. 275 (Fr.). (This was a case not governed by the EU Regulation. Nonetheless, the Cour de Cassation ruled that French insolvency proceedings should have universal effect in all countries where the bankrupt's assets are located. It went on to issue an injunction, enforced by daily financial penalties, to compel Banque Worms to waive its claim before the Spanish courts, and to reinstate the primacy of French insolvency proceedings).

18. Westbrook, 79 Am. Bankr. L.J. at 716.

19. 11 U.S.C.A. §§ 1334 and 1405.

20. Westbrook, 79 Am. Bankr. L.J. at 715.

21. 11 U.S.C.A.§ 1501(b)(1).

22. 11 U.S.C.A.§ 101(24) (defines a "foreign representative" as "a person authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding").

23. 11 U.S.C.A. § 304 (2000).

24. 11 U.S.C.A. §§ 1504 and 1515.

25. 11 U.S.C.A. § 1517(b).

26. See generally Collier International Business Insolvency Guide, Ch 9, 9.02 (2006).

27. 11 U.S.C.A. §§ 1507 and 1520 (2000).

28. Any creditor wishing to take action against the debtor's U.S. assets must first seek relief from the stay from the bankruptcy court. Alternatively it might seek "adequate protection" for the debtor's continued use of its collateral located in the U.S.

29. 11 U.S.C.A. § 1520(a)(2).

30. 11 U.S.C.A. §§ 301 to 303, 1511(a), and 1528.

31. These are guidelines, not requirements, by which the bankruptcy court measures the extent to which foreign law is compatible with U.S. law and practice. See Haarhuis v. Kunnan Enterprises, Ltd., 223 B.R. 252, 255 (D.D.C. 1998), judgment aff'd, 177 F.3d 1007, 34 Bankr. Ct. Dec. (CRR) 535, 44 Fed. R. Serv. 3d 398 (D.C. Cir. 1999).

32. 11 U.S.C.A. § 1506 (2000).

33. 11. U.S.C.A. § 1521.

34. Westbrook, 79 Am. Bankr. L.J. at 723.

35. 11 U.S.C.A.§ 1522.

36. Westbrook, 79 Am. Bankr. L.J. at 726.

37. 11 U.S.C.A. §§ 1528 and 1529.

38. 11 U.S.C.A. § 1529(1).

39. 11 U.S.C.A. § 1528.

40. 11 U.S.C.A. § 1529(2).

41. Cf. In re Maruko Inc., 160 B.R. 633 (Bankr. S.D. Cal. 1993).

42. 11 U.S.C.A. § 1530.

43. 11 U.S.C.A. § 1525(1).

44. 11 U.S.C.A. § 1525(2).

45. In re Maxwell Communication Corp. plc, 170 B.R. 800, 816, 25 Bankr. Ct. Dec. (CRR) 1567 (Bankr. S.D. N.Y. 1994), judgment aff'd, 186 B.R. 807, 34 Collier Bankr. Cas. 2d (MB) 1382, Bankr. L. Rep. (CCH) P 76681 (S.D. N.Y. 1995), order aff'd, 93 F.3d 1036, 29 Bankr. Ct. Dec. (CRR) 788 (2d Cir. 1996).

46. Warren & Westbrook, The Law of Debtors and Creditors at 835.

47. Federal Judicial Center, International Insolvency 4 (2001).

48. Westbrook, 79 Am. Bankr. L.J. at 816.

49. Warren & Westbrook, The Law of Debtors and Creditors at 835.

50. See Lucian Bebchuk & Andrew T Guzman, An Economic Analysis of Transnational Bankruptcies, XLII J. L. & Econ. 775 (1999).

51. Samuel L. Bufford, Global Venue Controls Are Coming: A Reply to Professor LoPucki, 79 Am. Bankr. L.J. 105 at 110 to 116.

52. American Law Institute, Transnational Insolvency Project, Principles of Cooperation in Transnational Cases Among Members of the North American Free Trade Agreement 1 (2003).

53. Lynn M. LoPucki, Global and Out of Control?, 79 Am. Bankr. L.J. 79.

54. In re Treco, 240 F.3d 148, 37 Bankr. Ct. Dec. (CRR) 125 (2d Cir. 2001) (cited by Professor LoPucki as authority for the proposition that the previous scheme under Code § 304 was one based on cooperative territorialism. The cases under § 304, however, point in both directions. One line of cases emphasized comity and tended to apply § 304 fairly liberally; the other (like Treco) line of cases tended to favor local, American creditors.) But see Cunard S.S. Co. Ltd. v. Salen Reefer Services AB, 773 F.2d 452, Bankr. L. Rep. (CCH) P 70762, 1986 A.M.C. 163, 2 Fed. R. Serv. 3d 1288 (2d Cir. 1985) (where the court stated that "comity would not be granted if it would result in prejudice to United States citizens").

55. Lynn M. LoPucki, Universalism Unravels, 79 Am. Bankr. L.J. 143 (2005).

56. LoPucki, 79 Am. Bankr. L.J. at 80.

57. LoPucki, 79 Am. Bankr. L.J. at 81.

58. In re Treco, 240 F.3d 148, 37 Bankr. Ct. Dec. (CRR) 125 (2d Cir. 2001).

59. Lucian Bebchuk & Andrew T Guzman, An Economic Analysis of Transnational Bankruptcies, XLII J. L. & Econ. 775, 783 (1999).

60. Westbrook, 79 Am. Bankr. L.J. at 723.

61. The filer of an involuntary case must meet technical requirements and risk liability for damages if the filer does not succeed, including a possible award of punitive damages. See generally 11 U.S.C.A. § 303.

62. LoPucki, 79 Am. Bankr. L.J. at 143.

63. In re National Warranty Ins. Risk Retention Group, 384 F.3d 959, 43 Bankr. Ct. Dec. (CRR) 185, 53 Collier Bankr. Cas. 2d (MB) 414, Bankr. L. Rep. (CCH) P 80167 (8th Cir. 2004).

64. See Tosco Corp. v. Communities for a Better Environment, 236 F.3d 495, 31 Envtl. L. Rep. 20354 (9th Cir. 2001); Industrial Tectonics, Inc. v. Aero Alloy, 912 F.2d 1090 (9th Cir. 1990).

65. 28 U.S.C.A. § 1332.

66. In re SPhinX, Ltd., 351 B.R. 103, 47 Bankr. Ct. Dec. (CRR) 17, 56 Collier Bankr. Cas. 2d (MB) 1176 (Bankr. S.D. N.Y. 2006), aff'd, 2007 WL 1965597 (S.D. N.Y. 2007).

67. In re BRAC Rent-A-Car International Inc., [2003] 1 WLR 1421.

68. See *In* re Eurofood IFSC Ltd., Case C-341/04, 27 September 2005, Recital 125 at ¶35.

69. Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv. L. Rev. 1121, 1137 (1966).

70. Eurofood IFSC Ltd., Case C-341/04, 27 September 2005, Recital 125.

71. In re SPhinX, Ltd., 351 B.R. 103, 47 Bankr. Ct. Dec. (CRR) 17, 56 Collier Bankr. Cas. 2d (MB) 1176 (Bankr. S.D. N.Y. 2006), aff'd, 2007 WL 1965597 (S.D. N.Y. 2007).

72. In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 2007 WL 2479483 (Bankr. S.D. N.Y. 2007).

73. SPhinX, 351 B.R. 103 ("But for one additional consideration, discussed below, upon the assumption that the Cayman Islands proceedings will primarily involve the investors, who, again, have not objected to the Petition, in balancing all of the foregoing factors the Court might be inclined to find the Debtors' COMI in the Cayman Islands and recognize the proceedings as foreign main proceedings").

74. Daniel M. Glosband, SPhinX Chapter 15 Opinion Misses the Mark, 25-10 Am. Bankr. Inst. J 44 (December 2006/January 2007).

75. Glosband, 25-10 Am. Bankr. Inst. J at 44.

76. Chris Mallon, Insolvency: Bankruptcy Blunder, Legal Week (September 28, 2006).

77. Chris Mallon, Insolvency: Bankruptcy Blunder, Legal Week (September 28, 2006).

78. See Brad B. Erens, Jayant W. Tambe and Mark G Douglas, U.S. Bankruptcy Court Refuses to Rubber-Stamp Failed Hedge Funds' Petition for Chapter 15 Recognition, Jones Day Business Restructuring Review (September/October 2007) at http://www.jonesday.com/services/services_pubs.aspx?AdvancedServices=bfb6c6ff-72c0-4fba-ae2f-4af21bec8295.

79. In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 2007 WL 2479483, at ¶6.

80. See In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 2007 WL 2479483, at ¶4 ("This presumption [of the debtor's COMI being its place of incorporation in §1516(c)] 'permits and encourages fast action in cases where speed may be essential, while leaving the debtor's true 'center' open to dispute in cases where the facts are more doubtful.' This presumption is not a preferred alternative where there is a separation between a corporation's jurisdiction of incorporation and its real seat.").

81. In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 2007 WL 2479483, at ¶4.

82. In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 2007 WL 2479483, at ¶5.

83. In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 2007 WL 2479483, at ¶5.

84. In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 2007 WL 2479483, at ¶6.

85. See In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 2007 WL 2479483, at ¶6 ("I part with the dicta in the SPhinX decision opining that if the parties in interest had not objected to the Cayman Islands proceeding being recognized as main, recognition would have been granted under the sole grounds that no party objected and no other proceeding had been initiated anywhere else… To the extent that non objection would make the recognition process a rubber stamp exercise, this Court disagrees with the dicta in the SPhinX decision.").

86. LoPucki, 79 Am. Bankr. L.J. at 97 to 101.

87. Bufford, 79 Am. Bankr. L.J. at 138.

88. Bufford, 79 Am. Bankr. L.J. at 131 to 141.

89. See In re Daisytek-ISA Ltd., [2003] B.C.C. 562, [2004] B.P.I.R. 30 (in this case, the English court based its COMI decision solely on a fairly detailed affidavit from the CEO of the holding company of the debtor, without giving notice or an opportunity to be heard to the French creditors and other parties in interest).

90. Bufford, 79 Am. Bankr. L.J. at 140.

91. Hilton v. Guyot, 159 U.S. 113, 164, 16 S. Ct. 139, 40 L. Ed. 95 (1895).

92. Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren, 361 F.3d 11, 17 (1st Cir. 2004).

93. This was apparently the view taken by the drafters of Chapter 15, reflected in the language of Code §1507(b), where the words "principles of comity" now appears in the root sentence of §1507(b).

94. See Cambridge Gas Transport Corp. v. Official Committee of Unsecured Creditors (of Navigator Holdings PLC et al.), [2006] UKPC (Lords of the Judicial Committee of the Privy Counsel) 26 (U.K.) [2006], 3 All E.R. 829.

95. In re Maxwell Communication Corp. plc by Homan, 93 F.3d 1036, 1048, 29 Bankr. Ct. Dec. (CRR) 788 (2d Cir. 1996).

96. E.g. Finanz AG Zurich v. Banco Economico S.A., 192 F.3d 240, 246 (2d Cir. 1999).

97. E.g. Philadelphia Gear Corp. v. Philadelphia Gear de Mexico, S.A., 44 F.3d 187, 191, Bankr. L. Rep. (CCH) P 76337 (3d Cir. 1994); In re Schimmelpenninck, 183 F.3d 347, 352, 365, 34 Bankr. Ct. Dec. (CRR) 932, 42 Collier Bankr. Cas. 2d (MB) 904 (5th Cir. 1999).

98. LoPucki, 79 Am. Bankr. L.J. at 154.

99. LoPucki, 79 Am. Bankr. L.J. at 89.

100. LoPucki, 79 Am. Bankr. L.J. at 81.

101. Bufford, 79 Am. Bankr. L.J. at 124. (The following examples were given—Daewoo and LG Card in Korea, Maruko in Japan, Air Canada in Canada, Parmalat in Italy, Swissair in Switzerland, Alstom in France, Global Telesystems Europe BV in the Netherlands, and United Airlines, Global Crossing, Daisytek International and Global Telesystems, Inc. in the U.S.).

102. Available online at http://curia.europa.eu/common/recdoc/convention/en/index.htm?76,19.

103. Council Regulation 44/2001 begins from the premise that "in no circumstances may a foreign judgment be reviewed as to its substance," and that in general "[a] judgment given in a Contracting State shall be recognized in other Contracting States."

104. See H.R. Rep. no. 109-31, 109th Cong., 1st Sess. 113 (2005) (the legislative history suggests that the decision whether to grant recognition of a foreign proceeding is obligatory once the three requirements in §1517(a) are met.).

105. In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 2007 WL 2479483, at ¶8.

106. Glosband, 25-10 Am. Bankr. Inst. J at 44.

107. In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 2007 WL 2479483, at ¶2.

108. SPhinX, 351 B.R. at 115-116 ("Recognition of a foreign main proceeding may also serve to indicate that the reasonable interests of creditors and the maximization of value, as well as considerations of international comity, generally support the bankruptcy court's deference to such proceeding. On the other hand, it is equally important to note that the Bankruptcy Code does not expressly mandate such across-the-board deference.").

109. In re SPhinX, 351 B.R. at 122.

110. In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 2007 WL 2479483, at ¶7.

111. In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 2007 WL 2479483, at ¶7.

112. Hilton v. Guyot, 159 U.S. 113, 164, 16 S. Ct. 139, 40 L. Ed. 95 (1895).

113. Hilton, 159 U.S. at 163 to 164.

114. Hilton, 159 U.S. at 202 to 203.

115. See Matter of Axona Intern. Credit & Commerce Ltd., 88 B.R. 597, 17 Bankr. Ct. Dec. (CRR) 1179, 19 Collier Bankr. Cas. 2d (MB) 257 (Bankr. S.D. N.Y. 1988), decision aff'd, 115 B.R. 442 (S.D. N.Y. 1990).

116. E.g., Finanz AG Zurich v. Banco Economico S.A., 192 F.3d 240, 246 (2d Cir. 1999).

117. E.g., Philadelphia Gear Corp. v. Philadelphia Gear de Mexico, S.A., 44 F.3d 187, 191, Bankr. L. Rep. (CCH) P 76337 (3d Cir. 1994).

118. E.g., In re Schimmelpenninck, 183 F.3d 347, 352, 365, 34 Bankr. Ct. Dec. (CRR) 932, 42 Collier Bankr. Cas. 2d (MB) 904 (5th Cir. 1999).

119. Schimmelpenninck, 183 F.3d at 365.

120. E.g., The French court, in In re SAS ISA-Daisytek, Trib. Comm. Pontoise, 6ienme ch., May 26, 2003, held that the EU Regulation required the recognition of the opening of the main Eurofood case in Leeds, England. After examining the text of the Leeds decision, which was presented to the court both in its English original and in an authenticated translation, the court of appeal found as a procedural matter that the Leeds court had considered all of the proper factors in determining that the Daisytek-F case was a main case. Thus, the court of appeal ruled, a French court was not permitted to second-guess the substance of the Leeds decision, and was required to recognize the English decision on COMI.

121. E.g., the priorities provided by a foreign bankruptcy law may differ from those in domestic legislation; see Petition of Brierley, 145 B.R. 151, 166, 23 Bankr. Ct. Dec. (CRR) 429, 27 Collier Bankr. Cas. 2d (MB) 828 (Bankr. S.D. N.Y. 1992).

122. See Cunard S.S. Co. Ltd. v. Salen Reefer Services AB, 773 F.2d 452, Bankr. L. Rep. (CCH) P 70762, 1986 A.M.C. 163, 2 Fed. R. Serv. 3d 1288 (2d Cir. 1985).

123. These considerations may nonetheless be relevant to whether there is "sufficient protection" of U.S. creditors under Code §1521(b) at the relief stage.

124. Westbrook, 79 Am. Bankr. L.J. at 726.

125. In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 2007 WL 2479483, at ¶8.

126. In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 2007 WL 2479483, at ¶8.

127. Mark G. Douglas, Chapter 15 Turns One: Ironing Out the Details, Jones Day Business Restructuring Review (November/December 2006) at http://www.jonesday.com/ pubs/pubs_detail.aspx?pubID=S3869.