

**Journey to the Center of the Economic Universe: How the Current U.S. COMI  
Timing Determination Misses the Mark**

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**I. Introduction**

Economic globalization sparked a chain of events on the world's bankruptcy stage. In the United States, this culminated in the enactment of Chapter 15 of the U.S. Bankruptcy Code. In an effort to encourage cooperation and coordination in international insolvencies, Chapter 15, in accord with the Model Law on Cross-Border Insolvency, contemplates a simplified recognition process,<sup>1</sup> in which the U.S. courts recognize a foreign proceeding as either main or non-main. Recognition of a proceeding as foreign main follows a determination that the proceeding is pending in the jurisdiction of the debtor's center of main interests ("COMI").

Litigation around the COMI issue has been intense since the inception of Chapter 15. Initially parties disputed the meaning of the phrase "center of main interests." Courts resolved this discussion by likening "center of main interests" to

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<sup>1</sup> See UNCITRAL Model Law on Cross-Border Insolvency, U.N. Commission on International Trade, 30th Sess., Annex 1 at art. 17(2), U.N. Doc A/52/17 (1997) (hereinafter "Model Law"), reprinted in 36 I.L.M. 1386 (1997); Jenny Clift, *The UNCITRAL Model Law on Cross-Border Insolvency – A Legislative Framework to Facilitate Coordination and Cooperation in Cross-Border Insolvency*, 12 Tul. J. Int'l. & Comp. L. 307, 309, 322 (2004).

the “principal place of business” standard in traditional U.S. jurisprudence.<sup>2</sup> Having defined the phrase, the courts then set about identifying which factors were relevant to the COMI determination.<sup>3</sup> This inquiry necessitated interpretation of the rebuttable presumption in Section 1516(c), which places the COMI at the debtor’s registered office. Courts considered what evidence would suffice to rebut the presumption,<sup>4</sup> and which party has the burden of rebuttal.<sup>5</sup> The presumption issue was finally put to rest in *Bear Stearns*, a case that introduced the rule that a court could consider evidence in rebutting the presumption, even where no party in interest had raised the issue. As the law continuously evolves, new issues ultimately arise. In the case of COMI, the current issue is that of the relevant time at which the COMI determination should be made.

The timing question asks at what point in time, leading up to and including the petition for recognition, the COMI inquiry should be performed. In answering this question, courts have focused on the time of the opening of the foreign proceeding for which recognition is sought,<sup>6</sup> or alternatively, the filing date of the

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<sup>2</sup> *In re Tri-Continental Exchange Ltd.*, 349 B.R. 627, 634 (Bankr. E.D.Cal. 2006).

<sup>3</sup> *In re SphinX, Ltd.*, 351 B.R. 103, 117 (Bankr.S.D.N.Y. 2006). (“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.”)

<sup>4</sup> *See e.g. Id* at 117-120 (discussing various factors courts have considered in rebutting a presumption of COMI).

<sup>5</sup> *In re Bear Stearns Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 128 (Bankr. S.D.N.Y. 2007).

<sup>6</sup> *See In re Millennium Global Emerging Credit Master Fund, Ltd.*, 458 B.R. 63 (Bankr. S.D.N.Y. 2011) (explaining that “[t]he appropriate date at which to determine COMI is on or about the date of the commencement of the foreign proceeding for which recognition is sought.”); *In re Gerova Financial Group, Ltd.*, 482 B.R. 86, 91 (Bankr. S.D.N.Y. 2012) (Notably, at the time of the filing of the Bermuda Proceedings, Bermuda was the situs of Gerova’s registered office, which creates a rebuttable presumption that Bermuda is Gerova’s COMI in the absence of evidence to the contrary.);

petition for recognition,<sup>7</sup> with preference for the latter. Timing the determination as of either the opening of the foreign proceeding or the petition for recognition invites manipulation of venue and frustrates the policy goals of Chapter 15, in addition to working as an end-run around the rule in *Bear Stearns*. This paper argues that the better inquiry would place the timing of COMI at the most recent instance of significant economic activity, effectuating a result more in line with the goals of COMI, while limiting the need for intense factual inquiries.

Because the history and policies behind the Model Law are so important to framing the issue of COMI, we discuss them at some length in Part II. We begin with a discussion of the United States' approach to international insolvencies prior to enactment of Chapter 15. From there, we turn to a discussion of the debate between Universalism and Territorialism, which sets the stage for our consideration of the Model Law, a reflection of Universalism. Next we turn to a discussion of what exactly the COMI determination entails and why it is so important. To conclude Part II we discuss the United States' enactment of Chapter 15.

In Part III we consider the U.S. approach to determining the location of a debtor's COMI. We discuss the U.S. courts' initial approach in accord with E.U. COMI

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<sup>7</sup> See *Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 130 (2<sup>nd</sup> Cir. 2013) (holding that "a debtor's COMI should be determined based on its activities at or around the time the Chapter 15 petition is filed, as the statutory text suggests."); *In re Fairfield Sentry Ltd.*, 440 B.R. 60, 64 (Bankr. S.D.N.Y. 2010) (stating that ". . . the filing date of the Chapter 15 petition should serve to anchor the COMI analysis."); *In re Ran*, 607 F.3d 1017, 1025 (5th Cir. 2010) (stating that ". . .examining a debtor's COMI at the time the petition for recognition is filed fulfills Congress's purpose for implementing Chapter 15"); *In re British Am. Isle of Venice (BVI), Ltd.*, 441 B.R. 713, 720-721 (Bankr.S.D.Fla. 2010) (finding an "establishment" under the non-main standard of §1502(5) "must be determined at the time of the filing of the chapter 15 petition"); *In re Betcorp Ltd.*, 400 B.R. 266, 290-92 (Bankr.D.Nev.2009) (" . . .the appropriate time to determine COMI was when the chapter 15 case commenced.").

jurisprudence, including a discussion of *Eurofood*.<sup>8</sup> Next, we address Judge Lifland's dramatic departure from this approach in *Bear Stearns* and how it has affected the COMI determination.<sup>9</sup>

Part IV focuses on specific concerns when attempting a solution to the timing question, with particular discussion of forum shopping, including credit costs and secretive proceedings unduly beneficial to the debtor.

Part V introduces the current U.S. interpretations of the appropriate time at which to perform the COMI inquiry, with specific focus on the decisions in *Millennium* and *Fairfield*. After introducing the cases we consider the problems prevalent in the Second Circuit timing determination in *Fairfield*. We discuss *Fairfield's* failure to effectuate policy considerations underlying Chapter 15, including encouraging forum shopping, minimizing certainty and predictability of legal process, and failing to fairly and equitably address creditors interests. We then turn to the textualism argument presented in *Fairfield*, arguing that the statute does not necessitate a present tense reading of the COMI determination. To round out the discussion, we analyze *Millennium* against the same backdrop as *Fairfield* in order to demonstrate how it fares.

Finally, in Part VI we present our arguments regarding when the timing determination should be made. We propose timing the COMI determination as of the date of the debtor's last significant economic activity. We discuss the adherence of our proposed standard to the policies underlying Chapter 15, its ability to preclude

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<sup>8</sup> *Bondi v. Bank of America, N.A. (In re Eurofood IFSC Ltd.)*, 2006E.C.R. I-3813, 2006 WL 1142304 p. 18-19, ¶ 35 (hereinafter "Eurofood").

<sup>9</sup> *In re Bear Stearns*, *supra* note 5 at 338.

forum shopping attempts in a Modified Universalist system, and address potential criticism.

## **II. The Journey to Chapter 15**

The journey to enactment of Chapter 15, as with most congressional enactments, was long and arduous. Though academics had been pushing for change for quite some time, the process formally began in 1994, when Congress commissioned the National Bankruptcy Review Commission.<sup>10</sup> Among other duties, Congress requested that the Commission address how to better handle transnational insolvencies.<sup>11</sup> After several revisions, vetoes, and counter proposals, Chapter 15 finally became law with the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act in 2005.<sup>12</sup> The history of the United States' approach to handling transnational insolvencies, including the debates leading up to the recent enactment, necessarily underlie any discussion of the importance and interpretation of the main recognition provision of Chapter 15, and the phrase "center of main interests." The effectiveness of potential, competing interpretations of the COMI determination must be gauged against the backdrop of this legislative history and the policy considerations giving rise to it.

As such, we first turn to the United States Bankruptcy Code's provisions dealing with transnational bankruptcies prior to Chapter 15, as the inadequacies of

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<sup>10</sup> Judith Benderson, *Introduction: A history of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 54 US Attorney's Bulletin 4 1 (2006) available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usab5404.pdf](http://www.justice.gov/usao/eousa/foia_reading_room/usab5404.pdf).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

those provisions largely prompted the current revisions. Once revision became a potentiality, debates sparked the division of academics and legislators alike into two camps of international insolvency theory: Universalism and Territorialism. These competing theories differ significantly in their approach and underlying policy rationale, and discussion of each is helpful for shaping the broader implications of the COMI timing issue. Consideration of the Model Law on Cross-Border Insolvency is also necessary given efforts to conform Chapter 15 to the Model Law in order to encourage a more consistent universal scheme. From there, we discuss the U.S. enactment of Chapter 15 and the COMI consideration specifically.

#### **A. U.S. Bankruptcy Law Before Chapter 15**

The history of Chapter 15 of the Bankruptcy Code spans both decades and continents. U.S. courts have been open to international cooperation in insolvency proceedings as far back as the late 19<sup>th</sup> Century.<sup>13</sup> Despite this, Congress took almost a century to codify these notions of comity in the Bankruptcy Code of 1978.<sup>14</sup> Section 304 of the 1978 bankruptcy code provided the first proper mechanism for a foreign representative to seek relief in aid of a foreign proceeding in the United States,<sup>15</sup> and notions of deference and cooperation with foreign proceedings lie at its core.<sup>16</sup> Conceptually, Congress felt that under Section 304 there would be one main proceeding pending in some foreign jurisdiction, and the United States would assist the foreign representative through ancillary proceedings to administer local

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<sup>13</sup> Early Examples of international cooperation in bankruptcy include *Canadian S. Ry. v. Gebhard*, 109 U.S. 527 (1883); *Hilton v. Guyot*, 159 U.S. 113 (1895).

<sup>14</sup> 11 USC §304 (repealed Apr. 30, 2005); Jay L. Westbrook, *Chapter 15 At Last*, 79 Am. Bankr. L. J. 713, 718-719 (2005) (Hereinafter “Chapter 15 At Last”).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

assets.<sup>17</sup> However, Congress' choice to make the language of the statute permissive greatly stunted results.<sup>18</sup> The statute allowed U.S. courts to exercise discretion in deciding whether or not to grant relief to the foreign representative, rather than mandating relief under suitable circumstances.<sup>19</sup> Somewhat predictably, this resulted in inconsistent application from jurisdiction to jurisdiction, which in turn undermined certainty of legal process.<sup>20</sup>

Cases brought under Section 304 were ancillary, meaning they allowed the foreign representative to seek injunctions, turnover of assets, and other specific, limited relief.<sup>21</sup> Section 304 did not provide for courts to approve distributions.<sup>22</sup> If the parties needed more relief than Section 304 provided, they had several options. They could travel to the court where the foreign proceeding was pending and litigate matters there, they could open a U.S. bankruptcy proceeding to distribute U.S. assets, or the creditors could petition U.S. courts to allow access to U.S. assets.<sup>23</sup> Here again treatment differed from case to case and from jurisdiction to jurisdiction, creating a system that provided little stability or predictability for either foreign or domestic parties.<sup>24</sup>

Naturally, as the world advanced beyond 1978, the economy became more globally focused. This led to an increased number of transnational corporations,

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<sup>17</sup> Hon. Allan L. Gropper, *The Arbitration of Cross-border Insolvencies*, 86 Am. Bankr. L. J. 201, 204-205 (2102) [hereinafter "*Arbitration*"].

<sup>18</sup> John J. Chung, *The Retrogressive Flaw of Chapter 15 of the Bankruptcy Code: A Lesson from Maritime Law*, 17 Duke J. Comp. & Int'l L. 253, 256-257 (2007).

<sup>19</sup> *Id.*

<sup>20</sup> *See Id.* (explaining that the permissive language produced a "wide variety of decisions").

<sup>21</sup> *Id.*

<sup>22</sup> Westbrook, *supra* note 14 at 717.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

which in turn increased the occurrence of cross-border insolvencies. Slowly, it became evident that the current permissive and jurisdiction-dependant system would be unacceptably inefficient in a growing economy. The increasing number of cross-border insolvencies demanded a more efficient method of cooperation and coordination in the administration of bankruptcy proceedings than the existing piecemeal approach, which led to high costs and unwieldy administration.<sup>25</sup>

### **B. Internationalization and the Debate Between Universalism and Territorialism**

As academics and legislators began to lobby for revision of the U.S. Bankruptcy Code's approach to transnational insolvencies, the theoretical debate about how such jurisdictional issues ought to be ideally handled grew. Two main ideological camps emerged: Territorialism and Universalism. The two lie on opposite sides of the spectrum, with both camps advocating their system as the proper solution.

Rooted in traditional ideas of national sovereignty, Territorialist theories view all people and all property within a nation's borders as subject to that nation's laws.<sup>26</sup> A Territorialist system allows nations to exercise exclusive jurisdiction over the assets physically within their venue.<sup>27</sup> The main shortfall of Territorialism is its waste of resources in administering a multinational insolvency case on multiple fronts, before multiple courts. All parties are worse off economically under a

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<sup>25</sup> See *Arbitration*, *supra* note 17 at 204 (discussing the "significant additional costs" in a piecemeal approach in the context of multinational enterprises).

<sup>26</sup> *Id.*

<sup>27</sup> Chung, *supra* note 18 at 262.



territorial system, as the many concurrent proceedings drain debtor, creditor, and judicial resources.<sup>28</sup>

Universalism hypothesizes a single law administered by a single court governing a multinational bankruptcy and controlling the worldwide distribution of assets regardless of physical location.<sup>29</sup> In a perfect world, countries would agree on which single law would rule, but even the staunchest Universalists realize that pure Universalism is not achievable without identity of laws and legal cultures; a goal not yet achieved.<sup>30</sup>

The difficulties of each system, raised in the ongoing debate, led to enactments in Chapter 15 and the Model Law that represent a compromise between the two theories. The statutes present a new theory coined “Modified Universalism,” which falls on a continuum slightly closer to the Universalist side of the spectrum.<sup>31</sup> The Modified Universalist system requires that the debtor’s home court administer an insolvency proceeding in accordance with the law of its jurisdiction, and then other countries enforce the judgments of the home court against assets physically within their jurisdiction. While proponents of Territorialism see modified

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<sup>28</sup> *Arbitration*, *supra* note 17 at 204 (stating that there are significant costs of piecemeal reorganizations of multinational organizations).

<sup>29</sup> John A.E. Pottow, *Procedural Incrementalism: A Model for International Bankruptcy*, 45 Va. J. Int’l L. 935, 947 (2005).

<sup>30</sup> *Arbitration*, *supra* note 17 at 220.

<sup>31</sup> The term was coined by Prof. Westbrook in his article *A Global Solution to Multinational Default*, 98 Mich. L. Rev. 2276, 2302 (2000). Therein he explained, “Because a pure form of Universalism is not immediately achievable, many Universalists have adopted ‘**Modified Universalism**,’ in which the courts seek a result in multinational cases as close as possible to a unified worldwide administration and distribution.”

Universalism as a large step toward pure Universalism,<sup>32</sup> Chapter 15 and its application today remain a hybrid of the two systems.

### **C. The Model Law on Cross-Border Insolvency**

As the debate raged on, other countries also began looking for a cross-border insolvency solution that could provide the needed predictability, while simultaneously recognizing the autonomy of individual jurisdictions.<sup>33</sup> As a result several countries, including the U.S., began an initiative in the 1990's urging the United Nations Commission on International Trade Law ("UNCITRAL") to take up the issue.<sup>34</sup> UNCITRAL responded in 1995 by convening a "working group" to discuss possible solutions.<sup>35</sup> The 36 Member States of UNCITRAL, as well as several interested non-Member states, joined the Working Group.<sup>36</sup> The combination of typical general complexities involved in international coordination and the technical nature of bankruptcy law created a daunting task for the Working Group. Remarkably, however, in just four two-week sessions conducted over the course of two years, UNCITRAL promulgated a Model Law on Cross-Border Insolvency.<sup>37</sup> Member states adopted it by consensus on May 30, 1997.<sup>38</sup>

UNCITRAL describes the Model Law as being "designed to assist States to equip their insolvency laws with a modern legal framework to more effectively

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<sup>32</sup> Westbrook, *supra* note 14 at 716.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Scott K. Brown, *Punching Your Ticket to the High-Speed International Insolvency Train*, 26-8 ABIJ 26, 65-66 (2008); Jenny Clift, *The UNCITRAL Model Law on Cross-Border Insolvency-A Legislative Framework to Facilitate Coordination and Cooperation in Cross-Border Insolvency*, 12 Tul. J. Int'l. & Comp. L. 307, 316 (2004).

<sup>37</sup> Westbrook *supra* note 14 at 717

<sup>38</sup> Brown, *supra* note 36 at 66.

address cross-border insolvency proceedings concerning debtors experiencing severe financial distress or insolvency.”<sup>39</sup> It focuses on encouraging and facilitating cooperation and coordination between the various jurisdictions involved in cross-border insolvency.<sup>40</sup>

The Model Law is not a system of substantive bankruptcy rules.<sup>41</sup> It is instead a body of law that guides a country in locally recognizing and providing relief in accordance with the decisions of the debtor’s home court. Countries have the option of adopting the Model Law into their own jurisprudence, and as of the writing of this article, twenty countries have chosen to do so.<sup>42</sup>

#### **D. What is COMI and Why Does it Matter?**

Under the Model Law, a debtor can petition the local court for recognition of foreign insolvency proceedings as either main or non-main proceedings.<sup>43</sup> The jurisdiction hosting the main proceeding applies its substantive laws to the case. Modified Universalism, the theory upon which the Model Law was built, envisions the main proceeding as being located in the jurisdiction which is the debtor’s true home.<sup>44</sup> It is important that the main proceeding be placed properly as the decisions of the foreign main proceeding are given effect by the local court and as

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<sup>39</sup> UNCITRAL Summary of the Model Law on Cross-Border Insolvency (1997) *available at* [http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/1997Model.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html)

<sup>40</sup> *Model Law*, *supra* note 1, Preamble.

<sup>41</sup> Westbrook, *supra* note 14 at 721.

<sup>42</sup> Australia (2008), British Virgin Islands (2003), Canada (2009), Colombia (2006), Eritrea (1998), Great Britain (2006), Japan (2000), Mauritius (2009), Mexico (2000), Montenegro (2002), New Zealand (2006), Poland (2003), Republic of Korea (2006), Romania (2003), Serbia (2004), Slovenia (2007), South Africa (2000), and the United States of America (2005). UNCITRAL, Status, 1997: Model Law on Cross-Border Insolvency (2010), *available online at* [www.uncitral.org/uncitral/ed/uncitral\\_texts/insolvency/1997/Model\\_status.html](http://www.uncitral.org/uncitral/ed/uncitral_texts/insolvency/1997/Model_status.html).

<sup>43</sup> Model Law, *supra* note 1 at art 17(2).

<sup>44</sup> Hon. Samuel L. Bufford, *Global Venue Controls are Coming: A Reply to Professor LoPucki*, 79 Am. Bankr. L. J. 105, 108-109 (2005).

such are eligible for considerable relief, including expedited control of the debtor's local assets and protection from unilateral action by creditors.<sup>45</sup> If the debtor filed a proceeding in a jurisdiction in which it has engaged in business activities, but is not the debtor's true center, it can be recognized as a non-main proceeding.<sup>46</sup> Non-main proceedings are eligible for considerably more limited relief from the local court.<sup>47</sup>

Reorganization or liquidation proceedings differ vastly depending on which jurisdiction's substantive laws apply to the insolvency proceeding. While a debtor is free to file bankruptcy in any court that has jurisdiction,<sup>48</sup> the Model Law only allocates main recognition to cases pending in the debtor's home country. Without some standard for determining a debtor's true home, those seeking favorable bankruptcy laws would be tempted to file in whichever jurisdiction results in the best resolution of their case whether or not it is the proper forum. In this vein, the Model Law's language permits a proceeding to be granted main recognition only if it is filed in the jurisdiction where the debtor has its center of main interests ("COMI").<sup>49</sup>

Drafters worked the COMI concept into the Model Law both to ensure that the court seeking control of a debtor's assets had some authority to do so, and to avoid allowing a debtor to run to a bankruptcy haven once visited by financial

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<sup>45</sup> *Model Law, supra* note 1 at art. 20.

<sup>46</sup> *Id.* at art. 17(2)(f).

<sup>47</sup> *Id.*

<sup>48</sup> Some country's venue laws are permissive enough to allow entry of foreign debtors with little to no real relation to that country. For a recent example of this in the U.S. courts, see *In re TMT USA Shipmanagement, LLC*, Case no. 4:13-bk-33740 (Bankr. S.D.Tx., 2013) (involving a Taiwanese shipping company, whose main creditors are all Chinese banks, which filed Chapter 11 in Houston despite having no real economic connection with the U.S.). The company incorporated a subsidiary in Texas just 13 days prior to filing Chapter 11, in accordance with U.S. bankruptcy venue laws.

<sup>49</sup> *Model Law, supra* note 1 at art. 17(2)(a).

trouble.<sup>50</sup> Unfortunately, multinational companies, and especially multinational companies that do not produce tangible goods, will readily seek to manipulate whichever characteristics the courts use to determine COMI.<sup>51</sup> Issues with forum shopping will be discussed in-depth in Section V below, but initially manipulation proves problematic because the cost of credit necessarily must adjust for risk, including how those risks will be handled under the applicable legal system.<sup>52</sup> If the legal system is unknown they will be difficult to quantify.<sup>53</sup> If the debtor manipulates the system by effectively changing the law to that of another jurisdiction after financial distress, the creditor's risk evaluation will be incorrect.<sup>54</sup> This uncertainty may result in parties entering into sub-optimal agreements, with potential to undermine the credit system on a broad scale.<sup>55</sup>

Because placement of the COMI determines the substantive law that applies in the proceeding, it is vitally important that the COMI standard be both clear and consistent for courts to reach the correct result. The inquiry into a debtor's COMI requires courts to look for a single location, that of the debtor's "center of main interests," the driver of its business decisions and economic activity. Put plainly, COMI is the heart of the debtor, and just as a body has only one heart, so too a debtor has only one COMI. To locate this heart it is vital to keep in mind the concepts central to COMI.

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<sup>50</sup> John J. Chung, *The New Chapter 15 of the Bankruptcy Code: A Step Toward Erosion of National Sovereignty*, 27 N.W. J. Int'l L. & Bus. 89, 122 (2006).

<sup>51</sup> See Lynn M. LoPucki, *Universalism Unravels*, 79 Am. Bankr. L.J. 143, 155 (2005) (discussing the manipulability of the factors comprising the COMI determination) (hereinafter "Universalism Unravels").

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

First, at its core, COMI is a pre-insolvency concept. It is meant to focus on a debtor's interests before a petition for insolvency is filed, not after. The pre-insolvency nature of COMI is stressed in the recently revised guide to enactment of the Model Law published by UNCITRAL, which says that "[w]here the business activity of the debtor ceases after the commencement of the foreign proceeding, all that may exist at the time of the application for recognition to indicate the debtor's center of main interests is that foreign proceeding and the activity of the foreign representative in administering the insolvency estate."<sup>56</sup> In the Guide Revisions, UNCITRAL recognizes that COMI is a characteristic of a viable business enterprise, so that where there is no economic activity there can be no COMI, nor should COMI be measured after the insolvency petition is filed.<sup>57</sup> To account for this, the Guide Revisions instructs courts to refer to the COMI at the inception of the underlying proceeding for which recognition is requested.<sup>58</sup> The tribunal governing the underlying proceeding will have made a determination with regard to the debtors COMI at the time of commencement, upon review of the debtor's current economic activity up until the date of insolvency. In insolvency, the economic activity can be shifted or ceased in ways that fail to represent the debtors COMI during its period of true economic viability. It is to this period of economic viability, the pre-insolvency period, which courts considering COMI are meant -- and must -- look to, if the correct result is to be achieved.

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<sup>56</sup> United Nations Commission on International Trade Law, *Interpretation and Application of Selected Concepts of the UNCITRAL Model Law on Cross-Border Insolvency Relating to Centre of Main Interests (COMI)*, A/CN.9/WG.V/WP.112 at para 128C (February 11, 2013) (hereinafter "Guide Revisions"), adopted on April 26, 2013, United Nations Commission on International Trade Law, *Report of Working Group V (Insolvency Law) on the Work of its Forty-third Session*, A/CN.9/766 at para 42.

<sup>57</sup> *See Id.*

<sup>58</sup> *Id.*

Further proof of the pre-insolvency nature of COMI is found in the European Union regulation that initially developed the COMI standard. As that regulation instructs, “the courts of the Member State within the territory of which the centre of a debtor’s main interest is situated shall have jurisdiction to open insolvency proceedings.”<sup>59</sup> EU courts automatically recognize as main a foreign proceeding pending in the jurisdiction where a debtor has its COMI.<sup>60</sup> This indicates that the COMI being sought is in existence before the beginning of the bankruptcy case, otherwise there would be nothing to inquire after.<sup>61</sup> By its plain language the EU statute indicates that COMI analysis is to be evaluated at some point in time before the filing of the proceedings.

Second, COMI is an expectation concept. The COMI inquiry seeks to find the jurisdiction in which the parties expected to litigate any potential insolvency at the time they entered into agreement with the debtor. To do this, the inquiry must extend beyond where the debtor sets up its physical location, and into where third parties perceive it to be located. This idea has been central to COMI since its inception, and is made evident in the European Union Insolvency Regulation, which explains COMI as “the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.”<sup>62</sup>

Critics seek to undermine the importance, or even existence, of creditor expectations by citing the prevalence of unwilling creditors and frequent movement of multinational companies. But we cannot be concerned with the expectations of

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<sup>59</sup> Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency proceedings.

<sup>60</sup> *Id.*

<sup>61</sup> *See Id (requiring automatic recognition).*

<sup>62</sup> *Id.* at ¶ 13.

unwilling creditors in reference to the importance of fixing an appropriate COMI. The expectations of creditors are important on the basis that sophisticated parties enter into contracts to extend credit on the assumption of risk. These unwilling creditors, tort victims, contractors etc., do not calculate risk in deciding to become involved with the company. Their expectations, or lack thereof, are thus irrelevant to this determination.

Some may criticize the reliability of expectations in the COMI determination, emphasizing that the type of companies filing international proceedings move their operations frequently, and thus the creditors cannot reasonably rely upon the proposed forum when extending credit. This criticism overlooks several key aspects. First, as with any situation involving competing interests, we must engage in some sort of balancing analysis. Companies should, of course, be allowed to freely move their headquarters and operations in the interest of sovereignty, autonomy, and economic competition. These concerns generally outweigh the damage to a creditor from a change of location. In fact, most of the creditors engaged in funding multinational corporations will likewise be multinational. Their lending policies will be aggregated; their loan choices will likely be made based on a diversified portfolio. Because they engage in hedging risk, the costs of any forum change to large creditors in this situation will likely be slight. The balance however tips in favor of creditors when companies illegitimately change their headquarters in an attempt to actively undermine the bargained for distribution of risk between the debtor and creditor, as it is the debtor who possesses power to move to the detriment of its creditors. Illegitimacy undermines the previously weighty and valid interests of a



debtor in altering their location. It furthermore places a heavy weight upon the creditor's side of the balance. In these situations, we are certainly concerned with the expectations of creditors, mainly because the debtor has exploited them.

Finally, COMI is an economic concept. Thus, to effectuate the correct placement of COMI, the focus must center principally on economic activity.<sup>63</sup> Early on, the U.S. courts developed a list of factors to be evaluated in determining where to locate a debtor's COMI. These factors include 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 most affected by the case; and/or the jurisdiction whose law would apply to most disputes.<sup>64</sup> A common thread runs through these factors. Each focuses on a distinct aspect of the debtor's economic activity, and when taken together they reveal where the debtor is conducting that activity – its center of main interests.

The recent guide revisions further stress economic activity of the debtor, and specifically the potential lack thereof after insolvency proceedings begin, as a reason to look back in time to the pre-insolvency activity of the debtor.<sup>65</sup> While the COMI standard makes no express mention of economic activity, the provision that allows

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<sup>63</sup> See Jay Lawrence Westbrook, *Locating The Eye Of The Financial Storm*, 32 Brook. J. Int'l L. 1019 (2007) (advocating a COMI analysis which takes into account both predictability and the likely quality of the substantive law of a chosen jurisdiction, placing COMI at the principal place of business rather than the place of incorporation); John A.E. Pottow, *The Myth (and Realities) of Forum Shopping in Transnational Insolvency*, 32 Brook. J. Int'l L. 785, 793 (2007)(placing COMI at place of incorporation is correct, but with caveat if it is not really the debtor's principle place of business); Ian F. Fletcher, *Insolvency in Private International Law*, 393-6 (2nd ed., Oxford2005) (proposing a 'command and control' test which places the COMI at the location from which command and control of the company was exercised on a regular basis); *In re Bear Stearns* 374 B.R. at 128; *In re Sphinx, Ltd.*, *supra* note 3 at 117.

<sup>64</sup> *In re Sphinx*, *supra* note 3 at 117.

<sup>65</sup> Guide Revisions, *supra* note 56 at para 128C.

for non-main recognition does explicitly require a debtor have economic activity in the proposed jurisdiction. That provision requires the proceedings be “pending in a country where the debtor has an establishment,”<sup>66</sup> and defines establishment as “any place of operations where the debtor carries out a non-transitory economic activity.”<sup>67</sup> The fact that main recognition is a heightened standard from that of non-main recognition strongly suggests more, not less, economic activity is required under COMI.

### **E. Modified Universalism Comes to America**

The United States adopted the Model Law as Chapter 15 of the U.S. Bankruptcy Code in 2005 as part of the Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA”).<sup>68</sup> Industry players and political leaders on both sides of the aisle hotly contested most of the provisions contained within BAPCPA, but Chapter 15 obtained nearly unanimous bipartisan support, and thus survived all versions of the law.<sup>69</sup>

Congress intentionally drafted Chapter 15 to follow the Model Law nearly verbatim, in an effort to encourage other countries to do the same.<sup>70</sup> For example, Chapter 15 contains the requirement that a proceeding will be recognized as foreign main if it “is pending in the country where the debtor has its center of main interests.”<sup>71</sup> The standard, now known in the industry as COMI, was a new concept

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<sup>66</sup> *Model Law*, supra note 1 at Art. 2(c).

<sup>67</sup> *Id.* at Art. 2(f).

<sup>68</sup> Chung, supra note 18 at 256-257; Brown, supra note 36 at 66.

<sup>69</sup> Westbrook, supra note 14 at 719.

<sup>70</sup> *Id.*

<sup>71</sup> 11 U.S.C. 1517(b)(1)

for U.S. attorneys.<sup>72</sup> As one leading researcher in international insolvency wrote, the term could have been replaced by “principal place of business’ as a phrase more familiar to American judges and lawyers.”<sup>73</sup> Despite the intended equivalence, the requirement of COMI caused heated, although not widespread, litigation in the early years of Chapter 15, as parties fought over where the main proceeding would be located. This debate invited academics and practitioners alike to speculate on the myriad of potential problems resulting from the undefined term.<sup>74</sup> These problems have largely failed to materialize, as a recent study has shown that, in the overwhelming majority of cases, either main or non-main status is awarded without conflict.<sup>75</sup>

Chapter 15 is the only chapter in the bankruptcy code that contains an express statement of purpose: “to incorporate the Model Law on Cross-Border Insolvency.”<sup>76</sup> It is designed as a means of cooperation, or comity, between U.S. and foreign jurisdictions, where ancillary proceedings or insolvency cases are pending abroad.<sup>77</sup> Comity has been defined as the “recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another

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<sup>72</sup> Westbrook *supra* note 14 at 719.

<sup>73</sup> *Id.*

<sup>74</sup> See e.g. Alesia Ranney-Marinelli, *Overview of Chapter 15 and Other Cross-Border Cases*, 82 Am. Bankr. L.J. 269, 295 (2008) (stating that courts have been left to interpret COMI, and commenting on issues relating a COMI determination for corporate group insolvencies); Benjamin J. Christenson, *Note: Best Let Sleeping Presumptions Lie: Interpretation of “Center of Main Interest” Under Chapter 15 of the Bankruptcy Code and an Appeal for Additional Judicial Complacency*, 2010 U. Ill. L. Rev. 1565 (2010) (outlining courts attempts to interpret COMI, and argues for more deference to party agreement to location); Lynn M. LoPucki, *Global and Out of Control?*, 79 Am. Bankr. L.J. 79, 98-101 (Winter 2005) (arguing that COMI can be manipulated, thus allowing forum shopping); Bufford, *supra* note 44 (responding to LoPucki).

<sup>75</sup> Westbrook, *An Empirical Study of the Implementation in the United States of the Model Law on Cross-Border Insolvency*, 87 Am. Bankr. L. J. 247, 255 (2013) (Hereinafter “Westbrook Empirical”).

<sup>76</sup> 11 U.S.C. §1501(a)(1)-(5).

<sup>77</sup> See Westbrook, *supra* note 14 at 721 (stating that the Model Law is a vehicle for cooperation between courts).

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.”<sup>78</sup> Because of the traditional inclination of nations to Territoriality, and the wide variance between international legal systems, comity rarely arises without legislative mandate. Chapter 15 is the congressional mandate giving U.S. courts the rules within which such comity can be afforded to foreign insolvency proceedings.

In extending comity to foreign insolvency proceedings Chapter 15 seeks to effectuate many of the same policies as the U.S. bankruptcy code in general, but with the specific needs of international proceedings in mind.<sup>79</sup> These policy goals include greater certainty of legal process, maximizing and protecting the debtor’s assets, fairly and equitably addressing creditor interests, and providing for restructuring of the debtor where possible.<sup>80</sup>

### **III. How does the U.S. Determine the Location of a Debtor’s COMI?**

When adopted, COMI was a term foreign to U.S. bankruptcy practitioners and judges alike. As in the Model Law, no definition of COMI was included with Chapter 15, so U.S. courts set about deciphering this strange, new statutory language.

For help in this task, Chapter 15 expressly instructs courts to look to the interpretations of other adopters of the Model Law.<sup>81</sup> Several countries had examined the COMI standard before the U.S. visited the issue. For example, in the regulation adopting the EU Convention, the European Council explained the concept

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<sup>78</sup> *Hilton v. Guyot*, 159 U.S. 113, 163-164 (1895).

<sup>79</sup> *In re SPhinX, Ltd.*, *supra* note 3 at 112, *aff’d*, 371 B.R. 10 (S.D.N.Y.2007); *In re Bear Stearns*, *supra* note 5 at 126.

<sup>80</sup> *Id.*

<sup>81</sup> 11 U.S.C. 1508 “In interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions.”

of COMI as “the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.”<sup>82</sup>

The U.S. court initially followed the European model, which placed COMI most often at the place of incorporation of the debtor, following the directive within Chapter 15 and the Model Law that, “In the absence of evidence to the contrary, the debtor’s registered office, or habitual residence in the case of an individual, is presumed to be the center of the debtor’s main interests.”<sup>83</sup> This presumption, however, is rebuttable, as was demonstrated in the European case commonly referred to as *Eurofood*.<sup>84</sup> *Eurofood*, a subsidiary of the giant, multinational food company Parmalat, initiated insolvency proceedings in Italy in 2003.<sup>85</sup> Parmalat was incorporated in Italy, but Eurofood was incorporated in Ireland. Bank of America, one of Eurofood’s creditors, requested that insolvency proceedings be opened in Ireland.<sup>86</sup> The court granted their request.<sup>87</sup> Two weeks later, Italian courts admitted Eurofood into the Parmalat proceedings, ignoring the case that had been initiated in Ireland.<sup>88</sup> The Italian court ruled that Eurofood’s COMI was in Italy, giving it jurisdiction to hear the insolvency case.<sup>89</sup> Meanwhile, Ireland maintained that it was the true COMI for Eurofood, eventually referring the matter to the European Court of Justice (ECJ) for ruling on where the COMI lay.<sup>90</sup> The ECJ determined that, while presumably a debtor’s COMI is where its registered office is

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<sup>82</sup> Council Reg. (EC) No. 1346/2000, ¶ 13.

<sup>83</sup> 11 U.S.C. 1516(c); *In re SPhinX, Ltd.*, *supra* note 3 at 117.

<sup>84</sup> *Id.*

<sup>85</sup> *Eurofood*, *supra* note 8 at ¶ 18.

<sup>86</sup> *Id.* at ¶ 19.

<sup>87</sup> *Id.* at ¶ 20.

<sup>88</sup> *Id.* at ¶ 21.

<sup>89</sup> *Id.* at ¶ 22.

<sup>90</sup> *Id.* at ¶ 23.

located, this presumption would be rebutted if the company's registered office was merely a "letterbox" company not carrying out any business in the [jurisdiction] where its registered office is situated."<sup>91</sup> The *Eurofood* court's emphasis on rebutting the presumption in favor of a debtor's location of economic activity indicates that the place of incorporation standard used by European courts assumes place of incorporation will most often be the location from which the debtor conducts its economic affairs.<sup>92</sup>

Later, in 2007, Judge Lifland rocked the COMI landscape in *Bear Stearns* with a new rule declaring *any evidence* pointing to a jurisdiction other than the debtor's registered office would trigger rebuttal of the presumption, whether or not interested parties had raised an objection.<sup>93</sup> *Bear Stearns* involved two U.S. based hedge funds that sought recognition for insolvency proceedings pending in the Cayman Islands. The debtor was incorporated in the Cayman Islands, but had no other economic relation to that jurisdiction. The court denied recognition of the Cayman Islands proceeding as main, explaining "the Petitioners contend that this Court should accept the proposition that the Foreign Proceedings are main proceedings because the Petitioners say so and because no else says they aren't. This contention must be rejected."<sup>94</sup> This interpretation suggested that, for all practical purposes, the "registered office" standard applies only where there is no

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<sup>91</sup> *Id.* at 34-35.

<sup>92</sup> *See Id.* (emphasizing that the presumption should only be rebutted where the actual center of a debtor would be ascertainable to third parties).

<sup>93</sup> *In re Bear Stearns*, *supra* note 5 at 130.

<sup>94</sup> *Id.*

economic or other activity occurring outside of the jurisdiction housing the registered office. Again, the focus is on economic activity.

The Second Circuit affirmed Judge Lifland, leading most to regard *Bear Stearns* as having effectively closed the door to recognition of foreign proceedings pending in haven jurisdictions.<sup>95</sup> But, as professionals trained in loopholes, lawyers have devised a new system, which threatens to re-open the door to recognition of haven filings. This new system seeks to manipulate the timing of the COMI determination in order to allow debtors to achieve main recognition of insolvency proceedings in jurisdictions with which the debtor had no legitimate connection leading up to and including the insolvency period. As such, the point in time at which courts should be determining where the COMI lies has become important. Because bankruptcy is largely about timing, and the law of the jurisdiction of the COMI controls the entire international insolvency, the question of when to time the determination of COMI implicates many policy considerations and can have a drastic effect on the global insolvency proceedings. Therefore, courts should scrutinize movements by the debtor that may be temporary, transitory, or merely an effort to manipulate forum.

#### **IV. Issues with Forum Shopping**

One of the most prevalent concerns in the enactment of Chapter 15, and one that we now raise in relation to the timing issue, is the ability of debtors to forum shop. Forum shopping is the ability of parties to litigation to choose which court will hear their case, and to which law those courts will apply. On its face, forum

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<sup>95</sup> Westbrook Empirical, *supra* note 75 at 252.

shopping does not threaten the legal system. In fact, some laws are written to deliberately allow and even encourage such choice among courts. It is when the parties abuse this ability to choose, using it for an unfair advantage, that forum shopping turns from a positive idea to a negative one.

As a common law system, the U.S. courts are especially susceptible to forum shopping attempts by litigants. Case law may vary significantly from one jurisdiction to another, and the decisions a court makes will naturally favor one side over the other. A court may interpret one law a certain way, or favor one kind of litigant or case over another. This result leads litigants to direct their cases into the forum that benefits their clients the most. For this reason U.S. courts have developed complex jurisdictional rules to help curb forum shopping attempts; however the issue continues to arise, as the potential benefit of forum shopping may be irresistible.

On an international scale, plaintiff-friendly features of U.S. law, like liberal discovery rules, jury trials, high damages awards, class actions, and contingency fees encourage global plaintiffs to seek relief in U.S. courts. On one hand, foreign forum shopping can be beneficial to the U.S., as it brings dollars into the economy and gives U.S. judges greater visibility. Conversely, such forum shopping may burden a judicial system already overloaded with its own litigation. Furthermore, U.S. courts often experience difficulty enforcing judgments abroad, making international forum shopping potentially an exercise in futility.



Potential problems with forum shopping in the bankruptcy context involve its effects on credit costs specifically, and the general economy more broadly.<sup>96</sup> The cost of credit necessarily must adjust for risk, including how those risks will be handled under the applicable legal system.<sup>97</sup> When the legal system that will govern is unknown, the risks become difficult, if not impossible, to quantify.<sup>98</sup> Likewise, if a debtor manipulates the legal system to that of another jurisdiction after financial distress, the quantified risk will be incorrect.<sup>99</sup> Such uncertainty results in parties entering into sub-optimal agreements, with the potential to undermine the credit system on a broad scale.<sup>100</sup> These concerns become magnified in the international context, where broader economies are at risk and courts in one country have little control over the actions of their global neighbors.

Chapter 15 presents a different sort of forum shopping problem, with COMI at the center of its inception, and hopefully, resolution. The problem arises when a foreign party files bankruptcy in a haven jurisdiction unrelated to any economic activity, then seeks recognition of those proceedings in the U.S. as foreign main proceeding, which is preferable, or a foreign non-main, which is better than nothing. The forum administering the underlying proceeding applies its substantive law to the bankruptcy, so the choice of forum has serious implications for the various stakeholders. These implications may be even more serious in light of the fact that debtors who forum shop seek to file in bankruptcy haven jurisdictions where the

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<sup>96</sup> Hon. Samuel L. Bufford, *Global Venue Controls are Coming: A Reply to Professor LoPucki*, 79 Am. Bankr. L.J. 105, 112 (2005).

<sup>97</sup>*Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

laws are more favorable to their positions.<sup>101</sup> Bankruptcy havens are often located in remote areas, far from the watchful eye of creditors and media coverage.<sup>102</sup> Furthermore, a bankruptcy case likely involves involuntary creditors like tort victims, employees, or taxing authorities whose interests in the case do not justify the expense of traveling to a foreign haven. For these reasons, filing in havens often causes a windfall to debtors, making the temptation too difficult to resist.

The pull is even too great for some nations to resist, who will adjust their laws to encourage increased filings by debtors looking to forum shop.<sup>103</sup> To be successful, a haven must offer some advantage to litigants over their home courts, so havens will enact or interpret laws in a way that will attract cases to their jurisdictions.<sup>104</sup> Bankruptcy havens tend to be small jurisdictions with little local economic activity to be adversely affected by permissive legislation.<sup>105</sup> Court proceedings in havens such as Bermuda and the Cayman islands can be highly secretive, with access to court files restricted to local lawyers.<sup>106</sup> Havens therefore may freely adapt their laws to the desires of forum shoppers without hurting home players.<sup>107</sup> Indeed, the haven's economy is often built upon the profits generated from haven activity, further encouraging the haven to enact laws attractive to forum shoppers.<sup>108</sup>

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<sup>101</sup> Courting Failure, *infra* n. 173 at 198.

<sup>102</sup> *Id.* at 193.

<sup>103</sup> Edward Janger, *Virtual Territoriality*, 48 Colum. J. Transnat'l L. 401, 407 (2010); Courting Failure, *infra* n. 173 at 51.

<sup>104</sup> Courting Failure, *infra* n. 173 at 51.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 194-95.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 50-51.

Theoretically, because the Model Law requires some form of economic activity for both main and non-main recognition, corporations should have little incentive to file for recognition of proceedings pending in haven jurisdictions where they perform no real economic activity. In reality however, monetary considerations often incentivize debtors to file in havens and trump the potential denial of recognition. It may be a gamble, as most business decisions are, but it is one that corporations may readily take.

Here at home, the U.S. statute governing domestic bankruptcy venue is somewhat flexible. Debtors are allowed to file bankruptcy at the location of their residence, headquarters, principal assets, or any place where they are already in bankruptcy.<sup>109</sup> The court then has the power to transfer the case to another forum.<sup>110</sup> Some have criticized this statute as inviting and fostering a system of domestic forum shopping within U.S. bankruptcy courts. A leading voice on this charge is that of Lynn M. LoPucki. Professor LoPucki laid out his criticism of bankruptcy forum shopping in his book, Courting Failure.<sup>111</sup> In the book, Professor LoPucki explains how the U.S. bankruptcy venue statute has invited forum shopping and then applies his same critiques to the “center of main interests” standard of international bankruptcy.<sup>112</sup>

Professor LoPucki attacks the U.S. bankruptcy venue statutes on several grounds. He criticizes the principal place of business standard, calling it “term of

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<sup>109</sup> 28 USC §1408

<sup>110</sup> *Id.*

<sup>111</sup> Lynn M. LoPucki, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS (2005). Prof. LoPucki’s book drew widespread criticism for his charges of corruption of judges within the U.S. bankruptcy system. Nevertheless, his analysis of forum shopping the bankruptcy context provides valuable insight into the problem.

<sup>112</sup> *Id.* at 28.

art” which is easily manipulable by the debtor.<sup>113</sup> Before it was used in the bankruptcy venue statute, U.S. courts interpreted the term “principal place of business” to mean the headquarters, or nerve center, of a firm.<sup>114</sup> LoPucki charges that as applied to bankruptcy, this nerve center may be nothing more than the office of a chief executive, which can be states away from the actual activities of the firm.<sup>115</sup> Courts that apply no real bite to the principal place of business standard open the door for a debtor to use any tenuous association with a forum for entry therein.<sup>116</sup> LoPucki goes on to explain how the lack of substance needed to enter a venue also makes it possible for a debtor to change forum. Under the principal place of business standard a firm need merely relocate the office of its chief executive, or hire a new leader in a preferred location to enter into that forum.<sup>117</sup>

Professor LoPucki then turns his eye to the global forum and COMI specifically, applying the same considerations from his discussion of domestic forum shopping activities.<sup>118</sup> He champions the territorial system of international insolvency, favoring it for its lack of effect on other countries beyond what those countries chose to grant and criticizes Modified Universalism as giving filers their choice of courts and bankruptcy laws, while lacking any mechanisms to address the problem of international venue abuses.<sup>119</sup> Professor LoPucki is right to urge caution, as Modified Universalism does lack the determinacy of forum present in a

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<sup>113</sup> *Id.* at 31.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *See Id.*

<sup>117</sup> *Id.* at 31-32.

<sup>118</sup> *See Id.* at Ch. 7-8 (discussing forum shopping in the international bankruptcy context as compared to that in the U.S.: “Forum shopping within the United States is tame in comparison with what goes on internationally.”)

<sup>119</sup> *Id.* at 207-209.

total Universalist system, where a central court's substantive law would apply to all cases equally. But he is too quick to dismiss the steps the model law and Chapter 15 have taken to combat forum shopping efforts in crossborder insolvency cases, namely COMI.

LoPucki applies his two main critiques of the domestic venue statute to COMI, calling it both indeterminate and easily changed by the debtor.<sup>120</sup> First, he says that courts, in a desire to attract large cross-border cases, will enthusiastically accept a debtor's assertion that COMI lies within the court's jurisdiction.<sup>121</sup> This, he says, will be done by courts giving effect to whichever standard of COMI will allow them to keep the case, be it location of incorporation, headquarters, administrative employees and operations, or assets.<sup>122</sup> This argument assumes COMI is permissive in the way the U.S. domestic venue statute is. It is not. As Professor Westbrook pointed out in his response to LoPucki's book, "in most cases just one jurisdiction will be plausible as the debtor's COMI."<sup>123</sup> Westbrook goes on to explain that, "rarely will the local jurisdiction fit [under the COMI standard] unless it is the place of executive administration or of the major economic activity of the company."<sup>124</sup> Where more than one location is put forward as the debtor's COMI, the emphasis should be on the debtor's true center of economic activity where it is ascertainable

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<sup>120</sup> *Id.* at 226. Professor LoPucki has a third criticism of COMI – how the determination should be made as applied to a corporate group. The authors recognize this is a concern, but have put it aside for now as it is beyond the scope of this paper. If the reader is interested, Professor LoPucki's criticism of corporate group COMI treatment can be found in his book on pages 221-226, and thoughtful responses by Judge Bufford, *supra* n. 158 at 135-138 and Prof. Westbrook *The Last Hurrah of Territorialism*, 41 *Tex. Int'l L.J.* at 332-335 help round out the issue.

<sup>121</sup> *Id.* at 219.

<sup>122</sup> *Id.*

<sup>123</sup> *The Last Hurrah*, *supra* n. 182 at 331.

<sup>124</sup> *Id.*

to third parties, and courts have adopted rules to cut away the chaff and get at that true center. Indeed, the Model Law anticipated problems with inconsistent interpretation of its provisions and answered by encouraging jurisdictions to look to one another for guidance. Courts have done that in their interpretation of COMI, consistently denying a determination of main recognition to any location that is not the true center of the debtor's global economic activity.<sup>125</sup>

Next, Professor LoPucki charges COMI as being readily changeable by the debtor. For proof of this assertion, he points to the ease with which a corporation can change their place of incorporation or headquarters, and says that even the location of assets and operations can be changed without actually moving the assets or operations.<sup>126</sup> But the COMI standard is meant to be a substantive inquiry into the debtor's true center. It is not merely a box to be checked. All of the relevant factors of economic activity are evaluated when determining COMI. The courts do not review only the place of incorporation or headquarters. They do not consider one factor in favor of another. A COMI determination views the debtor's activities in aggregate, so that shifting operations does not change the analysis, nor will it be enough, alone, to tip the entire COMI scale to the desired forum. Judges will readily recognize when a debtor is moving its headquarters or place of incorporation merely to manipulate forum.<sup>127</sup>

Some commentators are less critical of forum shopping in crossborder

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<sup>125</sup> See e.g. *Bear Stearns*, *supra* n. 5 at 130 (denying recognition of the Cayman Islands proceeding because it was not the location where the debtor conducted its interests on a regular basis "and, more specifically, [not] where principal interests, assets and management are located.").

<sup>126</sup> *Courting Failure* *supra* n. 173 at 229.

<sup>127</sup> *The Last Hurrah*, *supra* n. 182 at 331.

insolvency, advocate increased autonomy in a debtor's choice of forum. As the U.K. court wrote in *Shierson v. Vlieland-Boddy*, "a debtor must be free to choose where he carries on [his] activities" further commenting, "it is a necessary incident of the debtor's freedom to choose . . . that he may choose to do so for a self-serving purpose" and "at a time when insolvency threatens."<sup>128</sup> *Shierson* involved an individual debtor who filed bankruptcy after the U.K. courts entered a judgment against him in the amount of two million pounds. The debtor, who had previously lived in the U.K., claimed his center of main interests had shifted to Spain prior to the bankruptcy proceedings. The *Shierson* creditors argued that the correct COMI was in the U.K., as that was the COMI at "the time at which the debt [was] incurred" and should be given regard "because that is the time at which the creditors need to assess the risks of insolvency."<sup>129</sup> The *Shierson* court placed the COMI in Spain, finding the debtor had truly shifted his center to Spain.<sup>130</sup>

While a debtor must be free to locate his business where he pleases, there must also be some restraint. First and foremost, a debtor cannot be free to deliberately change locations at a time when he is gravely financially distressed or insolvent in search of favorable bankruptcy laws, a point which even the *Shierson* court recognized.<sup>131</sup> Second, there must be some ongoing business activity for a debtor to legitimately shift its COMI; otherwise there is nothing to be shifted. Finally, any shift must happen pre-insolvency, as COMI is measured by the debtor's economy activity before bankruptcy has been filed.

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<sup>128</sup> *Shierson v. Vlieland-Boddy*, [2005] EWCA Civ 974 at para. 55.

<sup>129</sup> *Id.* at para. 22.

<sup>130</sup> *Id.* at para. 29.

<sup>131</sup> *Id.*

## V. The Two Current Timing Standards

The litigation of COMI centered on factors relevant to the COMI determination in the initial years after Chapter 15's enactment. However, less than a year after *Bear Stearns*, the Bankruptcy Court for the Southern District of Texas became the first court to rule on the date at which courts should look at such factors to determine a debtor's COMI.<sup>132</sup> Faced with an adversary proceeding regarding the main recognition of an individual insolvency proceeding, the court concluded that the debtor's center of main interests must have been located in Israel at the time of the petition for recognition for Israel to be the COMI.<sup>133</sup> The plain language argument emphasizing the present tense of the statute, and adopted later in *Fairfield*, is first presented in the District Court's *Ran* opinion; and later discussed again in the 5<sup>th</sup> Circuit's affirmation.<sup>134</sup> Despite the fact that *Ran* involved an individual insolvency proceeding, wherein COMI is determined using the distinct "habitual residence" standard, it was not long until other courts began applying the reasoning contained therein to situations involving corporate debtors.<sup>135</sup>

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<sup>132</sup> *In re Ran*, 390 BR 257 (Bankr. S.D. Tex. 2008).

<sup>133</sup> *Id.* at 300.

<sup>134</sup> *In re Ran*, 406 BR 277, 284-285 (S.D. Tex. 2008); *In re Ran*, *supra* note 7 at 1025.

<sup>135</sup> *See e.g. In re British Am. Ins. Co.*, 425 BR 884, 915 (Bankr. S.D. Fla. 2010). This result is notable mostly due to the fact that the concept of a center of main interests for an individual leads to the presumption that their COMI lies where their habitual residence is, as opposed to where they are incorporated as applies in the business context. 11 U.S.C. § 1516. In the United States, and the EU however, the term habitual residence requires intent to stay in that location indefinitely. *In re Ran*, *supra* note 7 at 1022 referencing *Acrdige v. Evangelical Lutheran Good Samaritan Soc'y*, 344 F.3d 444, 448 (5<sup>th</sup> Cir. 2003) and *Pinna v. Caisse d'Allocations Familiales de la Savoie*, [1986] E.C.R. 1 (EC) 1986 (France). Intent to remain located in one place for the indefinite future necessarily considers the debtors current and intended future residence, placing the COMI determination in the present tense. The same principles do not apply to the business presumption- place of incorporation. Incorporation is an event that happened in the past, and is largely irrelevant for purposes of current economic activity or intended future economic activity. Thus when dealing with a question of timing, the



Ultimately the issue found its way into the Southern District of New York. As with most issues in bankruptcy, the Southern District has been a leading voice on interpreting COMI and determining the appropriate time to which courts should look in ascertaining a debtor's COMI. Until early 2013 there was a distinct split within the Southern District regarding the timing of the COMI determination. Bankruptcy courts decided the issue in two distinct ways – in favor of a determination as of the underlying proceeding and in favor of a determination as of the date of the petition for recognition.<sup>136</sup> Then in April of that year the Court of Appeals for the Second Circuit handed down a decision in *In re Fairfield Sentry Ltd.* finding the appropriate time for a COMI determination as the day of the petition for recognition.<sup>137</sup> Though the *Fairfield* decision resolved the inner-circuit split, the discussions contained in both *Fairfield* and *Millennium* are valuable as insights into the two schools of thought regarding the timing decision and the policy considerations underlying both positions. As the law in this area is in no way settled, and because the authors disagree with both determinations, we will examine each in turn.

#### **A. In re Millennium**

*In re Millennium* interprets Chapter 15 as dictating a COMI determination as of the date of the filing of the proceeding for which recognition is sought (the

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considerations relevant to an individual and a corporation are vastly different. No court has considered this in extending the time of petition for recognition consideration of COMI.

<sup>136</sup> See *In re Millennium Global Emerging Credit Master Fund Ltd.*, *supra* note 6 (aff'd by *In re Millennium Global Emerging Credit Master Fund Ltd.*, 474 B.R. 88 (S.D.N.Y., 2012)) (finding the COMI determination should be considered as of the date of the underlying proceeding); *Morning Mist Holdings Ltd. v. Kryz (In re Fairfield Sentry Ltd.)*, 440 B.R. 60 (Bankr. S.D.N.Y., 2010) (aff'd by *In re Fairfield Sentry Ltd.*, 2011 U.S. Dist. Lexis 105770 (S.D.N.Y., 2011)) (finding the COMI determination should be considered as of the date of the petition for recognition).

<sup>137</sup> 714 F.3d 127 (2<sup>nd</sup> Cir. 2013).

“underlying proceeding”).<sup>138</sup> The *Millennium* case arose out of the joint liquidation of a master and feeder fund incorporated in Bermuda.<sup>139</sup> After the liquidators (trustees if you will) discovered asset valuation discrepancies, they filed a Chapter 15 petition for recognition of the Bermudan proceeding to compel discovery from US entities.<sup>140</sup> Judge Gropper, in recognizing the Bermudan litigation as a foreign main proceeding, took the case as an opportunity to discuss the date at which to determine a debtor’s COMI. In support of an underlying proceeding time determination, Judge Gropper makes six distinct conclusions: (1) the plain language does not mandate a determination of the date of the petition for recognition as the operative time; (2) the term ‘center of main interests,’ and its history, support a finding of the underlying proceeding time; (3) legislative history does not support a change to the date of the petition for recognition; (4) UNCITRAL’s Guide to Enactment indicates that the drafters intended the time to be the time of the underlying proceeding; (5) using the date of petition for recognition can have results contrary to the underlying policy of Chapter 15; and (6) using the date of the petition for recognition facilitates forum shopping.<sup>141</sup>

Many courts that ruled on COMI and timing prior to *Millennium* concluded primarily that the plain language of the statute requires a timing determination as of the date for the petition of recognition.<sup>142</sup> Courts so holding focus on the present

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<sup>138</sup> *In re Millennium*, supra note 6 at 76.

<sup>139</sup> *Id.* at 65.

<sup>140</sup> *In re Millennium Global Emerging Credit Master Fund Ltd.*, 474 B.R. 88, 91 (S.D.N.Y., 2012).

<sup>141</sup> *In re Millennium*, supra note 6 at 72-76.

<sup>142</sup> See e.g., *In re Ran*, supra note 7 at 1025-26; *In re Betcorp*, supra note 6 at 291-92; *In re Fairfield Sentry, Ltd.*, 440 B.R. 60, 66 (Bankr. S.D.N.Y. 2010).

tense phrase “*have* the center of main interests.”<sup>143</sup> In *Millennium* Judge Gropper rejected that argument for failure to explain the assumption that ‘has its center of main interests’ mandates a determination that the petition date controls.<sup>144</sup> The more relevant time for consideration of COMI, Judge Gropper found, is the date of the filing of the underlying petition.<sup>145</sup> Not only does the language of the statute permit such an interpretation, but also notably the filing of a Chapter 15 petition is “a matter of happenstance.”<sup>146</sup> Implicitly, he reasoned, the precise time at which a coincidental event occurs should not govern such an important determination – one that could prevent recognition, undercut efficiency, and limit creditor recovery.

Judge Gropper laid out five additional reasons supporting his departure from previous interpretations of the COMI determination. He began with the term ‘center of main interests’ itself, explaining that Professor Westbrook had previously instructed that the term ‘center of main interests’ is essentially synonymous with ‘principal place of business,’ but that the drafters chose to keep COMI in chapter 15 to accurately reflect the Model Law.<sup>147</sup> He reasoned that, when examined against this background, it becomes evident that the drafters intended the time of the filing of the underlying proceeding to be operative.<sup>148</sup> Debtors no longer have a principal place of business once liquidation begins.<sup>149</sup> Of course, this reasoning ignores the fact that many businesses in the US reorganize and continue to have a principal

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<sup>143</sup> 11 U.S.C. § 1502(4)

<sup>144</sup> *Millennium*, *supra* note 6, at 72.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* (referencing Jay Lawrence Westbrook, *Chapter 15 at Last*, 79 Am. Bankr. L. J. 713, 719-20 (2005)).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

place of business; however, most other countries do not have reorganization schemes as permissive as the U.S. in this regard.<sup>150</sup> He concluded that the drafters therefore could not have contemplated that most businesses would continue to have a principal place of business when they file for recognition and accordingly, they could not have intended that courts consider the COMI of the business as of the time for the petition for recognition.

Judge Gropper found additional support by considering the definition of ‘foreign proceeding’ prior to enactment of Chapter 15, which defined a foreign proceeding as “a proceeding...in a foreign country in which the debtor’s...principal place of business or principal assets were located at the commencement of the proceeding, but which is convened for the purpose of liquidation...or reorganization.”<sup>151</sup> Despite Chapter 15’s changes to the definition of a foreign proceeding, nothing implies any intention to alter the timing of the COMI determination.<sup>152</sup>

Legislation in the European Union further bolstered Judge Gropper’s determination. In the European Union, there is no procedure for recognition of a foreign case; foreign courts (within the EU) must automatically recognize other

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<sup>150</sup> *Id.* at 73 (citing Christopher G. Paulus, *Global Insolvency Law and the Role of Multinational Institutions*, 32 *Brook. J. Int’l L.* 755, note 18 (2006-2007); Terrence C. Halliday, *Legitimacy, Technology, and Leverage: The Building Blocks of Insolvency Architecture in the Decade Ahead*, 32 *Brook. J. Int’l L.* 1081, 1094 (2007); UNCITRAL on Insolvency Law, U.N. Pub. Sales. No. E.05.V.10 (2005), available at [http://www.uncitral.org/pdf/english/texts/insolven/05-80722\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf)

<sup>151</sup> *Millennium*, *supra* note 6 at 73 (quoting 11 U.S.C. § 101(23) (1990)).

<sup>152</sup> *Id.*

proceedings.<sup>153</sup> Thus, Judge Gropper reasoned, the only point in time where the COMI matters would be as of the date of the underlying proceeding.<sup>154</sup>

Policy wise, Judge Gropper determined that considering the COMI determination as of the time of the underlying proceeding eliminates two potential risks arising from a determination as of the petition for recognition. First, a COMI determination as of the underlying proceeding avoids a situation, which some have termed the “black box,” where US courts deny recognition of a proceeding as either foreign main or non-main.<sup>155</sup> Second, a COMI determination as of the petition date encourages forum shopping in a way that consideration at the time of the underlying proceeding does not.<sup>156</sup>

Determination of COMI as of the date of the Chapter 15 petition for recognition can result in pushing debtors into a black box where they move their operations after filing for bankruptcy but before petitioning for recognition.<sup>157</sup> When a debtor moves its operations during the interim period before filing a petition for recognition, a COMI determination as of the date of the petition for recognition necessarily results in a determination that an insolvency proceeding in a jurisdiction, that perhaps was at the COMI at the time of the initial bankruptcy filing, is not currently a foreign main proceeding. If courts further find there is not

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<sup>153</sup> *Id.* at 74.

<sup>154</sup> *Id.* (referencing *Re Collins & Aikman Corp. Group*, [2005] EWCH (Ch) 1754, ¶ 39, 2005 WL 4829623; *Shierson v. Vlieland-Boddy*, [2005] EWCA Civ. 974, [2005] W.L.R. 3966 (2005)).

<sup>155</sup> *Id.* at 75. *See also* Travis Bayer, *Destroying Chapter 15's "Black Box,"* 31 *Quinnipiac L. Rev.* 85 (2013) (discussing how chapter 15 and the COMI determination land many ‘mailbox’ companies in a situation (the “black box”) where they cannot get recognition in the United States as either a foreign main or non-main proceeding).

<sup>156</sup> *Id.*

<sup>157</sup> *See, e.g. In re Ran, supra* note 7 (denying petitions for recognition in an individual case, where the debtor moved from Italy to the US after his bankruptcy filing).

sufficient “establishment” to deem the proceeding foreign non-main, foreign representatives may be shut out of the jurisdiction altogether.<sup>158</sup> Such a result undermines the Universalist goals implicit in Chapter 15’s enactment, and essentially shields foreign creditors from recovery against US assets.<sup>159</sup> Considering the COMI as of the filing of the underlying proceeding avoids this entire issue.

Judge Gropper additionally reasons that determining COMI as of the time of the filing for a petition of recognition encourages forum shopping by giving recognition to a change of residence in the interim between the filing of the underlying bankruptcy and the petition of recognition.<sup>160</sup> *In re Ran* discussed this potential issue, and there the court claimed it would reach a different result had the debtor filed his petition immediately after arrival in the United States.<sup>161</sup> Again, using the date of the filing of the underlying proceeding as the benchmark against which to determine where a debtor’s COMI lies discourages forum shopping, rather than encourages it.

On the basis of these considerations, Judge Gropper granted the petition for recognition of the Bermudan insolvency proceeding as a foreign main proceeding. The District Court for the Southern District of New York affirmed his decision in 2012.<sup>162</sup>

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<sup>158</sup> Bayer, 31 Quinnipiac L. Rev. at 112.

<sup>159</sup> *Id.*; *Millennium*, *supra* note 6 at 75.

<sup>160</sup> *Millennium*, *supra* note 6 at 75.

<sup>161</sup> *Id.* citing *In re Ran*, *supra* note at 1026.

<sup>162</sup> *In re Millennium Global Emerging Credit Master Fund Ltd.*, 474 B.R. 88 (S.D.N.Y., 2012).

## B. In re Fairfield Sentry

When Bernie Madoff tumbled, so did his largest feeder fund, Fairfield Sentry.<sup>163</sup> Fairfield Sentry entered into liquidation proceedings in the British Virgin Islands (BVI) in July 2009.<sup>164</sup> Shortly thereafter, a shareholder sought recovery in New York for alleged breach of duty by the fund's directors.<sup>165</sup> Pursuant to a BVI order, and most likely with knowledge that a U.S. bankruptcy proceeding would result in imposition of the automatic stay; Fairfield filed for foreign main recognition of the BVI proceedings in the bankruptcy court for the Southern District of New York.<sup>166</sup> The bankruptcy court granted foreign main recognition to the BVI proceeding and so one of the Sentry shareholders, Morning Mist, appealed the ruling to the district court.<sup>167</sup> The district court affirmed the bankruptcy court's determination, so Morning Mist again appealed the COMI determination to the Court of Appeals for the Second Circuit.<sup>168</sup> The Second Circuit again affirmed, finding Fairfield's COMI to be in the BVI, and the appropriate time for the COMI determination to be the date of the petition for recognition.<sup>169</sup> The Second Circuit considered the text of the statute, other federal courts, and international sources when deciding the proper date for the COMI determination.<sup>170</sup>

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<sup>163</sup> *Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 130 (2<sup>nd</sup> Cir. 2013).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 132.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 140.

<sup>170</sup> *Id.* at 133.

The court first looked to the text of the statute, emphasizing Congress' choice to use present tense verbs.<sup>171</sup> Because courts frequently look to Congress' verb choice as an indication of statutory interpretation, the Second Circuit argued that the use of present tense in Section 1517(b) implied Congressional intent for the COMI determination to occur as of the date of the petition for recognition.<sup>172</sup> Section 1517(b) states: "(b) such foreign proceeding shall be recognized – (1) as a foreign main proceeding if it *is pending* in the country where the debtor *has* the center of its main interests."<sup>173</sup> The court reasoned that the verb "has" requires courts to look at the debtor's current center of main interests, implying a COMI determination date of the date of the petition for recognition.<sup>174</sup> As further support, the court found the phrase "is pending" to contemplate a proceeding that has already begun, meaning that the statute does not allow a determination of COMI as of the date of commencement of the underlying proceeding.<sup>175</sup> From this, the Second Circuit concluded that the plain language of the statute demands a court to consider COMI as of the date of the petition for recognition.

Next, the Second Circuit turned to the analysis of other federal courts to support their determination. Though the Fifth Circuit is the only circuit court to have decided the question of timing, the Second Circuit noted that almost every federal court to consider the question likewise decided that the COMI determination

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<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> 11 U.S.C. § 1517(b)(1) (emphases added).

<sup>174</sup> See *In re Fairfield*, *supra* note 7 at 134 (discussing the present tense requirement, and rejecting an invitation to consider operational history in a COMI determination).

<sup>175</sup> *Id.*



should be considered as of the date of the petition for recognition.<sup>176</sup> The Fifth Circuit summarily rejected arguments that COMI should consider a debtor's operational history by pointing to other look-back periods included in the Bankruptcy Code.<sup>177</sup> They reasoned that the absence of a look-back provision in Section 1517, in light of prior inclusion in the Bankruptcy Code, implied that Congress did not anticipate that courts would use such an approach in the COMI determination.<sup>178</sup> Furthermore, as a policy matter, allowing a look-back period could result in "a denial of recognition in a country where a debtor's interests are truly centered, merely because he conducted past activities in a country at some point well before the petition for recognition was sought."<sup>179</sup> Both the Second and Fifth Circuits found such a result untenable.<sup>180</sup> Both courts were also persuaded by the argument that the ascertainability of a debtor's COMI to third parties would be undercut if the COMI inquiry required consideration of the debtor's operational history.<sup>181</sup>

The Second Circuit next discussed *In re Millennium's* decision that the COMI determination be made as of the date of the commencement of the underlying proceeding. Referencing the bankruptcy court's discussion of substituting principal place of business for COMI and citing to Professor Westbrook's article on the subject, the Second Circuit argued that their (contrary) view flowed from the cited

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<sup>176</sup> *Id.*

<sup>177</sup> *Id.* (citing *In re Ran*, *supra* n. 7 at 1025 (5<sup>th</sup> Cir. 2010); 11 U.S.C. § 522(b)(3)(A)).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* (quoting *In re Ran*, *supra* n. 7 at 1025).

<sup>180</sup> *In re Fairfield*, *supra* note 7 at 134; *In re Ran*, *supra* note 78 at 1025.

<sup>181</sup> *Id.*

discussion.<sup>182</sup> They further reasoned that Congress' choice to include COMI rather than the term "principal place of business" indicated an intentional departure from the traditional principal place of business consideration<sup>183</sup> such that Congress clearly did not intend courts to engage in consideration of a debtor's operational history.<sup>184</sup> The court in *Fairfield* also remained unmoved by *Millennium's* appeal to the prior Section 304 of the Bankruptcy Code. It noted that, while the prior definition of foreign proceeding contained in Section 101(23) may guide which factors are relevant to a COMI determination, its subsequent abandonment by Congress makes it irrelevant in determining the time courts should look at to determine COMI.<sup>185</sup>

As its final consideration the court turned to international interpretations. While looking at international interpretations generally is not very persuasive authority, Chapter 15 specifically instructs courts to consider international considerations.<sup>186</sup> Section 1508 says, "in interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions."<sup>187</sup> In accordance with this instruction, the court naturally turned to the UNCITRAL Guide and its reference to the European Union Convention on Insolvency Proceedings.<sup>188</sup> The EU Convention defines COMI as "the place where

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<sup>182</sup> *Id.* referencing *In re Millennium*, *supra* note 6 at 72 and Westbrook, *Chapter 15 at Last*, *supra* note 14 at 719-720.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 135-136.

<sup>186</sup> *Id.* at 136.

<sup>187</sup> 11 U.S.C. § 1508.

<sup>188</sup> *In re Fairfield*, *supra* note 7 at 136.

the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.”<sup>189</sup> The court pointed out that the emphasis on a debtor’s administration on a regular basis may indicate a broader time frame is relevant, but did not find such an interpretation likely or persuasive.<sup>190</sup> They concluded that because the EU automatically requires recognition, foregoing any formal recognition process like that of the United States, any analogy between the two systems was wanting.<sup>191</sup> This difference in recognition process combined with the European courts’ focus on a COMI’s ascertainability to third parties and regularity led to a finding by the Second Circuit that any EU interpretations of COMI was of “limited use” to the U.S. timing debate.<sup>192</sup>

The Second Circuit thus resolved their inner-circuit split in favor of a timing determination as of the date of the petition for recognition. The court noted that courts may consider the time period between the filing of the underlying proceeding and the filing of a petition for recognition if there was some concern that a debtor had manipulated its COMI in bad faith.<sup>193</sup> Notably absent from the decision was any word in consideration of the potential of the arrived upon timing consideration to invite forum shopping activity by debtors.

### **C. Issues with the Second Circuit’s Determination**

The Second Circuit’s determination that the COMI analysis should be considered as of the time of the filing of the petition for recognition is problematic.

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<sup>189</sup> *Id.* (citing Council Regulation (EC) No 1346/2000 of 29 May 2000, Preamble ¶ 13.)

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 137.

<sup>193</sup> *Id.*

Specifically, a determination as of the date of the petition for recognition undermines major policy goals underlying Chapter 15 in general and the COMI requirement more specifically. Furthermore, the plain language of Section 1517 does not mandate a determination as of the date of the petition for recognition.

### **i. Policy Arguments**

In interpreting a provision of a statute, we should keep in mind the purpose with which the statute was enacted. As discussed in section II above, Chapter 15 and the COMI determination were enacted for several reasons: to minimize forum shopping, to ensure certainty of legal process, to maximize the debtor's assets, and to equitably address creditors' interests. With this background in mind, the Second Circuit's decision falls short. Considering where a debtor's COMI is as of the date of the petition for recognition encourages forum shopping and minimizes certainty of the legal process. When these two policy goals are undermined, the other two lay vulnerable also.

In order to properly consider these policy arguments it is necessary to establish the ease with which multinational corporations, the corporations to which Chapter 15 most often applies, can change their locations. Professor LoPucki illustrates this process using several examples, two of which – *Singer* and *Derby Cycle* – will be discussed here.<sup>194</sup> *Singer* began as a U.S. based company, but was purchased by a Chinese company in 1989, which subsequently changed the company's incorporation to the Netherlands Antilles and its headquarters to Hong

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<sup>194</sup> Lynn M. LoPucki, *Global and Out of Control?*, 79 Am. Bankr. L.J. 79, 98-101 (Winter 2005).

Kong.<sup>195</sup> Ten years later, when it needed to file bankruptcy, 75% of Singer's employees were located outside of the US.<sup>196</sup> Despite this, Singer's management wanted to file bankruptcy in the United States, so they recruited a CEO in New York and made New York their headquarters.<sup>197</sup> Singer faced a few more hurdles and ended up essentially creating a U.S. company, transferring all of its assets to the new company, bankrupting itself.<sup>198</sup> This allowed Singer to file in the United States.

Derby Cycle Corporation's achieved the same result by selling its principal assets, located in the Netherlands, prior to filing bankruptcy.<sup>199</sup> The remainder of the assets were mostly located in the United States, thus the US parent company was able to file bankruptcy in the US, despite the fact that the subsidiary was operated out of England.<sup>200</sup> These examples show the ease with which an international corporation can shift its assets and operations in search of a favorable venue for insolvency proceedings.

### *1. Forum Shopping*

Forum shopping comes at a cost. What the debtor seeks to gain from favorable laws equally injures creditors. Economically the cost to creditors comes in the form of undermining their expectations of the potential risks in lending.<sup>201</sup> In a broader sense, the unpredictability of lending risks may lead to overall increases in the cost of credit.<sup>202</sup> Politically, these and further costs may accrue to unwilling

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<sup>195</sup> *Id.* at 98.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 98-99.

<sup>199</sup> *Id.* at 101.

<sup>200</sup> *Id.* at 101.

<sup>201</sup> Andrew B. Dawson, *Offshore Bankruptcies*, 88 Neb. L. Rev. 317, 323 (2009).

<sup>202</sup> *Id.*

creditors such as employees, judgment creditors, tort victims, and trade creditors.<sup>203</sup> These groups are least able to protect themselves, and therefore are often protected by the very legal protections the debtor is seeking to avoid.<sup>204</sup> Costs increase when debtors choose a haven jurisdiction as their forum.<sup>205</sup> Companies that seek protection under the laws of haven jurisdictions generally prop up the economies of those jurisdictions; those courts therefore have little incentive to express concern for the unwilling creditors or other vulnerable groups.<sup>206</sup>

Speaking in hypotheticals, as lawyers are trained to do, one can imagine a situation in which a company (we'll call it Company X) files for bankruptcy in a haven jurisdiction. After filing, Company X moves its headquarters to the haven jurisdiction. Later, once Company X has ceased any economic activity beyond that related to the insolvency proceeding, Company X files a petition for main recognition of the haven proceeding. Under *Fairfield's* logic this may in fact pass. *Fairfield* does provide for consideration of the time period between filing of a proceeding and the petition of recognition if the debtor has relocated.<sup>207</sup> Perhaps such a consideration can prevent this manipulation of the COMI determination, but if determining a debtor's COMI as of the date of the petition for recognition will open the gates to forum shopping such that courts need to look back at the interim

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<sup>203</sup> *Id.* at 323-324 (citing Lynn M. LoPucki, *Global and Out of Control?*, *supra* n. 194 at 102-103).

<sup>204</sup> *Id.* at 323.

<sup>205</sup> *Id.* at 324.

<sup>206</sup> *Id.*

<sup>207</sup> *In re Fairfield*, *supra* note 7 at 137.

period, would it not make more sense to determine COMI as of the date of the underlying proceeding in the first instance?<sup>208</sup>

## 2. *Certainty and Predictability of Legal Process*

Certainty and predictability of legal process are important policy considerations underlying Chapter 15. When sophisticated creditors lend to companies, their decision to extend credit and the terms of that credit reflect their calculation of the overall risk contained therein.<sup>209</sup> Underlying this risk calculation is the question of what possible recovery arises from potential default; this question hinges on the substantive law that will decide it. When dealing with global corporations, certainty of legal process is undermined when a creditor's perception of where the debtor's COMI is ends up being drastically different than where the courts determine it is. This situation successfully arises in cases where debtors forum shop for favorable substantive laws.

Furthermore, predictability and certainty of legal process are undermined when different courts determine that a debtor's COMI is in different jurisdictions. If a debtor's COMI is determined by looking at factors occurring at the time the petition for recognition is filed, it is possible that two or more courts may come to different conclusions as to where a debtor's COMI is.

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<sup>208</sup> It is important that we recognize existing scholarship indicating a decline in haven jurisdiction filing. Evidence indicates that upon the decision in *Bear Stearns*, haven filing slowed. See *Offshore Bankruptcies*, *supra* note 201 at 337-338 (finding one haven filing in the year follow *Bear Stearns*); Westbrook Empirical, *supra* n. 95 at 112 (reporting that "haven filings as a percentage of total Chapter 15 filings have fallen from more than a third (37%) prior to *Bear [Stearns]* to less than 10% since that decision.") While this result is certainly interesting, the authors question whether a sufficient amount of time has passed in which to conclude there will be a consistent reduction in haven jurisdiction filings. On the heels of a major, and surprising, legal decision it is no wonder that filings cooled. However, as with any other legal doctrine, lawyers will find a new way to attempt to avoid a seemingly unfavorable decision.

<sup>209</sup> Obviously this is a simplification of the vastly complicated banking system.

Consider Company X. After filing for bankruptcy in a haven jurisdiction, but before moving their headquarters to that haven, the foreign representative, under pressure from a large creditor, brings a petition for recognition in England. The English court, applying their strong presumption in favor of place incorporation as the COMI, denies the petition for recognition of a foreign main proceeding, but grants the proceeding as a foreign non-main proceeding. Company X doesn't want to lose their petition again so they subsequently re-incorporate and move their headquarters to the haven jurisdiction. They then file a petition for recognition in the United States. Under the *Fairfield* test, the courts may grant a petition for main recognition of the haven jurisdiction proceeding. Under *Millennium*, however it is much more likely that Company X's COMI will be determined to be equivalent of that found by the English court.

### 3. *Fairly and Equitably Address Creditors' Interests*

Determining COMI as of the day of the petition for recognition further fails to equitably and fairly address creditors interests. The forum shopping activity invited by timing the determination as of the petition does not equitably address creditor interests. As noted above, forum shopping tends to harm unwilling creditors because the forum has no interest in protecting employees or tort creditors outside of its country.<sup>210</sup> Debtors also forum shop to achieve some perceived benefit not

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<sup>210</sup> *Offshore Bankruptcies*, supra note 201 citing Jay Lawrence Westbrook, *Locating the Eye of the Financial Storm*, 32 Brook. J. Int'l L. 1019, 1031 (2007) ("One great source of abuse with havens, of course, is that they regulate conduct that has no effect on the regulating jurisdiction or its citizens, so they are free to accept results that no polity would be likely to permit as applies to its own citizens or its own economy.")



available in their natural forum, and in a bankruptcy case where there is only so much money to go around, any benefit for the debtor comes at a cost to a creditor.

Creditor interests are managed by risk considerations made before extending credit. Such considerations are subverted by the debtor's ability to change the factual predicate of that risk. Of course, debtors can and should freely be allowed to change their business center, but there is something particularly offensive about a debtor manipulating the laws effecting a bargained for risk on the eve of the fruition of that risk, and this at a time when the debtor is likely to be the only person in possession of information indicating how imminent the risk is.

The fact that conducting a COMI determination as of the date of the filing of the petition for recognition can result in a black box – where a foreign representative is unable to receive recognition for a proceeding as either main or nonmain – and further fails to fairly and equitably protect creditors' interests. Though, as the court in *Bear Stearns* indicated in dicta, the debtor may still be able to receive recognition as a plenary case,<sup>211</sup> other courts question their authority to do so.<sup>212</sup> When a debtor is shut out of a forum entirely, the creditors have no recourse in their home courts or against assets in their home country. Such a result can hardly be deemed to fairly and equitably address creditors' interests. In fact, many of the creditors may be unsophisticated enough, or have claims small enough, that seeking recourse in a haven jurisdiction is impossible or economically inefficient.

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<sup>211</sup> *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd.*, 374 B.R. 122, 132 (Bankr. S.D.N.Y. 2007), *aff'd* 389 B.R. 325 (S.D.N.Y. 2008).

<sup>212</sup> *Destroying Chapter 15's "Black Box"*, *supra* note 119 at 112 citing *United States v. J.A. Jones Constr. Grp., LLC*, 333 B.R. 637, 639 (E.D.N.Y. 2005).

Thus, such a result allows debtors to manipulate the law to the direct detriment of their most vulnerable creditors.

The likelihood of a black box is exacerbated by determination of the COMI as of the petition date. While the potential for a black box is most often seen in cases such as *Bear Stearns*, where there is a “mailbox” company, there is also the very real possibility that a black box will occur where a debtor files in its COMI as of the date of the original bankruptcy, and subsequently winds down operations in an effort to move their COMI to another forum. Determining the COMI as of the date of the petition for recognition thus exacerbates the potential for a black box situation, undercutting an equitable consideration of creditor interests.

## **ii. Textualism and Its Failure**

### *1. Textualism Considerations*

The final policy consideration helpful in determining the timing of the COMI determination is the statutory interpretation standard of textualism, as the current standard governing COMI timing was significantly influenced by textualist ideals.<sup>213</sup> Textualism is the idea that the words written by Congress and codified into law should be read to mean exactly what they say. The textualist believes that “[t]he text is the law, and it is the text that must be observed.”<sup>214</sup> Quoting Justice Holmes, the textualist says, “We do not inquire what the legislature meant; we ask only what

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<sup>213</sup> See e.g. *In re Fairfield*, supra note 100 at 133-134 (“The present tense suggests that a court should examine a debtor's COMI at the time the Chapter 15 petition is filed”); *In re Ran*, supra n. 7 at 1026 (“Congress's choice to use the present tense requires courts to view the COMI determination in the present, i.e. at the time the petition for recognition was filed.”); *In re British Am. Investments*, supra n. 99 at 910 (“This phrase is stated in the present tense.”).

<sup>214</sup> Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A Matter of Interpretation: Federal Courts and the Law*, 22 (Amy Gutmann ed., 1997).

the statute says.”<sup>215</sup> Originally textualism permitted some exceptions to this rule, allowing courts to depart from the statutory text where the text led to an absurd result or resulted from a scrivener’s error.<sup>216</sup> Over time, textualists have grown more militant in their insistence the text be read for its plain meaning, coming to eschew the belief “that the goal of statutory interpretation is to identify the objective meaning of statutory text without regard to what any legislator intended that text to mean.”<sup>217</sup>

Textualism presents a problem when one considers the nature of jurisprudence in a common law system wherein the law of interpretation is judge-made law. A judge is called upon to use their judgment in both the interpretation and application of statutory text. If a simple reading of the language of a statute were sufficient, then we would need English majors on the bench -- not judges. However, a simple reading of the statute may not always be sufficient. The members of Congress are human, and as such they sometimes make mistakes. For example, in the Class Action Fairness Act of 2005 (CAFA) Congress drafted a portion of the statutory text in error.<sup>218</sup> A plain reading of the language of the statute says that a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not **less** than 7 days after

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<sup>215</sup> Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. Pa. L. Rev. 117, 123 (2009).

<sup>216</sup> *Id.* at 121.

<sup>217</sup> *Id.* at 119.

<sup>218</sup> CAFA §4(a), 28 U.S.C. §1332(d) (2006); Four years after the original adoption of CAFA, Congress fixed the error discussed herein, effective December 1, 2009. *See* Statutory Time-Periods Technical Amendments Act of 2009, Pub. L. No. 111-16, §§6(2), 7, 123 Stat. 1607, 1608-09 (codified at 28 U.S.C. §1453(c)(1)).

entry of the order.<sup>219</sup> The statute seems to make clear that an appeal cannot be filed for at least 7 days, but in reality the language Congress meant to adopt was exactly the opposite, that the district court's ruling could be appealed provided the appeal was taken not **more** than seven days after entry of the order.<sup>220</sup> Congress passed the statute to expedite the appeals process and avoid delays, yet the language as written effectuated the opposite.<sup>221</sup> The Congressional record explicitly emphasized that Congress's intent in adopting CAFA was to develop a body of appellate law interpreting the legislation without unduly delaying the litigation of class actions."<sup>222</sup> Had a strict textualist interpretation been performed on the statute, the result would have been completely contrary to the intended purpose of the legislation. Such conflicts are one of the central reasons judges are asked to use their judgment in interpreting statutory language.

Textualism alone cannot be relied upon to consistently provide the correct result to statutory interpretation. It is not uncommon for both sides to claim plain language in a dispute over statutory interpretation.<sup>223</sup> Occasionally the court itself is even split along these lines. One judge may write an opinion citing textualism's "plain meaning" creed as the rationalization for his decision, while another judge in the same case will reach an opposite conclusion claiming his interpretation is the true plain meaning of the words at issue. A prime example of the confusion arising

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<sup>219</sup> CAFA, *supra* n. 86 at §4(a).

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> S. Rep. No. 109-14, at 49 (2005)

<sup>223</sup> Robert J. Gregory, *Overcoming Text in an Age of Textualism: A Practitioner's Guide to Arguing Cases of Statutory Interpretation*, 35 Akron L. Rev. 451, 466 (2002).

from textualism in this context is Section 521(2)(A) of the United States Bankruptcy Code.<sup>224</sup> In pertinent part, that section reads:

(A) within thirty days after the date of the filing of a petition . . . the debtor shall file with the clerk a statement of his intention with respect to the retention or surrender of such property and, **if applicable**, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property; . . .<sup>225</sup>

While the language seems simple, this section has been the subject of serious and frequent disagreement regarding the obligation of debtors not in default on secured consumer loans, who wish to retain the property without formally reaffirming the agreement with secured creditors.<sup>226</sup> Debtors and creditors have urged a variety of plain language interpretations of this statute, and courts in various jurisdictions have issued judgments using many of them.<sup>227</sup> This statute arguably presents an extreme example, but it is illustrative of the fact that plain language is rarely plain enough on its face to fully support a decision. If it were, judicial intervention would not be necessary.

Further complicating the ability of textualism to provide a consistent or reliable method of statutory interpretation on its own is the nature of the English language, which often lends a dual meaning to text. A prime example of a case in

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<sup>224</sup> 11 U.S.C. §521(2)(A) (2000) (emphasis ours).

<sup>225</sup> *Id.*

<sup>226</sup> Scott B. Ehrlich, *The Fourth Option of Section 521(2)(A)—Reaffirmation Agreements and The Chapter 7 Consumer Debtor*, 53 Mercer L. Rev. 613, 614 (2002)

<sup>227</sup> *See Id.* at 640-673 (detailing the various “plain language” interpretations of §521(2)(A).

which the text can have dual plain meanings is *Limtiaco v. Camacho*.<sup>228</sup> There the Supreme Court was attempting to decipher the meaning of the words, “tax valuation.”<sup>229</sup> Attorneys for both sides presented the Court with arguments that the language meant either assessed value or, alternatively, appraised value.<sup>230</sup> Justice Souter, writing for four justices, concluded that if he were denied consideration of purpose and limited to textualism as a means of interpretation “a coin toss would be [his] only way of judgment.”<sup>231</sup>

A better system would be one that neither ignores the text nor regards the text as simply being the law, independent of the intent behind it, because “in rare cases the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters, and those intentions must be controlling.”<sup>232</sup>

## 2. *Textualism Applied*

Proponents of a COMI determination as of the date of the petition for recognition frequently appeal to the present tense language of the statute – notably “*is pending*” and “*has* its center of main interests.”<sup>233</sup> We find Judge Gropper’s arguments regarding interpretation of the text to be quite persuasive. The significance of the present tense language “is pending” is readily dismissed. The statute reads: “Such foreign proceeding shall be recognized as a foreign main

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<sup>228</sup> 549 U.S. 483 (2007).

<sup>229</sup> *Id.* at 492.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 493.

<sup>232</sup> *Id.* at 123; *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)

<sup>233</sup> *See e.g. In re Fairfield*, *supra* note 100 at 133-134 (“The present tense suggests that a court should examine a debtor’s COMI at the time the Chapter 15 petition is filed”); *In re Ran*, *supra* n. 7 at 1026 (“Congress’s choice to use the present tense requires courts to view the COMI determination in the present, i.e. at the time the petition for recognition was filed.”); *In re British Am. Investments*, *supra* n. 99 at 910 (“This phrase is stated in the present tense.”).

proceeding if it is pending in the country...”<sup>234</sup> The phrase “is pending,” modifies ‘proceeding’ not ‘the center of its main interests’; and thus has no implication on the timing of COMI. Furthermore, when a foreign representative files a petition of recognition, there will always be a proceeding presently pending- otherwise there would be nothing to recognize. The statute does not require that the proceeding be pending at the time of the COMI determination, as the Second Circuit implies, but merely requires that the proceeding be pending at the time of the petition for recognition.

Likewise, the phrase “has the center of its main interests” relates to the foreign proceeding. The entire statute consists of a rubric against which to judge whether the proceeding should be recognized as foreign main. The proceeding is currently pending at the time of consideration of a petition for recognition, and the proceeding has been pending in the past as well. Where a statute is concerned with events that have happened in the past, the use of the present tense does not necessitate a present timing determination.<sup>235</sup> The use of the present tense “has” in Chapter 15 does not thus automatically mandate the court consider the center of main interests as of the moment of the petition.

The Supreme Court considered a similar issue in their interpretation of the Armed Career Criminal Act (ACCA) in *McNeill v. United States*.<sup>236</sup> The ACCA defines a serious drug offense as one “for which a maximum term of imprisonment of ten

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<sup>234</sup> 11 U.S.C. § 1517(b)(1).

<sup>235</sup> See e.g. *McNeill v. United States*, 131 S. Ct. 2218, 2222 (2011) (holding that the present tense verb usage in the Armed Career Criminal Act does not mean that courts must consider the current statutory sentences).

<sup>236</sup> *Id.*

years or more is prescribed by law.”<sup>237</sup> The petitioner in *McNeill* argued that the present tense of the verb “is” required that the court look at the maximum term of imprisonment for each prior crime as of the time of the sentencing for the current crime, “as if the state offense were committed on the day of the federal sentencing.”<sup>238</sup> The Supreme Court rejected this argument as overlooking the fact that the “ACCA is concerned with convictions that have already occurred.”<sup>239</sup> The Court further appealed to the broader context of the statute and the absurd result should the petitioner’s position be adopted.<sup>240</sup>

Here also, Chapter 15 is concerned with a proceeding that is already pending. Adopting the timing decision in *Fairfield* requires courts to consider the debtor’s COMI as if the underlying bankruptcy proceeding just began. The broader context of Chapter 15 clearly counters against this position. Considering Chapter 15’s express mandate to consider international usage and attempt to apply the sections of Chapter 15 in a similar manner as other sovereigns,<sup>241</sup> and coupling that mandate with the indicated intent of the drafters<sup>242</sup> and the EU Regulation on Insolvency,<sup>243</sup> it becomes evident that the statute does not contemplate a COMI determination as of the date of the petition for recognition.

#### **D. How Does Millennium Fare?**

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<sup>237</sup> 18 U.S.C. § 924(e)(2)(A)(i).

<sup>238</sup> *McNeill v. United States*, 131 S. Ct. at 2222.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at 2222-2223.

<sup>241</sup> 15 U.S.C. § 1508.

<sup>242</sup> See e.g., Westbrook, *supra* n. 14 at 719-720 (2005) (articulating the drafters’ understanding that “center of main interests” was essentially equivalent to “principal place of business” concept in the United States, but that the authors forwent using the familiar term in order to keep the statute as identical to the Model Law as practical).

<sup>243</sup> Council Regulation (EC) No. 1346/2000, Art. 3 ¶ 1 (May 29, 2000)



*Millennium* fares significantly better than *Fairfield* when measured against the policy considerations underlying the enactment of Chapter 15. However, troublesome issues still arise. Notably, determining the debtors COMI as of the date of the underlying proceeding still allows for forum shopping activity by debtors. Furthermore, the certainty of legal process may still be undermined under a COMI determination as considered in *Millennium*. On the other hand, creditors' interests are more fairly and equitably addressed. For these reasons, a COMI determination as of the date of the underlying proceeding represents a more desirable option when compared to a determination as of the date of the petition for recognition.

However, a COMI determination as of the date of the underlying proceeding still affords debtors significant opportunities to forum shop. Just as a debtor may change his incorporation, center of operations, or headquarters after the filing of the underlying petition for bankruptcy, it may change its incorporation, center of operations, or headquarters in anticipation of the filing of the underlying proceeding. The *Millennium* determination therefore does not sufficiently protect against forum shopping activity.

Additionally, a COMI determination as of the date of the underlying proceeding may still undermine the certainty of legal process. This is especially the case where forum shopping occurs for the same reasons articulated in the discussion of *Fairfield* above. Fortunately, the chance that COMI determinations will differ among various courts vanishes when the consideration occurs as of the date of the underlying proceeding. However, the issue may still arise due to the difference between the U.S. considerations in determining a debtor's COMI and

other country's considerations.<sup>244</sup> The U.S. tends to look at more than a debtor's place of registration when considering where the center of main interests is located.<sup>245</sup> Other jurisdictions, most notably the European Union, rely heavily on the Model Law presumption that the place of incorporation is the center of main interests.<sup>246</sup> This discrepancy may result in differing COMI determinations in different jurisdictions, which tend to undermine certainty of legal process.<sup>247</sup> Certainty implies that each court should make an identical determination of the debtor's center of main interests – one located in the place where the debtor's actual center lies. Conflicting decisions can undermine certainty and lead to inefficiency in risk consideration, in turn increasing the cost of credit.

Finally, determination of the COMI as of the date of the underlying proceeding may still fail to fairly and equitably address creditors interests, as anytime a statute leaves open a significant avenue for forum shopping, creditor interests will not be fairly or equitably addressed.

## **VI. A New Standard: Date of Most Recent Economic Activity**

The timing standards used by the courts in *Fairfield* and *Millennium* are flawed in both their adherence to the policy goals central to COMI and their ability to deter manipulation of venue through forum shopping. It is critically important that COMI's focus remain on economic activity of the debtor, therefore a more

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<sup>244</sup> Anthony V. Sexton, *Current Problems and Trends in the Administration of Transnational Insolvencies Involving Enterprise Groups: The Mixed Record of Protocols, the UNCITRAL Model Insolvency Law, and the EU Insolvency Regulation*, 12 Chi. J. Int'l L. 811, 827 (2012).

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 827, 831 (citing *Eurofood IFSC Ltd.*, 2006 ECT 1-3813); Samuel L. Bufford, *Center of Main Interests, International Insolvency Case Venue, and Equality of Arms: The Eurofood Decision of the European Court of Justice*, 27 NW J. Int'l L. & Bus. 351, 357 (2007).

<sup>247</sup> Sexton, *supra* n. 245 at 827.

appropriate time for the COMI determination would be that of the debtor's most recent substantial business activity. This brings the focus of the COMI inquiry back to those activities that drive U.S. COMI jurisprudence and, while not foolproof, will be less susceptible to manipulation by the debtor.

From the early days of Chapter 15 the courts have treated business activity as a central tenet in determining the location of a debtor's COMI. Initially the court interpreted COMI as equivalent to the concept of a "principal place of business" in U.S. law.<sup>248</sup> The idea of a principal place of business presupposes that there is some sort of business being carried on, and it is this business activity to which the COMI inquiry looks. The court developed a list of factors to help in locating COMI -- all center around the debtors economic activity.<sup>249</sup> Furthermore, the process for rebuttal of the presumption of Section 1517(b)(1) revolves around the economic activities of the debtor.<sup>250</sup> Even in Europe, where the presumption of COMI being at the location of incorporation is much stronger than it is here in the U.S., the presumption may still be overcome "in the case of a 'letterbox company not carrying out any business in the territory of the Member State in which its registered office is situated."<sup>251</sup> Non-main recognition is a lower standard, which affords a debtor less benefit yet expressly requires an establishment for the "conduct of non-transitory business."<sup>252</sup> Again, economic activity is the focus of even this lesser inquiry. Economic activity is the foundation of COMI, its very heart and soul.

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<sup>248</sup>*In re Tri-Continental Exchange Ltd.*, 349 B.R. at 633-34.

<sup>249</sup> See *In re SPhinX, Ltd.*, *supra* n. 3 at 117.

<sup>250</sup> See *Bear Stearns*, *supra* n. 5 at 129-130.

<sup>251</sup> *Eurofood*, *Supra* n. 8 at p. 18-19, ¶ 35.

<sup>252</sup> *Bear Stearns*, *supra* n. 5 at 131

Our proposal would look not to time as much as to economic activity.<sup>253</sup> Timing is not the appropriate focus of the COMI inquiry. It creates functional problems and misses the point of the COMI analysis. Functionally, if no activity exists, then a COMI determination cannot be made at present as there can be no “center of main interests” when there is no legitimate business activity. Timing the determination as of the date of the most recent significant business transaction reformulates the focus of the question from “when” to “where,” with the where focusing on that business activity of the debtor which is necessary for establishment of COMI.

When COMI is timed at either the Chapter 15 filing or the underlying petition date, it allows the debtor to manipulate the result by winding up global economic activity before filing. Conducting the COMI inquiry at a time when business activity has ceased throws COMI off balance and cripples it of its purpose – which is to place the insolvency proceeding in the venue where the debtor had its home and was ascertainable to creditors when it was economically viable. Shifting the determinative date to that of the most recent substantial business activity will ensure that the resulting inquiry looks to true economic activity, the goal of COMI.

Furthermore, when the COMI determination is redirected to focus on the most recent substantial business activity it will better effectuate the broader policy goals of Chapter 15. Creditor interests will be better preserved because the COMI will be placed in the location where the debtor was ascertainable by third parties

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<sup>253</sup> We believe time is the wrong question, but as the inquiry has been presented as one of time, we have framed our response to answer in kind. Rather than time, our focus is on economic activity, and searching backward in time until that economic activity is located.

while economically viable. This will help lenders better evaluate credit risk of international debtors, which in turn will help stabilize credit prices and benefit the broader global economy.

Looking to the most recent significant business activity will also limit forum shopping activity by debtors. While no standard is perfectly immune to forum shopping, this proposal would be the least susceptible to manipulation by the parties. It need not be a “meandering and never ending inquiry into the debtor’s past interests” as the *Ran* court feared.<sup>254</sup> The inquiry would look back only far enough to find significant economic activity, and it should be easily located. Debtor records could be examined, and parties would be invited to testify. Likely one or more creditors or other interested parties to the insolvency proceeding would be involved in locating the last significant business activity as it “takes two to tango.” Therefore it would not just be the debtor’s assertion of activity, but would involve other parties with a stake in the case. This would encourage parties to accurately present business records, and would minimize a debtor’s ability to mislead the court. Less manipulation of venue will result in reduction of the cost of credit and increased confidence in dealings from which all players in the global marketplace will benefit.

There remains a question of what type of business activity will sufficiently meet the standard of “significant business activity.” This would be for the court to establish, but would need to be business activity which is related to the debtor’s industry, and not investment or real estate transactions (unless, of course, the

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<sup>254</sup> *In re Ran*, *supra* n. 96 at 1025.

debtor's business is investment or real estate). Likewise the business activity should not include transactions in preparation of insolvency proceedings or transactions that occur once insolvency has begun, as this would undermine the purpose of COMI.

Textualists may criticize this standard as perverting the plain language of Section 1517(b)(1). The text of that statute is drafted in the present tense, but as discussed above, there is ambiguity as to whether the present tense was used in adherence to the canons of statutory construction. If the present tense is to control, it is unclear whether the verbs "is" and "has" relate to the underlying bankruptcy proceeding for which recognition is sought or the Chapter 15 filing date. The revisions to the UNCITRAL guide strongly suggest the former.<sup>255</sup> Both the canons of statutory construction and the express language of the Model Law require that U.S. courts look to sources external to the statutory language to clarify the ambiguity within Section 1517(b)(1). Finally, looking to the most recent business activity would be an inquiry to the debtor's current COMI, as COMI cannot move unless the place from which the business conducts legitimate economic activity has also shifted, and for that to occur, there must be some economic activity being conducted.

Recently the EU has begun to face similar questions to those that arose in *Fairfield* and *Millennium*, and the EU courts have approached this as an inquiry into business activity rather than timing. EU courts refer to the issue as "COMI-shifting." In cases where a debtor has sought to shift COMI, the EU courts have focused on

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<sup>255</sup> Guide Revisions, *supra* n. 56 at 128B.

whether the shift was “genuine.”<sup>256</sup> To determine whether the shift of COMI was genuine, the EU court asks questions which focus on the debtor’s economic activity.<sup>257</sup> These questions are very similar to those developed by U.S. courts including the location of the debtor’s incorporation, location where the actual management and control functions are performed, location of main offices and bank accounts, location where the majority of creditors reside, and location where business activities are performed.

The EU has consistently emphasized that COMI must be readily ascertainable by third parties, in particular current and potential creditors.<sup>258</sup> The EU standard for a normal COMI determination is no different from one where the COMI has shifted.<sup>259</sup> If a debtor is able to prove they have legitimately moved their business operations to the new jurisdiction, a shift in COMI will be granted. Indeed, EU courts consider a debtor “free to re-locate [it’s] COMI, even on the eve of insolvency” as long as the move is one of substance and not “mere illusion.”<sup>260</sup> Importantly, the shift in COMI is allowed up to the eve of insolvency, but not after, emphasizing the pre-insolvency nature of COMI. And even while allowing a shift, the EU courts recognize that forum shopping is a real concern, such that evidence of a shift in

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<sup>256</sup> See *Sparkasse Hilden Ratingen Velbert v Horst Konrad Benk, The Official Receiver* [2012] EWHC 2432 (Ch), 29 August 2012 (court denied COMI shift when business had “no long-term prospect of economic survival” in the new jurisdiction) (hereinafter “Benk”); *Re Hellas Telecommunications (Luxembourg) II* [2010] BCC 295 (court recognized COMI shift after the petition because it had legitimately moved its head office and principal address to London, creditors were informed of the new address, a press release was issued, the company was registered in England under the Companies Act and the company opened a bank account in London);

<sup>257</sup> *Id.*

<sup>258</sup> *Shierson v Vlieland-Boddy* [2005] 1 WLR 3966, at para 55.

<sup>259</sup> *Id.* at para 6.

<sup>260</sup> *Benk, supra* n. 257 at para 19 (citing *Shierson v Vlieland-Boddy* [2005] 1 WLR 3966, at 3986A).

COMI will be scrutinized with extra care.<sup>261</sup>

For example, the E.U. court recognized a COMI shift in *Hellas Telecommunications*, where the debtor had moved from Luxembourg to the U.K. a mere three months before an administration order was granted.<sup>262</sup> The *Hellas* court's focus was not on the time of the determination, but on the debtor's economic activity.<sup>263</sup> Specifically the court looked at what economic activity had occurred, was occurring, and would occur in the future.<sup>264</sup> The *Hellas* debtor had moved its head office and principal assets to London, had re-incorporated in London, and had notified all of its creditors of its move.<sup>265</sup> The court found this to be proof of a substantive shift in COMI that was readily ascertainable by third parties.<sup>266</sup>

Conversely, EU courts have denied movement of the COMI into jurisdictions where a debtor lacks long-term prospects for economic survival.<sup>267</sup> This indicates that the main focus within the EU is not on the timing of the determination, but on the existence of business activity by the debtor. Indeed the idea of "timing" on which the U.S. courts have focused may be wrong question entirely.

To truly affect the goal of Chapter 15 and the Model Law of a globalized standard the U.S. rule should follow the EU's lead and look at the movement of a debtor's economic activity over time leading up the petition date to determine if a true shift of COMI has occurred. Where such a shift has occurred before insolvency proceedings begin, the court would perform an inquiry as to the substantive nature

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<sup>261</sup> *Id.* at para. 7.

<sup>262</sup> *Hellas Telecommunications*, *supra* n. 254 at 121.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Benk*, *supra* n. 257 at para 25(d).



of the shift, looking at the same factors now employed in locating COMI. If the shift was substantive, then it would be acknowledged and the new jurisdiction would be the debtor's COMI, haven or no. If, however, the shift was not substantive, meaning there was no movement of the location from which the debtor directs its economic activity (critically this would include instances where global economic activity has ceased at some point before the shift), then COMI would not be moved. This may not be a workable standard, however, as the U.S. courts have made the question one of timing. The best answer therefore lies in timing the determination as of the date of the most recent significant business transaction. Such an inquiry would capture the heart of the European rule, while allowing the U.S. courts to address timing as such.

Some may argue that any standard that chooses one particular date is subject to manipulation by the parties. While this is true, placing COMI at the date of most recent substantial business activity should minimize this effect. First, the requirement that the business activity be substantive should deter debtors from entering into business transactions merely to manipulate forum. Additionally, the requirement that the activity be related to active business would also preclude usage of real estate or other investment type transactions for COMI determination. The date would be terminated upon filing of the underlying insolvency petition so that DIP financing or asset disposal would not be employed or mistaken as a significant business transaction for the purpose of the COMI determination. In any event, the COMI would likely need to be placed before those events could occur. The point is that the debtor's business activity be the driver rather than the insolvency

proceeding or the preparation for such.

## **VII. CONCLUSION**

COMI is hardly a settled matter. Each time the courts resolve an issue, a new one arises in its place. The primary issue remaining to be settled is timing of the COMI determination. To correctly address the timing issue courts must look to the statutory language, policy goals of Chapter 15, and foreign interpretation of the issue. Courts have split in their determination of the correct point in time to evaluate COMI, but the prevailing standard is the date of the filing of the Chapter 15 petition. This standard is not mandated by the use of present tense in Section 1517(b)(1), is flawed in its adherence to the policy goals of Chapter 15, ignores foreign interpretation of the timing issue, and is readily manipulable by parties seeking favorable bankruptcy laws. Timing the determination as of the date of the underlying petition is somewhat better, but susceptible to the same criticisms.

The courts should adopt a standard that would determine COMI as of the date of the most recent significant business transaction. Such timing is consistent with the statutory language and policy goals of Chapter 15. It aligns with the decisions of foreign courts that emphasize business activity when forum is shifted, and is least easily manipulated by the parties to the insolvency proceeding.