

**CHAPTER 15 OF THE U.S.
BANKRUPTCY CODE:
NEW PROCEDURES FOR CROSS
BORDER INSOLVENCIES**

by

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The Bankruptcy Abuse, Prevention and Consumer Protection Act of 2005, which was signed into law in the United States on April 20, 2005 and became effective, for the most part, on October 17, 2005, creates a new chapter of the United States Bankruptcy Code (11 U.S.C. 101, *et seq.*, as amended) (the “Bankruptcy Code”)¹ – Chapter 15. Chapter 15 replaces or modifies previous Bankruptcy Code sections dealing with multi-national insolvency proceedings. Chapter 15 is entitled “Ancillary and Other Cross Border Cases,” and replaces existing Bankruptcy Code section 304 in dealing with cross border cases.

Chapter 15 is based on the Model Law on Cross Border Insolvency which had been prepared by the United Nations Commission on International Trade Law (UNCITRAL), with significant input from insolvency practitioners all over the world. *U.S. v. J.A. Jones Constr. Group, LLC*, 333 B.R. 637, 638 (E.D.N.Y. 2005). It was designed to create procedures for cooperation among foreign courts where insolvency proceedings are pending in more than one country and establish guidelines for the protection of assets internationally, while being sensitive to the political issues and differing legal systems of the countries involved. Any determination of a request for assistance under Chapter 15 must be “consistent with the principles of comity².” 11 U.S.C. § 1507; *see J.A. Jones*, 333 B.R. at 638.

Chapter 15 establishes more detailed procedures and, in certain instances, expands the rights of the foreign representative from those previously provided under section 304. Chapter 15 follows the UNCITRAL model law by expressly encouraging cooperation and communication between courts handling cross border cases. 11 U.S.C. § 1525. While most courts in the U.S. and other countries have effectively utilized cross border protocols and cooperation agreements, some have been reluctant to do so without express statutory authority. Chapter 15 further establishes procedures and recommendations for communication and cooperation between U.S. case trustees and examiners, their foreign counterparts and the foreign court. 11 U.S.C. §§ 1526 and 1527.

A Chapter 15 case is commenced by the filing of a petition seeking recognition of a foreign proceeding by a foreign representative. 11 U.S.C. § 1504. Some of the highlights of new Chapter 15 are summarized below.

GENERAL PROVISIONS

Chapter 15 is designed so that the recognition procedure is the gateway to a foreign representative’s access to state and federal courts in the United States on behalf of

¹ Unless otherwise indicated, all citations to sections of the Bankruptcy Code contained herein are to those sections as they exist after October 17, 2005.

² “Comity,” in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws. *Hilton v. Guyot*, 159 U.S. 113, 163-64, 16 S.Ct. 139, 143 (1895).

a foreign debtor. Venue is limited to the district in which the debtor has its principal place of business in the United States.

Both foreign and domestic creditors have the same rights regarding commencement and participation in a Chapter 15 case. However, Chapter 15 does contain special notification procedures for foreign creditors and enables the court to provide additional time for foreign creditors to file proofs of claim. 11 U.S.C. § 1514. With the exception of foreign insurance companies, the limitations on who may be a debtor, as set forth in 11 U.S.C. § 109, still apply. 11 U.S.C. § 1501(c).

SECTION 109

Section 109 of the Bankruptcy Code defines who may be a debtor under the various chapters of the Bankruptcy Code. Section 109(a) provides that a person may be a debtor under the Bankruptcy Code if the person "resides or has a domicile, a place of business, or property in the United States" 11 U.S.C. § 109(a). Although a "person" is defined generally as an individual, partnership, or corporation, 11 U.S.C. § 101(41), other legal entities have also been found to be a "person" and thus an eligible debtor. *See e.g., In re Midpoint Dev., LLC*, 313 B.R. 486 (Bankr. W.D. Okla. 2004) (concluding that a state limited liability company is a "person" and thus an eligible debtor). Foreign corporations are therefore generally eligible for relief under the Bankruptcy Code.

Chapter 15 expressly incorporates the limitations of Section 109(b) as to who may seek relief under Chapter 15. 11 U.S.C. 1501(c). Under Section 109(b), any person is eligible for relief under Chapter 7 (liquidation) except for railroads, insurance companies, and certain banking institutions. 11 U.S.C. § 109(b). Any person eligible for relief under Chapter 7, except for stockbrokers or commodity brokers, may file for relief under Chapter 11, the business reorganization bankruptcy sections. 11 U.S.C. § 109(d). *See In re Agency for Deposit Ins., Rehabilitation, Bankruptcy and Liquidation of Banks*, No. 03 Civ. 9320(JSR), 03 Civ 9321(JSR), 2004 WL 414831 (S.D.N.Y. Mar. 4, 2004) (noting that Yugoslavian bank was not eligible to be a debtor under Section 109). Chapter 15, however, does expand the category of eligible debtors, specifically stating that foreign insurance companies are now eligible for relief under Chapter 15. 11 U.S.C. § 1501(c).

To summarize, a foreign corporation that is not a railroad or a banking institution and that has a residence, domicile, place of business, or property in the United States can obtain relief under Chapter 15. Additionally, notwithstanding the proscription of Section 109, foreign insurance companies may also be debtors under Chapter 15.

Requirement of Domicile

A person that has a domicile in the United States may be a debtor under the Bankruptcy Code. A corporation's domicile is its state of incorporation. *Underwood v. Hilliard (In re Rimsat, Ltd.)*, 98 F.3d 956, 960 (7th Cir. 1996) (citing *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 588, 10 L.Ed. 274 (1839); Restatement (Third) of the Foreign Relations Law of the United States § 213 (1987)). Therefore, a foreign

corporation, incorporated in a foreign country, must have a residence, place of business, or property in the United States to qualify for relief under § 109. *See GMAC Inv. Funds Trust I v. Globo Comunicacoes e Participacoes S.A. (In re Globo Comunicacoes e Participacoes S.A.)*, No. 04 Civ. 2818(VM), 2004 WL 2624866, at *9 (S.D.N.Y. Nov. 17, 2004) (noting that foreign debtor with no residence or place of business in the U.S. may still qualify for relief under Section 109 if it has property in the U.S.).

Requirement of Residence

A person that resides in the United States may be a debtor under the Bankruptcy Code. Questions regarding corporate residence arise in a variety of diverse contexts such as jurisdiction, attachment, taxation, and bankruptcy, and must be treated individually in connection with the statutes in which the term is used. *Pennsylvania Ins. Guar. Ass'n v. Charter Abstract Corp.*, 790 F.Supp. 82, 85 (E.D. Pa. 1992). *See, e.g.*, 28 U.S.C. § 1391(c) (providing that "[f]or purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced.").

The concept of a corporation's "residence" is a slippery one, however, and bankruptcy courts that have considered petitions for relief by foreign debtors have grabbed on to the (somewhat) more concrete determination of whether the foreign corporation has a place of business or property in the United States. *See GMAC Inv. Funds Trust I v. Globo Comunicacoes e Participacoes S.A. (In re Globo Comunicacoes e Participacoes S.A.)*, No. 04 Civ. 2818(VM), 2004 WL 2624866, at *9 (S.D.N.Y. Nov. 17, 2004).

Requirement of Place of Business

A person that has a place of business in the United States may be a debtor under the Bankruptcy Code. Bankruptcy courts construing the place-of-business requirement for foreign debtors were given guidance by the early opinion of *In re Carnera*, 6 F.Supp. 267 (S.D.N.Y. 1933). In *Carnera*, an Italian boxer who frequently fought in the United States filed a voluntary petition in New York. For several months prior to the petition date, the debtor lived in a hotel where he received his mail, negotiated fights and exhibitions, paid trainers and sparring partners, and kept correspondence files and a typewriter used by his manager for business use. The court concluded that the hotel was the debtor's principal place of business for the greater part of the six months preceding the petition date: "It does not matter that there was no sign on the door or that there were no office boys moving around. [The debtor] and his staff had business, and the place where most of that business was carried on was his quarters at the Hotel Victoria." *Id.* at 269.

A case that followed *Carnera* in eschewing the notion that a debtor need have a formal place of business in the U.S. to qualify for bankruptcy relief was *In re Brierley*,

145 B.R. 151 (Bankr. S.D.N.Y. 1992).³ The debtor in *Brierley* was one of the many entities related to Maxwell Communication Corporation, which was the subject of dual insolvency proceedings in the United States and England. The debtor had an accountant working in the New York office of Arthur Anderson on behalf of the joint administrators of the Maxwell companies. The accountant worked in Arthur Anderson's offices and reported to a partner at Arthur Anderson. The accountant's employment agreement with the debtor deemed her an independent contractor, although that was done on the advice of tax attorneys. The debtor's name did not appear in the building directory or on any signs. However, the accountant worked full-time for the debtor, was paid by the debtor, communicated regularly with the debtor's personnel in England, and kept in her office certain books and records of the debtor. Moreover, the debtor's location in New York was widely broadcast to third parties having business with the debtor. Therefore, "by virtue of [the accountant's] continuous presence and employment and the substantial activities conducted here by [the debtor, the debtor] has a place of business in this district, notwithstanding that its premises are contained within the larger premises of Arthur Anderson." *Id.* at 162.

Recently, the court in *In re Paper I Partners, L.P.*, 283 B.R. 661 (Bankr. S.D.N.Y. 2002) discussed the place-of-business requirement. The partnership debtors were formed under the laws of Delaware and Turks and Caicos, respectively. The debtors, contesting involuntary Chapter 7 bankruptcies, argued that section 109 was not satisfied because their respective partnership formation agreements provided that their principal place of business was in Luxembourg; according to the debtors, only "administrative" functions were performed in the United States. The court first noted that the statute requires merely "a place of business" in the United States, not a "principal place of business" in the United States. Second, the incantation in the organization documents of Luxembourg as their place of business was not determinative. Each debtor operated through its general partner (the same entity), which conducted substantial, substantive business of the debtors in the New York office of the general partner. Both partnership debtors, therefore, were eligible to be debtors under the Bankruptcy Code by virtue of their having a place of business in the United States. *Id.* at 672-74.

Additionally, in *In re Spanish Cay Co., Ltd.*, 161 B.R. 715 (Bankr. S.D. Fla. 1993), a Bahamian corporation whose principal asset was an island in the Bahamas filed for Chapter 11 relief in Florida. The debtor's president sold island lots and island club memberships and conducted the advertising, marketing, and other business affairs of the debtor, all from a houseboat in Florida. The court held that the debtor qualified for relief under section 109 because, among other things, it had a place of business in the U.S. The court rejected a creditor's argument that the debtor's place of business should not be recognized under section 109 because the business was unlawful in that the debtor had failed to comply with applicable state laws regulating business entities: "This Court

³ The issue before the court was whether the eligibility requirements for section 109 also applied to a foreign debtor seeking relief pursuant to a section 304 ancillary proceeding. The court determined that they did not, but noted that even if section 109 applied to a section 304 proceeding, the debtor met those requirements. The court's comments, while dicta, are still instructive.

refuses to deny the debtor eligibility under Section 109 on these grounds."⁴ *Id.* at 721. The creditor also urged the court to deny section 109 relief on the ground that any advertising and marketing activities were actually conducted by affiliates of the debtor and not by the debtor itself. However, because the debtor "or" its related entities undoubtedly conducted business activities in Florida and because there was a "continuity of interest" between the debtor and the related entities, the debtor had a place of business in Florida. *Id.* at 721-22.

In *In re Global Ocean Carriers Ltd.*, 251 B.R. 31 (Bankr. D. Del. 2000), fifteen affiliated debtors were involved in the shipping industry and were headquartered in Athens, Greece. All but one of the debtors were incorporated in Cyprus, Singapore, or Liberia. To establish their eligibility for Chapter 11 relief, the Debtors presented evidence that, among other things, some of the Debtors' vessels visited U.S. ports on a regular basis. The court determined, however, that "[h]aving some business in the United States (and even being physically present in the United States for 30% of the year) is insufficient to constitute having a place of business in the United States." *Id.* at 37.

To summarize, a foreign corporation need not have a formal office or signs in the U.S. to have a place of business here. The cases thus far have found sufficient a corporation's having nontransitory employees or representatives conducting the company's affairs in the U.S. and representing that fact to third parties. A court may even treat related entities doing business here as one entity for purposes of section 109's place-of-business requirement.

Requirement of Property

A person that has property in the United States may be a debtor under the Bankruptcy Code. A foreign corporation with real property in the U.S. would have little difficulty demonstrating its entitlement to relief under section 109, as such property is both easily locatable and quantifiable. However, difficult questions still exist as what amount or form of tangible and intangible personal property is "sufficient" to warrant bankruptcy protection. Courts have conflicting answers to the question of what amount of property will suffice to warrant bankruptcy relief. *See e.g., In re Aerovias Nacionales de Columbia S.A. Avianca*, 303 B.R. 1 (Bankr. S.D.N.Y. 2003) (holding that a debtor was eligible under section 109 because the debtor (i) had offices in Miami, (ii) flew from Columbia to two U.S. airports (New York and Miami), (iii) leased its planes primarily from lessors who either were based or did substantial business in the U.S., (iv) had significant structured debt governed by N.Y. law, and (v) on any given day, had significant property in the U.S. in the form of airplanes and airport rights); *In re Head*, 223 B.R. 648, 651-52 (Bankr. W.D.N.Y. 1998) (holding that "no amount of doing business in the United States will, of itself, provide a basis for eligibility under section 109," and that a contingent claim in a trust fund held for the benefit of a third-party was "too tenuous, too inchoate, and too contrived" to satisfy the requirement of section 109);

⁴ Would an alien drug dealer conducting the "business" of selling cocaine in the U.S. qualify for relief under section 109?

In re McTague, 198 B.R. 428 (Bankr. W.D.N.Y. 1996) (holding that a debtor's intangible interest in \$194 held in a bank account in New York satisfied the requirement of section 109); *In re Kava Bowl*, 41 B.R. 244, 247 (Bankr. D. Haw. 1984) (holding that jurisdiction was lacking when the only property the debtor had in Hawaii was cash and accounting records that had no value to any entity other than the debtor).

In *In re Global Ocean Carriers Ltd.*, discussed previously in connection with the "doing business" requirement, the Court held that notwithstanding the lack of business operations in the United States, the debtors were still eligible to be debtors in a U.S. proceeding because the foreign corporate debtors had property in the United States in the form of funds in various bank accounts. The Court stated "[T]he bank accounts constitute property in the United States for purposes of eligibility under section 109 of the Bankruptcy Code, regardless of how much money was actually in them on the petition date."

Bank-account cases do raise some interesting issues: First, who has control over a bank account in a multi-state or multi-national bank? Only the branch office that the debtor visited or called when opening the account? For example, what if a Swiss debtor opened a bank account at the Zurich branch of Ameri-Swiss Bank. If the debtor may access his account at the Dallas office of Ameri-Swiss, the corporate headquarters where the bank is managed, may the debtor file for bankruptcy in Dallas?

One final query: What if a foreign debtor has no residence, domicile, or place of business in the United States, and no property in the United States except for the unearned portion of the retainer paid to American bankruptcy counsel shortly before the petition date? The *Global Ocean Carriers* case suggests that the retainer may be sufficient to establish § 109 eligibility. The foreign corporate debtors in that case argued that they were eligible for Chapter 11 relief because, among other things, they had an interest in the retainer paid by the debtors to the debtors' American bankruptcy counsel. The court was convinced:

We agree. The retainers were paid on behalf of all the Debtors and, therefore, all the Debtors have an interest in those funds. It is not relevant who paid the retainer, so long as the retainer is meant to cover the fees of the attorneys for all the Debtors, as it clearly was in these cases. Thus, we conclude that the Debtors do have sufficient property in the United States to make them eligible to file bankruptcy petitions under section 109 of the Bankruptcy Code.

In re Global Ocean Carriers Ltd., 251 B.R. at 39.

The foreign debtors otherwise qualified for relief pursuant to § 109 because they had other property in the United States, so the outcome of *Global Ocean Carriers* is unremarkable. But the proposition established by *Global Ocean Carriers* – that a mere retainer paid to American bankruptcy counsel is sufficient to establish section 109 eligibility – promises to expand exponentially the number of eligible debtors.

The Bankruptcy Court for the Southern District of Texas expanded the concept of sufficient property under section 109 even further in *In re Yukos Oil Company*. 321 B.R. 396 (Bankr. S.D. Tex. 2005). In that case, the debtor, Yukos Oil Company, (“Yukos”), filed a petition for relief under Chapter 11 of the Bankruptcy Code, despite the fact that it had no significant assets in the United States. *Id.* at 400. Yukos was headquartered in Moscow and its employees and the majority of its oil reserves were located in Russia. *Id.* However, Yukos had one employee in the U.S. Bruce K. Misamore, Yukos’ chief financial officer, had fled from Moscow and had conducted his duties as CFO from his home in Houston, Texas, since December 4, 2004. *Id.* at 402. In addition, mere hours before the bankruptcy petition was filed, Yukos incorporated a subsidiary named Yukos USA, Inc. (“Yukos USA”) in Texas. *Id.* Yukos then transferred approximately \$480,000 to Yukos USA’s bank account at Southwest Bank of Texas in Houston.⁵ *Id.* Yukos also had lenders and investors from outside Russia, including individual and institutional investors in the U.S.⁶

Although the *Yukos* case was ultimately dismissed under Section 1112(b) of the Bankruptcy Code⁷, the Bankruptcy Court rejected the argument that Yukos, as a foreign company, was not eligible to be a debtor under Section 109. The court reasoned that because nominal amounts of property have been deemed sufficient to establish standing under section 109, Yukos was eligible to be a debtor due to the funds deposited in its Texas bank account before the bankruptcy petition was filed. *Id.* at 406-07. Yukos supports the theory that even a *de minimis* presence in the United States can create jurisdiction under Section 109.

FOREIGN REPRESENTATIVE

Any “foreign representative” appointed in a “foreign proceeding” who is authorized to either administer the financial restructuring, liquidation or reorganization of a debtor’s assets, or is authorized to act as a representative in a foreign proceeding, is authorized to file a petition seeking recognition of the foreign proceeding in the United States. *See U.S. v. J.A. Jones Constr. Group, LLC*, 333 B.R. 637, 638 (E.D.N.Y. 2005). The minimal requirements for recognition of a foreign proceeding are some type of documentation or certification from the foreign court confirming the existence of the foreign insolvency proceeding and the authority of the foreign representative to act. *See In re Artimm, S.R.L.*, 335 B.R. 149, 158 (Bankr. C.D. Cal. 2005) (explaining that any petition for recognition must be accompanied by (1) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; (2) a

⁵ The \$480,000 represented the remainder of a \$1 million retainer that Yukos had transferred to its bankruptcy counsel, Fulbright & Jaworski L.L.P., after a deduction for services rendered.

⁶ Two groups of these non-Russian investors later filed pleadings in support of Yukos in the bankruptcy. *See id.* at 400-01.

⁷ The Bankruptcy Court concluded that Yukos’ “sheer size” as well as “its impact on the entirety of the Russian economy, weigh[ed] heavily in favor of allowing resolution in a forum in which participation of the Russian government is assured.” *Id.* at 411.

certificate from the foreign court establishing the existence of the foreign proceeding and the appointment of the representative; or (3) other acceptable evidence of the existence of the foreign proceeding and the appointment of the foreign representative). This is a less exacting standard than that which existed under prior section 304, which required some investigation into the nature and purpose of the foreign proceeding. While the definition of “foreign representative” has been modified somewhat in Chapter 15, the prior statute was interpreted broadly, and it is unlikely that the definitional changes will have much practical impact on who is a foreign representative.

DEFINITION OF FOREIGN PROCEEDING

While the definition of “foreign proceeding” has been expanded in Chapter 15, the expansion appears to be for purposes of clarification based on analysis of existing case law. A “foreign proceeding” is now a “collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purposes of reorganization or liquidation.” 11 U.S.C. § 101(23); *see J.A. Jones*, 333 B.R. at 638 n.2. Most notable changes in this definition from section 304 is that some type of court supervision of the foreign proceeding is expressly required, the reference to insolvency laws is broader than prior references to liquidation and debt adjustment, and the venue requirements of domicile, residence or principal place of business for the foreign proceeding are expanded to require only that the proceeding be filed in a foreign country (presumably to accommodate possible concurrent main and nonmain proceedings). These latter factors, however, continue to remain viable concepts in regards to the new definitions of main and nonmain foreign proceedings.

MAIN AND NONMAIN FOREIGN PROCEEDINGS

One of the most significant provisions of Chapter 15 adopted from the European Insolvency Regulation promulgated by the European Union (“EU”) is the concept of determining whether a foreign proceeding is a “main” or “nonmain” proceeding, that is the proceeding with primary control over the debtor and its estate. It is anticipated that the U.S. bankruptcy courts will apply tests similar to the “center of main interest” (“COMI”) or “establishment” tests used in the EU in determining whether a foreign proceeding is main or nonmain.⁸ However, while not meant to be a venue concept, the definitions of main and nonmain contained in Chapter 15 may create disputes similar to the venue disputes that have plagued Chapter 11 cases in the U.S.

Section 1502(4) provides that a “foreign main proceeding” is a foreign proceeding “pending in the country where the debtor has the center of its main interests.” Section 1516 provides the rebuttable presumption that the location of the debtor’s registered office is the center of its main interests. *See In re Artimm*, 335 B.R. at 159. Section 1502(5) defines a “foreign nonmain proceeding” as a foreign proceeding “pending in a

⁸ For more information on cases analyzing the “center of main interest” (“COMI”) or “establishment” tests visit www.eir-database.com.

country where the debtor has an establishment.” “Establishment” is defined in section 1502(2) as “any place of operations where the debtor carries out nontransitory economic activity.” How these definitions will be applied in cases where a parent corporation is registered in one country, but its operating subsidiaries are registered in different countries and have operations in several others, remains to be seen. One anticipates that courts will go through a similar factual analysis to that undertaken in venue disputes, looking at factors such as the extent of business operations in a given country, the number of employees, the location of most and/or major creditors, and the like.

U.S. Courts may also find guidance in the decisions of European Courts applying the similar European COMI and establishment standards. The issue of what qualifies as an entity’s COMI has been a contentious issue for European Courts. Primarily, courts have struggled with the question of how much weight they should give the presumption that a debtor’s COMI is the location of the debtor’s registered office.

Some courts have considered the location of the debtor’s registered office important despite evidence that could rebut the presumption. For example, in *Re Eurofood IFSC Ltd.*, the Irish High Court determined that Eurofoods, a subsidiary of the Parmalat group, had its COMI in Ireland, notwithstanding the fact that the parent entity clearly had its COMI in Italy. [2004] BCC 383 (High Court (Ireland)), *aff’d by* [2005] I.L. Pr. 2 (Supreme Court (Ireland)). The court based its decision on the fact that the company was registered in Ireland, conducted the administration of its business interests in Ireland, and third-party creditors were under the belief that they were doing business with an Irish company. Parmalat argued that Eurofoods’ COMI was in Italy, because Eurofoods was a wholly owned subsidiary of Parmalat formed for the sole purpose of financing other members of the corporate family, company policy was determined in Italy, and the company had no employees in Ireland. The Irish courts rejected Parmalat’s arguments, however, an Italian court disagreed with the findings of the Irish courts and determined that the debtor’s COMI was in Italy. Tribunale Parma (February 30, 2004).

This jurisdictional dispute between the Italian and Irish courts was referred to the European Court of Justice (ECJ), and on September 27, 2005, an advocate-general of the ECJ agreed with the Irish courts, determining that where a subsidiary is located is the critical question, not where its parent company is located. Opinion of Advocate General Jacobs, Case C-341/04, *Eurofood IFSC Ltd.* (September 27, 2005) The advocate general reasoned that “the fact of the parent company’s control is not sufficient to rebut the presumption . . . that the centre of main interest of a subsidiary company is situated in the [location] where its registered office is to be found.” *Id.* at ¶ 110.

In a May 2, 2006 ruling that has far-reaching implications for pan-European insolvencies, the ECJ agreed with the Irish courts and determined that the liquidation of Eurofood should be carried out under Irish law. According to the ECJ, when a debtor company carries out its business in the country where its registered office is located—as opposed to merely keeping a “letterbox” or post-office address for the company there—the fact that a parent company can or may control the debtor company from another country does not rebut the presumption that COMI lies where the debtor company’s

registered office is located. Judgment of the Court (Grand Chamber), Case C-341/04, *Eurofood IFSC Ltd.* (May 2, 2006).

Other courts have determined that the presumption that a debtor's COMI is the place of its registered office is not a particularly strong presumption. For example, in *Re Parkside Flexibes SA* (Ch.) (Combined Court, Quayside, Newcastle-upon Tyne), No. 75 (February 9, 2005), the court wrote that "there seems to be no reason to suppose that this presumption is a particularly strong one. It is rather, just one of the factors to be taken into account with the rest of the evidence which is before the court." *Id.* at ¶ 9. The court then proceeded to set forth what has been referred to as the "balance of probabilities test" to see if the presumption has been rebutted. The court asked itself "is [the company's COMI] more probably Poland or more probably England?" *Id.* at ¶ 32. After determining that the debtor's interests in both countries weighed equally, the court considered whether third-parties would consider the debtor's COMI to be England or Poland. *Id.* at ¶ 36. The court determined that while the evidence of where the debtor's interests were located weighed equally between Poland and England, the presumption was rebutted because third-party creditors were likely to believe the debtor was centered in England. This approach seems to offer little, if any, weight to location of the registered office of the debtor. *Id.* Even the court expressed that this decision was reached "by the narrowest of margins." *Id.* at ¶ 37.

In *Re BRAC Rent-A-Car Int'l*, High Court of Justice Chancery Division Companies Court, EWHC (Ch.) 128--0042/2003 (February 7, 2003), the court determined that the location of the registered office of the debtor was of little importance. The Court determined that although the company was registered in the United States, the COMI was in the United Kingdom. *Id.* at ¶ 31. The court based its decision on the fact that the company had been registered as a foreign company in the United Kingdom for many years and that the company's operations were almost completely run in the United Kingdom and almost all of its employees worked in the United Kingdom. *Id.* at ¶ 4.

In determining whether the presumption was rebutted, some courts have considered the effect the presumption would have on the interests of third-parties. In *Re Daisytek-ISA Ltd.*, [2003] BCC 562 (Chancery Division). In *Daisytek-ISA Ltd.*, a company was trading in the country in which it was registered but was, to a greater degree, controlled from a head office elsewhere. The court determined that the French and German subsidiaries of a United Kingdom company had their COMI in the United Kingdom. *Id.* at ¶ 14-18. The court reasoned that the majority of the subsidiaries' creditors knew that the registered office of the parent company was the location of the most important functions for the subsidiaries. *Id.* The court wrote that "the most important 'third parties' . . . are the potential creditors." *Id.* at ¶ 16.

In *Skjevesland v. Gevevan Trading Co. Ltd.*, [2003] BCC 209 (Chancery Division (Bankruptcy Ct)), [2003] BCC 391 (Chancery Division), the English courts emphasized that the most important considerations when determining a COMI were where the debtor conducted the administration of its business on a regular basis and where third-party creditors believed the debtor's COMI was located. The courts explained that the ability

of creditors to ascertain where the debtor is located should be of primary importance to courts in determining the locations of a COMI.

The determination of whether a foreign proceeding is main or nonmain dictates the extent to which certain relief can be granted and the extent of the rights granted the foreign representative. Section 1517(b) contemplates that a court will determine whether a foreign proceeding is main or nonmain if it enters an order granting recognition of the foreign proceeding. A petition for recognition should be determined at the earliest time possible. 11 U.S.C. § 1517(c).

EFFECT OF RECOGNITION OF A FOREIGN MAIN PROCEEDING

The relief available to a foreign representative under Chapter 15 upon recognition of a main foreign proceeding by the U.S. bankruptcy court is significantly greater than that which had been available under section 304 in that, with certain exceptions, the panoply of rights available under Chapter 11 become immediately available to the foreign representative. Additionally, the foreign representative of a main foreign proceeding has the option of filing a full voluntary Chapter 11 case, while the foreign representative of a nonmain foreign proceeding is limited to filing an involuntary Chapter 11 case.

In emergency situations, interim temporary remedies are available where necessary to protect “the assets of the debtor or the interests of the creditors.” 11 U.S.C. § 1519(a). These temporary remedies may include stays of execution, entrusting U.S. assets to the foreign representative, prohibiting or restricting asset transfers or encumbrance by the debtor and discovery rights. A foreign representative is no longer required to meet the extensive test contained in former section 304(c) such as just treatment of creditors, distribution of the estate in accordance with the absolute priority rule, comity and the like. However, section 1506 does permit the court to deny any relief that would be “manifestly contrary to the public policy of the United States.”

Chapter 15 seems to give courts greater discretion in fashioning relief while making the recognition of a foreign proceeding easier. An order of recognition grants the following relief: (i) automatic stay of actions against the debtor (subject to the limitations contained in section 362 of the Bankruptcy Code); (ii) secured creditors will be entitled to receive adequate protection akin to section 361 of the Bankruptcy Code; (iii) the foreign representative will be able to sue and be sued in the United States; (iv) the court will be able to order the examination of witnesses akin to a Rule 2004 examination; (v) the foreign representative may be permitted to administer and realize on some or all of the debtor’s U.S. assets. 11 U.S.C. §§ 1520 and 1521; *see J.A. Jones*, 333 B.R. at 638; *In re Artimm*, 335 B.R. at 159. Relief granted under section 1520 is automatic, where relief under section 1521 will only be granted if “the interests of the creditors and other interested entities, including the debtor, are sufficiently protected.” 11 U.S.C. § 1522(a). Additionally, any provisional relief granted under section 1519 prior to recognition automatically is extended upon entry of the order of recognition of the foreign proceeding.

Some limitations still exist. Most notably, the ability of the foreign representative to commence avoidance actions (actions for the recovery of preferences and fraudulent transfers) is limited to cases where a full Chapter 11 case is subsequently filed. Otherwise, avoidance actions are not within the powers granted a foreign representative under Chapter 15. Thus, one of the benefits of the determination that a foreign proceeding is a main proceeding is the ability to file for Chapter 11 and obtain avoidance powers.

AVAILABILITY OF ADDITIONAL ASSISTANCE

If recognition is granted under Chapter 15, courts also have the ability to “provide additional assistance to a foreign representative under [Title 11] or under other laws of the United States.” 11 U.S.C. § 1507(a). Chapter 15 does not specifically define additional assistance, but this provision could be interpreted to enable courts to fashion relief for foreign debtors far beyond that which is enumerated in sections 1519, 1520 and 1521. Some suggest that this section will preserve the ability of U.S. courts to apply case law under prior section 304 to “broadly mold appropriate relief.” See *In re Culmer*, 25 B.R. 621, 624 (Bankr. S.D.N.Y. 1982); Lawrence J. Westbrook, *Multinational Enterprises in General Default; Chapter 15, the ALI Principles, and the EU Insolvency Regulation*, 76 Am. Bankr. L.J. 1, 11 (2002) (“[Section] 304 case law that might otherwise be deemed withdrawn by a provision of the Model Law will remain available, as long as it increases, rather than decreases, the assistance given to the foreign court.”).

In determining whether additional assistance is appropriate, a court should take into consideration: (1) the just treatment of holders of claims against or interests in the debtor’s property; (2) the protection of claim holders in the U.S. against prejudice and inconvenience in the processing of claims in a foreign proceeding; (3) the prevention of preferential or fraudulent property dispositions; (4) the distribution of proceeds of the debtors’ property in accordance with the court order recognizing the foreign proceeding; and (5) the opportunity for a fresh start when applicable. 11 U.S.C. § 1507(b). The application of these factors to any particular case or circumstances should be consistent with the principles of comity. *Id.*

CONCURRENT PROCEEDINGS

Once a foreign proceeding is recognized in the United States, the foreign representative may file a case under Chapter 11 or Chapter 7 provided the debtor has assets in the United States. 11 U.S.C. § 1528. Subchapters IV and V of Chapter 15 provide somewhat detailed procedures for cooperation and coordination of the simultaneous proceedings, including determinations of insolvency, distribution of assets and coordination of rulings to prevent inconsistent rulings and results. *In re Artimm*, 335 at 159-60.

CASES INVOLVING CHAPTER 15

There is limited case law addressing the provisions and effect of Chapter 15. Only one published case has directly based its holding on the provisions of Chapter 15 since it became effective. In *U.S. v. J.A. Jones Construction Group, LLC*, the District Court for the Eastern District of New York received a request from a foreign receiver, appointed pursuant to an order of the Superior Court of Quebec, to stay a breach of contract suit pending in the District Court in accordance with Canadian law. 333 B.R. at 637-38. The court explained that it could not authorize the relief requested by the receiver, because “relief under Chapter 15 is available only after a foreign representative commences an ancillary proceeding for recognition of a foreign proceeding.” *Id.* at 638. The court additionally explained that if the receiver follows the proper procedures under Chapter 15 and the foreign proceeding is recognized as a foreign main proceeding, the request for stay would be unnecessary, as the automatic stay provided for in Chapter 15 would achieve the same result. *Id.* at 639. However, under the auspice of honoring the “comity that American courts should accord foreign bankruptcy proceedings,” the District Court temporarily stayed the breach of contract action for sixty (60) days to give the foreign representative an opportunity to seek relief under Chapter 15. *Id.*

Another case has addressed the provisions of Chapter 15, but only in *dicta*, as the case was filed before Chapter 15 became effective. In *In re Artimm, S.R.L.*, the Debtor had a bankruptcy case pending in Rome, Italy. 335 B.R. at 155. Rome was the location of the Debtor’s domicile and principal place of business. *Id.* The Italian trustee filed an ancillary proceeding under Section 304 in California state court in an attempt to avert a default judgment against the Debtor. *Id.* While Section 304 controlled the case, the court also considered its decision in light of the newly passed Chapter 15 of the Bankruptcy Code. *Id.* at 157. The court determined that because there is a presumption under Chapter 15 that a debtor’s center of main interest is where its registered office is located, because this Debtor’s registered office was located in Rome, and because no contrary evidence was presented, the proceeding in Rome would qualify as a foreign main proceeding under Chapter 15. *Id.* at 159. The court then explained that under Chapter 15, the automatic stay would apply with respect to the debtor and property of the debtor within the jurisdiction of the United States. *Id.* The court also discussed the possible effects of Sections 1520 and 1521. *Id.* at 159-60.

Several other courts have recognized foreign proceedings under Chapter 15 without published decisions.⁹ On December 8, 2005, in the case of *In re Tri Gem*, Case No. 05-50052, the Bankruptcy Court for the Central District of California entered an order recognizing a foreign main proceeding pending in Korea based on evidence that the Debtor’s main center of interest was in the Republic of Korea. The court recognized that its finding would initiate an automatic stay of actions against the Debtor and property of the Debtor.

The Bankruptcy Court for the Western District of Washington also recognized a foreign proceeding as a foreign main proceeding in *In re Ian Gregory Thow*, Case No.

⁹ For more information on the cases discussed in this section or to track new cases dealing with Chapter 15, visit www.chapter15.com/bin/chapter15_cases.

05-30432, on Nov. 10, 2005. The court noted that because virtually all of the Debtor's assets and creditors were located in British Columbia and because British Columbia was the location of the debtor's main interests, the Thow Canadian Bankruptcy Case was a foreign main proceeding pursuant to Chapter 15.

On December 7, 2005, the Bankruptcy Court for the Southern District of New York recognized a foreign main proceeding in the case of *In re La Mutuelle du Mans Assurances IARD, U.K. Branch*, Case No. 05-60100, available at 2005 WL 3764946. The court determined that the Debtor's center of main interest was located in England. As a result of its determination, the court noted that the foreign representative was entitled to all the relief set forth in Section 1520 of the Bankruptcy Code, and the court granted additional broad relief under Section 1521(a) and (b).

On April 13, 2006, a foreign representative of Yukos Oil Company ("Yukos") filed a Chapter 15 petition for recognition of a foreign proceeding pending in the Arbitrazh Court of the City of Moscow as a foreign main proceeding. *In re Yukos Oil Co.*, Case No. 06-10775 (Bankr. S.D.N.Y.). The foreign representative also filed an Application for an Order to Show Cause and Issue a Temporary and Preliminary Restraining Order. *Id.* On the same day, the court entered a temporary restraining order enjoining Yukos and its management from approving certain transactions without the prior consent of the foreign representative. *Id.* The court's temporary restraining order is effective until April 21, 2006. *Id.* All parties-in-interest have been instructed by the court to appear and show cause why a preliminary injunction should not be granted to further enjoin certain actions by Yukos and its management on April 21, 2006. *Id.*

Courts have recognized foreign proceedings as foreign main proceedings in several other cases.¹⁰ Additional Chapter 15 cases have been filed and should be considered by the courts in the coming months.¹¹

¹⁰ See *In re Moulin Global Eyecare Holdings, Ltd.*, Case No. 06-30018 (Bankr. N.D. Cal. March 3, 2006) (recognizing winding up proceedings in Hong Kong and Bermuda as foreign main proceedings); *In re Vekoma Int'l B.V., et al.*, Case No. 06-50151 (Bankr. W.D. Tex. March 2, 2006) (recognizing liquidation proceeding in the Netherlands as a foreign main proceeding); *In re Gestion-Privee Location L.L.C.*, Case No. 06-80071 (Bankr. M.D.N.C. February 24, 2006) (recognizing Japanese bankruptcy proceeding as a foreign main proceeding); *In re Trade & Commerce Bank*, Case No. 05-60279 (Bankr. S.D.N.Y. February 16, 2006) (recognizing liquidation proceeding ongoing in the Grand Court of the Cayman Islands as a foreign main proceeding).

¹¹ The following cases are currently pending in front of various Bankruptcy Courts: *In re New World Network Int'l, Ltd.*, Case No. 06-10157 (Bankr. S.D.N.Y.) (filed December 9, 2005 in aid of a winding up proceeding pending with the Supreme Court of Bermuda); *In re MuscleTech Research & Dev., Inc.*, Case No. 06-10092 (Bankr. S.D.N.Y.) (filed January 18, 2006 in aid of proceeding under Canada's Companies Creditors' Arrangement Act); *In re Young Chang Co, Ltd.*, Case No. 06-40043 (Bankr. W.D. Wash.) (filed January 13, 2006 in aid of proceeding under Korea's Company Reorganization Act).

CONCLUSION

Chapter 15 expressly provides that in interpreting this chapter, the courts shall consider its international origin and the need to promote its application consistent with the application of similar statutes adopted by foreign jurisdictions¹². 11 U.S.C. § 1508. The international aspects of the new law have received little attention outside of legal circles. The changes codified in Chapter 15 could make cross border filings easier to accomplish and multi-national cases easier to administer. This would result in significant benefits to the global economy in terms of financial market stability, saved jobs and stronger global companies.

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¹² For more information on cases analyzing similar statutes visit www.eir-database.com.