NATIONAL BANKRUPTCY CONFERENCE
A Voluntary Organization Composed of Persons Interested in the Improvement of the Bankruptcy Code and Its Administration

August 20, 2018

Honorable Tom Marino
Chairman
Subcommittee on Regulatory Reform,
Commercial and Antitrust Law
House of Representatives
Washington, DC 20515

Honorable Chuck Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Honorable David Cicilline
Ranking Member,
Subcommittee on Regulatory Reform
Commercial and Antitrust Law
House of Representatives
Washington, DC 20515

Honorable Dianne Feinstein
Ranking Member,
Committee on the Judicial
United States Senate
Washington, DC 20510

Re: Revisions to Chapter 15 of the Bankruptcy Code

Dear Reps. Marino and Cicilline and Sens. Grassley and Feinstein:

The National Bankruptcy Conference ("NBC") is a voluntary, non-partisan, not-for-profit organization composed of about 60 of the nation's leading bankruptcy judges, professors and practitioners. It has provided advice to Congress on bankruptcy legislation for nearly 80 years. I enclose a Fact Sheet which provides further information about the NBC. This letter updates a January 27, 2016 letter by adding more current information and authorities.

Chapter 15, Ancillary and Other Cross-Border Cases, was added to the Bankruptcy Code by section 801 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.[1] Chapter 15 is the United States embodiment and enactment of the Model Law on Cross-Border Insolvency ("Model Law") promulgated by the United Nations Commission on International Trade Law ("UNCITRAL"). The United States and forty four countries (plus two overseas territories of the United Kingdom) have adopted the Model Law.[2] NBC Conferees were actively involved in the development and drafting of the Model Law as members (International Insolvency Institute) and heads (United States and the International Bar Association) of delegations to UNCITRAL and then assisted Congress in drafting chapter 15.[3] As experience has developed in cases under

[1]House Report No. 109-31, Pt. 1, 109th Cong., 1st Sess. 105, *et seq* (2005) ("H. R. Rep.").

[2]*See* http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html.

[3]Conferee Professor Jay L. Westbrook was a head of the United States delegation to UNCITRAL Working Group V (Insolvency) while Conferee Daniel M. Glosband was the IBA's lead delegate. They also led a consulting group organized by the United States Department of State in drafting the legislation that was enacted by Congress as chapter 15.

chapter 15, the NBC has identified a number of revisions that are necessary or desirable for chapter 15 to fulfill its purposes, as set forth in section 1501(a), and to function and be interpreted in light of its international origin and consistently with the application of similar statutes adopted by foreign jurisdictions, as set forth in section 1508.

1. 11 U.S.C. § 103(a)

The rigid, ostensibly "plain meaning" interpretational approach taken by the Second Circuit in the *Barnet* decision discussed below raises the possibility that section 103 might be interpreted to prevent the application of several Bankruptcy Code sections that either apply by their terms in chapter 15 or are referenced in chapter 15 but are not specified in section 103(a). Section 103(a) provides:

> **11 U.S.C. § 103 Applicability of chapters**
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> (a) Except as provided in section 1161 of this title, chapters 1, 3, and 5 of this title apply in a case under chapter 7, 11, 12, or 13 of this title. This chapter, sections 305, 306, 307, 362(o), 555, 556, 557, 559, 560, 561 and 562 of this title and any section of this title specifically made applicable by a section of chapter 15 apply in a case under chapter 15.

Sections 305 and 306, as they now exist and as they would be amended by changes recommended below, apply to chapter 15 by their terms. They should be added to section 103(a).

Additional sections of the Bankruptcy Code apply in cases under chapter 15 because they are specifically referenced in chapter 15. Section 1502(c) refers to sections 109(b) and (e) to exclude entities identified in those sections from the scope of chapter 15. Section 1520 applies (with limitations) sections 361, 362, 363, 549 and 552.[4] We recommend the following revisions to address this problem:

> **11 U.S.C. § 103. Applicability of chapters**
>
> (a) Except as provided in section 1161 of this title, chapters 1, 3, and 5 of this title apply in a case under chapter 7, 11, 12, or 13 of this ~~t~~itle, ~~and this~~**. This** chapter**,** sections **305, 306,** 307, 362(o), 555, **556,** ~~through~~ 557, ~~and~~ 559**, 560, 561, and** ~~through~~ 562 of this title, **and any section of this title specifically made applicable by a section of chapter 15** apply in a case under chapter 15.

2. 11 U.S.C. § 103(k)

Section 103(k) identifies sections of chapter 15 that apply (a) in all cases under title 11 and (b) in situations when no case under title 11 is pending. It was intended to identify

[4] While section 1523 gives a foreign representative the power to initiate avoidance actions in a case concerning the debtor under another chapter of the Bankruptcy Code and references sections 522, 544, 545, 547, 548, 550, 553 and 724(a), those sections only apply in cases under chapters other than chapter 15. Consequently, while mentioned in chapter 15, they do not need to be added to the list of sections that apply in a chapter 15 case.

sections of chapter 15 that would apply even if there were no chapter 15 case but, in retrospect, it was not sufficiently comprehensive. Section 103(k) currently states:

11 U.S.C. § 103 - Applicability of chapters

(k) Chapter 15 applies only in a case under such chapter, except that—
(1) sections 1505, 1513, and 1514 apply in all cases under this title; and
(2) section 1509 applies whether or not a case under this title is pending.

The sections currently specified in section 103(k)(1) deal with authorization of a trustee or other entity to act in a foreign country (§ 1505), the rights of foreign creditors to participate in a case under title 11 (§ 1513) and notifications to foreign creditors concerning a case under title 11 (§ 1514). The section currently specified in section 103(k)(2) deals with access to courts in the United States by foreign representatives (§ 1509).

In addition to sections 1505, 1513 and 1514, sections 1511, 1523, 1531 and 1532 should apply to all cases under title 11 while section 1510 should apply generally, regardless of whether there is a case pending under title 11. These sections would appear to apply beyond chapter 15 based on their language and function, but they are not referenced in 11 U.S.C. § 103(k).

Section 1510, Limited jurisdiction, provides: "The sole fact that a foreign representative files a petition under section 1515 does not subject the foreign representative to the jurisdiction of any court in the United States for any other purpose." The provision was intended to protect against an extension of jurisdiction "beyond the boundaries of the case and any related actions the foreign representative may take …."[5]

Section 1511, Commencement of case under section 301, 302 or 303, empowers a foreign representative, upon recognition, to commence a case under other chapters of title 11. It must necessarily apply to the case commencement procedures for those chapters. For example, section 301 refers to a voluntary case under a chapter being commenced by an entity that may be a debtor under that chapter and makes no reference to the foreign representative of a recognized foreign main proceeding who may file such a petition by virtue of section 1511.[6]

Section 1531, Presumption of insolvency based on recognition of a foreign main proceeding, literally creates this presumption for the purposes of an involuntary petition filed under section 303 and must apply in such a case.

Section 1532, Rule of payment in concurrent proceedings, replaced former section 508(a) and was intended to apply generally, regardless of whether there is a chapter 15 proceeding.[7] The language follows the Model Law and is designed "to avoid situations in which

[5] H.R. Rep. at 111.

[6] *Id.*

[7] 11 U.S.C. § 1532: "Without prejudice to secured claims or rights in rem, a creditor who has received payment with respect to its claim in a foreign proceeding pursuant to a law relating to insolvency may not receive a payment for the same claim in a case under any other chapter of this title regarding the debtor, so long as the payment to other creditors of the same class is proportionately less than the payment the creditor has already received."

a creditor might obtain more favorable treatment than the other creditors of the same class by obtaining payment of the same claim in different jurisdictions."[8]

While the applicability of these sections to other chapters of title 11 (or beyond, in the case of section 1510) may appear self-evident, in light of decisions in cases that apply the language of chapter 15 and related provisions more narrowly and literally than contemplated by section 1508, clarifying the statutory language to avoid potential misunderstanding would be prudent. The NBC recommends the following revisions:

> **(k)** Chapter 15 applies only in a case under such chapter, except that—
> (1) sections 1505, **1511,** 1513, ~~and~~ 1514**, 1523, 1531, and 1532** apply in all cases under this title; and
> (2) ~~section~~**sections** 1509 ~~applies~~**and 1510 apply** whether or not a case under this title is pending.

3. 11 U.S.C. § 109(a)

In an appeal certified directly from the bankruptcy court in *Drawbridge Special Opportunities Fund, LP v. Barnet (In re Barnet)*, 737 F. 3d 238 (2d Cir. 2013), the Second Circuit ruled that section 109(a) applied to a petition for recognition of a foreign proceeding and remanded the case to the bankruptcy court because the foreign representatives had not proved that the debtor satisfied the requirements of section 109(a). In the court's view:

> Section 103(a) makes all of Chapter 1 applicable to Chapter 15. Section 109(a)—within Chapter 1—creates a requirement that must be met by any debtor. Chapter 15 governs the recognition of foreign proceedings, which are defined as proceedings in which "the assets and affairs of the debtor are subject to control or supervision by a foreign court." 11 U.S.C. § 101(23). The debtor that is the subject of the foreign proceeding, therefore, must meet the requirements of Section 109(a) before a bankruptcy court may grant recognition of the foreign proceeding.[9]

Section 109(a) provides:

> **11 U.S.C. § 109 - Who may be a debtor**
>
> (a) Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title.

After the *Barnet* decision, the section 109(a) requirement has been regularly satisfied by the transfer of a small amount of the foreign debtor's property to the United States, usually the establishment of a funded retainer account, as an incidental step in the commencement of a chapter 15 case.[10] On a second petition for recognition of the Australian

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[8] Guide to Enactment and Interpretation of the UNCITRAL Model Law, ¶ 239, available at http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html.

[9] See Section 1, above, for the text of § 103(a).

[10] *See*, e.g., *In re* The Cash Store Financial Services Inc., Case No. 15-12813, Docket No. 1-1, ¶ 4 (Bankr. S.D.N.Y. October 16, 2015). ("CSF is eligible to be a debtor under chapter 15 pursuant to sections 109(a) and 1501(b) of the Bankruptcy Code. CSF has a USD 50,000 retainer held in

liquidation of Octaviar Administration Pty Ltd., filed by Ms. Barnet after the remand, the bankruptcy court granted recognition to the foreign proceeding, finding that causes of action asserted by the foreign representatives and $50,000 held by their U.S. counsel in a retainer account each constituted "property in the United States" for purposes of section 109(a).[11] Bankruptcy Judges in Delaware and Florida rejected the Second Circuit's *Barnet* ruling and the Delaware judge predicted that the Third Circuit would also reject it.[12] A California bankruptcy judge applied section 109(a) to a recognition petition and then found that a retainer account was not sufficient to satisfy the section 109(a) property requirement. On appeal, the District Court, affirmed the applicability of section 109(a) but suggested that the retainer account should satisfy it.[13]Nevertheless, the contrived property transfer solely to satisfy section 109(a) exposes the recognition petition to a challenge that it was not filed in good faith or was "manifestly contrary to public policy". Conversely, by creating an artificial but permeable obstacle to recognition, the ruling inadvertently invites venue shopping based on the newly-minted "principal assets."[14]

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the United States by Conway Mackenzie, Inc. since 2014, and a retainer held in the United States by Rothschild Inc. since 2014, the balance of which is USD 21,532.09."); *see also In re* Berau Capital Resources Pte Ltd, 2015 WL 6507871 (Bankr. S.D.N.Y. 2015) (holding that each of funds in a retainer account and contract rights under a New York law-governed indenture constitute property sufficient to satisfy § 109(a)); In re B.C.I. Finance Pty Limited, 583 B.R. 288 (Bankr. S.D.N.Y. 2018) (finding that $1,250 in a retainer account suffices to satisfy § 109(a)).

[11] *In re* Octaviar Administration Pty Ltd (Debtor in a Foreign Proceeding), 511 B.R. 361 at 372-373 (Bankr. S.D.N.Y. June 19, 2014), citing *In re* Cenargo Int'l PLC, 294 B.R. 571, 603 (Bankr. S.D.N.Y. 2003); *In re* Yukos Oil Co., 321 B.R. 396, 401-403 (Bankr. S.D. Tex. 2005); *In re* Global Ocean Carriers Ltd., 251 B.R. 31, 39 (Bankr. D. Del 2000). *See also In re* Suntech Power Holdings Co., Ltd., 520 B.R. 399 (Bankr. S.D.N.Y. Nov. 17, 2014). A number of subsequent cases have found a retainer account to be sufficient to satisfy the §109(a) requirement including *In re* B.C.I. Finances Pty Limited, 583 B.R. 288 (Bankr. S.D.N.Y 2018) where the court ruled that each o $1,250 retainer account and causes of action (for breach of fiduciary duty) satisfied § 109(a).

[12] *In re* Bemarmara Consulting A.S., Case No. 13-13037 (Bankr. D. Del. Dec. 17, 2013); *In re* MMX Sudeste Mineracao S.A. (Bankr. D.D. Fla. Nov. 1, 2017 ("I reject the holding of the Second Circuit in drawbridge Special Opportunities Fund vs. Barnet…and agree with the majority view of commentators and courts that find that 109 does not apply to a Chapter." Transcript of 11/1/17 Hearing, p.5, Lines 21-24); appeal dismissed for lack of jurisdiction, U.S.D.C.S.D. Fla., No. 17-24308-Civ-Scola, Apr. 3, 2018).

[13] *In re* Forge Group Power Pty Ltd., Case No. 17-300008 (Bankr. N.D. Cal. Mar. 22, 2017); 2018 WL 827913 (N.D. Cal. Feb. 12, 2018).

[14] *See* 28 U.S.C. § 1410(a). The *Suntech* case, supra, is an exemplar of all that is bad about the *Barnet* ruling. ("Focusing on venue rather than eligibility, Solyndra nevertheless contends that the JPLs opened the BONY account to manipulate the placement of the case in this Court rather than in the Northern District of California where the Debtor allegedly had its principal place of business in the United States at the time the JPLs filed the chapter 15 petition …. Solyndra argues that the JPLs' conduct was somehow improper, but I disagree. Interpreting the Bankruptcy Code to prevent an ineligible foreign debtor from establishing eligibility to support needed chapter 15 relief will contravene the purposes of the statute to provide legal certainty,

Barnet is wrong; only the requirements specified in section 1517 (Order granting recognition) must be satisfied for recognition. Two Conferees who were actively involved in drafting both the Model Law and chapter 15 wrote a long article explaining in detail why *Barnet* is wrong.[15] In sum, section 1517 focuses on eligibility of the foreign proceeding and foreign representative, not the debtor, and contains no debtor-eligibility requirements.

The Second Circuit essentially invited Congress to revisit the drafting of section 109(a) in the last sentence of the *Barnet* opinion: "We direct the Clerk of Court to forward copies of this opinion to Congress following the specified protocol adopted by the Judicial Conference."[16] Amending the statute to reverse *Barnet* and preclude other courts from making the same mistake should be relatively easy.

We propose the following revision, which simply specifies the chapters to which section 109(a) applies and does not include chapter 15 in the list:

11 U.S.C. § 109. Who may be a debtor

(a) Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title. **This subsection does not apply in a case under chapter 15**.

4. 11 U.S.C. § 303

Prior to BAPCPA, section 303(b)(4) granted authority to a foreign representative to file an involuntary petition:

11 U.S.C. § 303 - Involuntary cases

(b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title—…
(4) by a foreign representative of the estate in a foreign proceeding concerning such person.

Section 303(b)(4) was not amended by BAPCPA despite the enactment of section 1511, which provides as follows:

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maximize value, protect creditors and other parties in interests and rescue financially troubled businesses. *See* 11 U.S.C. § 1501(a).") 520 B.R. at *412-*413.

[15] **Chapter 15 Recognition in the United States: Is a Debtor "Presence" Required**?, Int. Insolv. Rev., Vol. 24:28-56 (2015). Among other things, the *Barnet* opinion completely ignores section 1508, which dictates that courts shall take an international perspective in interpreting chapter 15 and look to the UNCITRAL Guide to Enactment for guidance. The Guide makes clear that there are no debtor-eligibility requirements for recognition ("In principle, the Model Law was formulated to apply to any proceeding that meets the requirements of article 2, subparagraph *(a)*, independently of the nature of the debtor or its particular status under national law."). UNCITRAL Model Law on Cross-Border Insolvency, Guide to Enactment and Interpretation, 55.

[16] *Barnet*, supra, 737 F.3d at *251.

11 U.S.C. § 1511 - Commencement of case under section 301, 302, or 303

(a) Upon recognition, a foreign representative may commence—
(1) an involuntary case under section 303; or
(2) a voluntary case under section 301 or 302, if the foreign proceeding is a foreign main proceeding.

Consequently, the "upon recognition" pre-condition to the filing of an involuntary petition by a foreign representative was not interpolated into section 303, creating an internal inconsistency in the statute. This inconsistency was noted by the late Judge Lifland in his decision in the *Bear Stearns* case, where he denied recognition to foreign proceedings of hedge funds that had neither their COMI nor an establishment in the country of the foreign proceeding. *In re Bear Stearns High–Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122 (Bankr. S.D.N.Y. 2007); *aff'd* 389 B.R. 325 (S.D.N.Y. 2008). Judge Lifland noted:

> Nonrecognition of the Foreign Proceedings, however, does not leave the Petitioners without the ability to obtain relief from U.S. courts…. While section 304 of the Bankruptcy Code was repealed upon the enactment of chapter 15, section 303 was not repealed. Section 303(b)(4) of the Bankruptcy Code specifically provides that an involuntary case may be commenced under chapter 7 or 11 of the Bankruptcy Code by a foreign representative of the estate in a foreign proceeding so that a foreign representative is not left remediless upon nonrecognition.
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> FN15. 11 U.S.C. § 303(b)(4)…. Section 303(b)(4) does not require that the foreign proceeding be recognized. This flexibility leaves open the potential coordination of a case filed here under Title 11 with the Foreign Proceeding. *See* 11 U.S.C. § 1529 (implicating cooperation and coordination among proceedings under sections 1525, 1526 and 1527 of the Bankruptcy Code, i.e., section 1527(5), concurrent proceedings involving the same debtor).
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> FN15. It would appear that the failure to repeal section 303(b)(4) along with section 304 may be a drafting error in view of the newly enacted section 1511(b) which likewise addresses the commencement of a case under sections 301 and 303. The inconsistencies of the two statutes have not been conformed.

The NBC agrees that the failure to amend section 303 was a drafting error and should be corrected, as follows:

11 U.S.C. § 303. Involuntary cases

(b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title—

(4) by ~~a~~ foreign representative ~~of the estate in a foreign proceeding concerning such person~~if the debtor is the subject of a foreign proceeding that has been recognized under section 1517.

5. 11 U.S.C. § 305

Section 305 of the Bankruptcy Code is entitled Abstention and deals with the dismissal of cases under title 11 and the suspension of proceedings in such cases. Recent cases suggest that there should be specific statutory language to give the bankruptcy court clear

statutory authority to abstain in international cases when abstention would better serve the interests of the system of cooperation represented by chapter 15 of the Code, as well as the flexibility to abstain in appropriate cases with respect to matters or issues that are not within the effective jurisdiction of the United States.[17]

There is some debate as to the extent to which the U.S. bankruptcy courts should exercise jurisdiction over full bankruptcy cases under the Code (chapters 7 or 11 primarily) where the debtor's "center of main interests" (its "COMI") is located outside the territorial jurisdiction of the United States. The general policy of chapter 15 is to recognize the foreign proceeding and proceed with an ancillary, cooperative case in the United States under that chapter, although a full United States bankruptcy case is permitted where the debtor satisfies one or more of the requirements to be a debtor in a case under title 11 of the United States Code.[18]

A question arises when a foreign debtor chooses to file its only bankruptcy proceeding in the United States, without filing in its "home" (COMI) country. United States jurisdictional rules have long permitted a filing here if there is any debtor property located in the United States, and no suggestion is made that this rule should change as a matter of jurisdiction.[19] Yet the result is that any debtor based in any country in the world can come to the United States to conduct its liquidation or reorganization, even if its assets, creditors, and business are mostly outside the United States. In those circumstances, we believe the court should have discretion under section 305(a) of the Code to abstain from or suspend all or any part of the full United States bankruptcy case.

Some courts have refused to dismiss a U.S. case where U.S. assets do not predominate and the debtor's COMI is elsewhere, as long as there is sufficient U.S. property to warrant a debt-adjustment proceeding in this country, at least in a case where the debtor has obtained the consent and cooperation of its principal foreign creditors and shareholders for the commencement of a proceeding only in the United States and not in the "home" country.[20]

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[17] Related changes to § 103(a) and 28 U.S.C. § 1334 are discussed in Part 6, below.

[18] 11 U.S.C. § 109 Who may be a debtor:

"(a) Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title."

[19] See, for example, the *Yukos* case where jurisdiction was premised on the balance of the retainer that the debtor had paid to its U.S. bankruptcy counsel. *In re* Yukos Oil Co., 321 B.R. 396 (Bankr. S.D. Tex. 2005). Similarly, in *In re* Global Ocean Carriers, Ltd., 251 B.R. 31 (Bankr. D. Del. 2000), the Court sustained jurisdiction over a group of foreign shipping companies based on the presence in the United States of a small bank account and retainers that the companies had paid to counsel in the U.S. who filed their petitions. In *In re* Iglesias, 226 B.R. 721, 722-23 (Bankr. S.D. Fla. 1998), the Court held that an Argentine citizen who had a bank account of about $500 in Florida could file a bankruptcy case there because he had "property" in the United States. Of course, other courts have dismissed cases filed in this country by foreign debtors seeking to use U.S. law only to delay their creditors. *In re* Head, 223 B.R. 648 (Bankr. W.D.N.Y. 1998).

[20] See *In re* Avianca, 303 B.R. 1 (Bankr. S.D.N.Y. 2003).; *In re* Globo Communicacoes e Particpacoes S.A., (S.D.N.Y. 2004); *In re* Monitor Single Lift I, Ltd., 381 B.R. 455 (Bankr. S.D.N.Y. 2008). See generally, Oscar Couwenberg and Stephen J. Lubben, *Corporate Bankruptcy Tourists*, 70 The Business Lawyer 719 (2015).

Others believe that the U.S. courts should not attempt to exercise primary jurisdiction over assets the great bulk of which lie beyond the effective control of the U.S. courts or in circumstances in which the exercise of United States jurisdiction would violate the principles of modified universalism that underlie chapter 15.[21] For example, the U.S. case may merely be obstructing the administration of the foreign proceeding to gain negotiating leverage for a party.[22] It has been argued that the exercise of such jurisdiction is contrary to the purposes of chapter 15, as that term is used in section 305(a)(2)(B).[23] There may also be practical reasons for courts not to entertain cases when they lack the practical ability to exercise control over the debtor or its assets. For example, a debtor might file for the benefit of the automatic stay, but later refuse, with impunity, to abide by subsequent court orders.

Section 305 as it is now drafted does not offer a court the kind of specific statutory authority to efficiently deal with these sorts of situations. Section 305 currently provides as follows:

11 U.S.C. § 305. Abstention

> **(a)** The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if—
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> **(1)** the interests of creditors and the debtor would be better served by such dismissal or suspension; or
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> **(2) (A)** a petition under section 1515 for recognition of a foreign proceeding has been granted; and
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> **(B)** the purposes of chapter 15 of this title would be best served by such dismissal or suspension.
>
> **(b)** A foreign representative may seek dismissal or suspension under subsection (a)(2) of this section.
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> **(c)** An order under subsection (a) of this section dismissing a case or suspending all proceedings in a case, or a decision not so to dismiss or suspend, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of title 28 or by the Supreme Court of the United States under section 1254 of title 28.

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[21] See, e.g., Georges Affaki, "A European View on the U.S. Courts' Approach to Cross-Border Insolvency – Lessons from Yukos," *reprinted in* Les Faillites Internationales, Colloque du 30 Novembre 2007, at 25 (Centre Francais de Droit Comparé, vol. 10, 2007). Both *Yukos* and *Global Ocean Carriers* are discussed and critiqued in Affaki's piece. See also Westbrook, "National Regulation of Multinational Default," *reprinted in* Economic Law and Justice in Times of Globalisation, at 777 (Festschrift für Carl Baudenbacher) (Nomos 2007). Professor Westbrook expresses concern over whether exercising control over such "solitary non-main proceedings" might undermine the development of cross-border principles. *Id.*

[22] *See In re* Northshore Mainland Servs., Inc., 537 B.R. 192 (Bankr. D. Del. 2015); *In re* Oi Brasil Holdings Cooperatief U.A. 578 B.R. 169 (Bankr. S.D.N.Y. 2017); *In re* Zhejiand Photovoltaic Co., Ltd., 2017 WL 6539481 (Bankr. D. New Jersey 2017).

[23] See Jay Lawrence Westbrook, "Multinational Insolvency: A First Analysis of Unilateral Jurisdiction," Norton Annual Review of International Insolvency 2009.

Thus section 305(a)(2) provides clear authorization for the court to dismiss a case when a petition for recognition of a foreign proceeding has been granted, while section 305(b) provides clear authorization for a recognized foreign representative under chapter 15 to seek dismissal or suspension of a case. However, it does not provide protection against an abusive or otherwise inappropriate filing of a full United States case made by the debtor in the situation where no chapter 15 recognition petition has been granted. That authority should be explicitly given to the courts. In addition, a specific authorization should include language that would allow a court to abstain from consideration of only part of the case or only some of the proceedings. That would make it clear that, if the court were inclined to sustain jurisdiction over a case involving a debtor located primarily abroad, it could still limit its exercise of jurisdiction to those assets within the court's effective control. Such a provision would also be consistent with section 1528. That section provides that, after recognition of a foreign main proceeding, a full bankruptcy case can only be commenced under another chapter of the Code if the debtor has assets in the U.S.[24] Once commenced, the case administration is limited to "assets that are within the territorial jurisdiction of the United States."[25] It makes sense that section 305 remain consistent with chapter 15.

The general authority under section 305(a)(1) to dismiss a case if dismissal would better serve the interests of the debtor and creditors may, in some instances, encompass dismissal of a case that is inconsistent with the purposes of chapter 15 or in which the court cannot exercise effective control over the debtor or its assets. However, the analysis required to conclude that dismissal is appropriate under the current statute is attenuated and does not focus on the primary reasons that dismissal is appropriate.[26] The NBC believes that there should be a clear statutory basis for dismissal of cases involving debtors whose COMI is outside of the United States when those cases either conflict with the purposes of chapter 15 or involve a debtor or assets over which the court does not have effective control.

Thus, modification to section 305 is appropriate. The statute, incorporating the foregoing proposals, would then read in relevant part as set forth below.

11 U.S.C. § 305. Abstention

> **(a)** The court, after notice and a hearing, may dismiss a case under this title, or may suspend ~~all proceedings~~**a proceeding** in a case under this title, at any time if—
>
> (1) the interests of creditors and the debtor would be better served by such dismissal or suspension; ~~or~~

[24] *See* 11 U.S.C. § 109(a). Having assets in the U.S. is one basis for a person's eligibility for bankruptcy relief in the U.S. There are others as well (e.g., incorporation in the U.S., principal place of business in the U.S.). Section 1528 restricts the debtor that is the subject of a foreign main proceeding to the "assets in the U.S." qualification for eligibility.

[25] *See* 11 U.S.C. § 1528. The section actually permits a slightly greater reach – other assets that are "within the jurisdiction of the U.S. court by virtue of section 541(a) and 28 U.S.C. § 1334(e), but only "to the extent that such other assets are not subject to the jurisdiction and control of the foreign proceeding …"

[26] *See In re* Compania de Alimentos Fargo, S.A, 376 B.R. 427 (Bankr. S.D.N.Y. 2007); *In re* Yukos Oil Co., 321 B.R. 396 (Bankr. S.D.Tex. 2005).

(2)(A) a petition under section 1515 for recognition of a foreign proceeding has been granted; and

(B) the purposes of chapter 15 of this title would be best served by such dismissal or suspension.; or

(C) the debtor's center of main interests is not the United States and the court cannot exercise effective control over either the debtor or the debtor's material assets.

(b) A foreign representative may seek dismissal or suspension under subsection (a)(2) of this section.

(c) An order under subsection (a) of this section dismissing a case or suspending ~~all proceedings~~**a proceeding** in a case, or a decision not so to dismiss or suspend, is not reviewable by appeal or otherwise by the court of appeals under section 158 (d), 1291, or 1292 of title 28 or by the Supreme Court of the United States under section 1254 of title 28.

6. 11 U.S.C. § 306

As discussed in Part 2, above, section 1511 provides that a foreign representative of a foreign main proceeding, upon recognition, may commence a voluntary case under section 301 or 302. Prior to the enactment of chapter 15, a foreign representative could appear under section 304, commence an involuntary case under section 303 or request abstention or dismissal of a case under section 305. Section 306 permitted those appearances without exposing the foreign representative to jurisdiction of any other court in the United States.[27] While section 1510 provides for such limited jurisdiction upon filing a petition for recognition under chapter 15, and the reference to section 304 was deleted from section 306, section 306 was not modified by BAPCPA to reflect the additional authority to file petitions under sections 301 and 302, and it should have been. As currently written, section 306 applies to petitions or requests under section 303 or 305:

11 U.S.C. § 306. Limited appearance

An appearance in a bankruptcy court by a foreign representative in connection with a petition or request under section 303 or 305 of this title does not submit such foreign representative to the jurisdiction of any court in the United States for any other purpose, but the bankruptcy court may condition any order under section 303 or 305 of this title on compliance by such foreign representative with the orders of such bankruptcy court.

Section 306 should be amended to add references to sections 301 and 302, as follows:

11 U.S.C. § 306. Limited appearance

An appearance in a bankruptcy court by a foreign representative in connection with a petition or **a** request under section **301, 302,** 303**,** or 305 of this title does not submit such foreign representative to the jurisdiction of any court in the United States for any other purpose, but the bankruptcy court may condition any order under section **301, 302,** 303**,** or 305 of this title on compliance by such foreign representative with the orders of such bankruptcy court.

[27] H.R. Rep. at 325-326.

7. **11 U.S.C. § § 1502(4) and (5) and 1517(b): Clarification of the time at which the center of main interests ("COMI") of a debtor is determined by adopting the UNCITRAL formulation of the date of the commencement of the foreign proceeding**.

A growing number of decisions under chapter 15 have concluded that the COMI of a debtor in a foreign proceeding should be measured as of the date that the petition is filed for recognition under chapter 15. These decisions conflict with the original intention of the Model Law and the recent revision of the Guide to Enactment, which measure COMI as of the date of the commencement of the foreign proceeding.

Section 1502(4) defines a "foreign main proceeding" as a "foreign proceeding pending in the country where the debtor *has* the center of its main interests" 11 U.S.C. § 1502(4) (emphasis added). Section 1517(b)(2) states that a foreign proceeding shall be recognized "as a foreign main proceeding if it *is* pending in the country where the debtor *has* the center of its main interests." 11 U.S.C. § 1517(b)(2) (emphasis added).

The tense used is the same as that used in the Model Law:

"a foreign proceeding taking place in the State where the debtor *has* the centre of its main interests." Model Law, Art. 2(b).[27]

"if it *is* taking place in the State where the debtor *has* the centre of its main interests." Model Law, Art. 17(2)(a).

The verb tense was not deemed an issue by the drafters of the Model Law, who assumed that the center of main interests would not (and could not) change once the foreign proceeding was initiated, because "centre of main interests" referred to the business activity of the enterprise prior to the filing of the insolvency proceeding. The source of the COMI concept was the then nascent European Union Convention on Insolvency Proceedings, which used COMI as a jurisdictional test. That is, a country signatory to the convention could not open an insolvency proceeding for a given entity unless that entity's "centre of main interests" was located in that country. *See* M. Virgos and E. Schmit, *Report on the Convention on Insolvency Proceedings*, Brussels 3 May 1996 *available at* http://aei.pitt.edu/952.

The Guide to Enactment (as amended in 2013) explains:

> Under the [EC] Regulation, the decision on centre of main interests is made by the court receiving an application for commencement of insolvency proceedings at the time of consideration of that application. Under the Model Law, a request for recognition of a foreign proceeding may be made at any time after the commencement of that proceeding; in some cases it has been made several years later. Accordingly, the court considering an application for recognition under the Model Law must determine whether the foreign proceeding for which recognition is sought is taking place in a forum that was the debtor's centre of main interests when the proceeding commenced (the issue of timing with respect to the determination of centre of main interests is discussed at paras. 157-160 below).

Guide to Enactment, ¶ 141.

Regarding the timing issue, UNCITRAL Working Group V (Insolvency) revised the Guide to Enactment to address questions that had arisen with respect to the tense issue:

> The Model Law does not expressly indicate the relevant date for determining the center of main interests of the debtor.…
>
> The use of the present tense in article 17 does not address the question of the relevant date, but rather requires the foreign proceeding to be current or pending at the time of the recognition decision; if the proceeding for which recognition is sought is no longer current or pending in the originating State at that time (*i.e.* it is no longer "taking place" having been terminated or closed), there is no proceeding that would be eligible for recognition under the Model Law.…
>
> With respect to the date at which the centre of main interests of the debtor should be determined, having regard to the evidence required to accompany an application for recognition under article 15 and the relevance accorded the decision commencing the foreign proceeding and appointing the foreign representative, *the date of commencement of that proceeding is the appropriate date*. Where 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 centre of main interests is that foreign proceeding and the activity of the foreign representative in administering the insolvency estate. In such a case, *determination of the centre of the debtor's main interests by reference to the date of the commencement of those proceedings would produce a clear result.* The same reasoning may also apply in the case of reorganization where, under some laws, it is not the debtor that continues to have a centre of main interests, but rather the reorganizing entity. In such a case, the requirement for a foreign proceeding that is taking place in accordance with article 17, subparagraph 2 *(a)* is clearly satisfied and the foreign proceeding should be entitled to recognition. Moreover, *taking the date of commencement to determine centre of main interests provides a test that can be applied with certainty to all insolvency proceedings*.

Model Law, ¶¶ 157-159 (emphasis supplied). A similar conclusion was expressed with regard to the determination of the debtor's establishment, for purposes of non-main proceedings.

In the U.S., however, there is a decades long jurisprudential tradition of applying the principle of "plain meaning" as the first (and often the only) rule of statutory interpretation when considering provisions of the Bankruptcy Code. The Second Circuit took just such an approach in *Morning Mist Holdings, Ltd. v. Krys (In re Fairfield Sentry)*, 714 F.3d 127 (2d Cir. 2013). Judge Lifland granted recognition to the BVI liquidation of Fairfield Sentry, resulting in the stay of a derivative action brought by Morning Mist Holdings Limited, a shareholder, in New York state court. Fairfield Sentry had been out of business since the Madoff fraud surfaced in December 2008. Its board of directors appointed a "Litigation Committee" which governed until April 2009, when ten shareholders asked the BVI court to appoint a liquidator; two were appointed on July 21, 2009. The chapter 15 petition was filed on June 14, 2010. The bankruptcy court framed the issue:

> At bottom, the main point of contention between the parties seems to be whether, as the Petitioners argue, [citing *Lavie v. Ran*, No. 09–20288, 2010 WL 2106638, at *7 (5th Cir. May 27, 2010)], the Debtors' center of main interests ("COMI") should be measured as of the date of the Petition and the Court should consider the liquidation proceeding as ongoing business activities, or, as the Objectors argue, COMI should include the period prior to and leading up to the filing of the Petition and the Court should focus only on the Debtors' business activities prior to the liquidation, [as those were the economic and business functions contemplated by their charters].

Judge Lifland cited several cases that focused on the time of the petition for recognition as the date to measure COMI: *Lavie v. Ran (In re Ran),* 607 F.3d 1017 (5th Cir. 2010), *In re British Am. Ins. Co. Ltd.*, 425 B.R. 884 (Bankr. S.D. Fla. 2010); *In re Betcorp Ltd.*, 400 B.R. 266 (Bankr. D. Nev. 2009). He also noted that those courts would allow "a broader temporal COMI assessment where there may have been an opportunistic shift to establish COMI." However, he never ruled that the chapter 15 petition date was the proper measurement date. Instead, he said: "The contentions of both parties are misplaced, as a review of the relevant factors places the COMI focus in the BVI for the pre- and post-liquidation periods." He then essentially followed the lead of the *British American* court to the effect that COMI "can become lodged with the foreign representative" in finding that "the facts now extant provide a sufficient basis for finding that the Debtors' COMI for the purpose of recognition as a main proceeding is in the BVI, and not elsewhere." In justifying recognition, Judge Lifland also quoted then Judge Markell: "'non- recognition where recognition is due may forestall needed inter-nation cooperation,' *In re Betcorp,* 400 B.R. at 291."[28]

Morning Mist appealed the grant of recognition, and the district court and Second Circuit affirmed. The Second Circuit, relying on a plain meaning standard for statutory interpretation, elected to focus on the COMI measurement date:

> The present tense suggests that a court should examine a debtor's COMI at the time the Chapter 15 petition is filed. "Consistent with normal usage, we have frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach." *Carr v. United States,* 560 U.S. 438, 130 S.Ct. 2229, 2236, 176 L.Ed.2d 1152 (2010); *see also Dobrova v. Holder,* 607 F.3d 297, 301 (2d Cir.2010) (relying on Congress's use of present perfect tense in statutory construction). In *In re AroChem Corp.,* we were guided by the tense used in a provision of the Bankruptcy Code allowing bankruptcy trustees to hire professionals (*e.g.,* lawyers, accountants), as long as the professionals "`*do not hold or represent* an interest adverse to the estate.'" *In re AroChem Corp.,* 176 F.3d 610, 623 (2d Cir.1999) (quoting 11 U.S.C. § 327(a)) (emphasis added). The present tense signified that an estate's counsel would not be disqualified based on past or future representations. *Id.*
>
> It therefore matters that the inquiry under Section 1517 is whether a foreign proceeding "*is pending* in the country where the debtor *has* the center of its main interests." 11 U.S.C. § 1517(b)(1) (emphases added). In this light, we reject Morning Mist's invitation for us to consider the debtor's entire operational history. Likewise, a COMI determination based on the date of the *initiation* of the foreign proceeding is not compelled by the statute. A foreign proceeding "*is pending,*" 11 U.S.C. § 1517(b)(1) (emphasis added), only after it has been commenced. Under the text of the statute, therefore, the filing date of the Chapter 15 petition should serve to anchor the COMI analysis.

Id., at 133-34.

The court agreed with Judge Lifland that a recent change of domicile might warrant a different result. It found support for the chapter 15 petition date COMI measurement from the fact that "[m]ost courts in this Circuit and throughout the country appear to have examined a debtor's COMI as of the time of the Chapter 15 petition." The court rejected Judge Gropper's contrary view (supported by a quotation from a law review article by Professor Westbrook) that if COMI is recognized as the principal place of business, then "it is obvious that

[28] *In re* Fairfield Sentry Limited, 440 B.R. 60 (S.D.N.Y. 2010).

the date for determining an entity's place of business refers to the business of the entity before it was placed into liquidation."[29]

The Second Circuit also noted that the *then* UNCITRAL Guide to Enactment of the Model Law (*i.e.*, the pre-2013 version) also used the present tense, as did the EU Regulation; but otherwise the Regulation and other international sources were "of limited use." The Second Circuit decision focused on literal statutory interpretation and failed to reflect an understanding of the substantive concerns underlying the COMI issue. UNCITRAL, by adopting the requirement that a foreign proceeding be either a foreign main proceeding or a foreign non-main proceeding, mandated that the proceeding be in a country where the debtor had a tangible economic presence—either its principal place of business or at least a regular place of business. Chapter 15 adopted this anchoring requirement, and Judge Lifland and the district court endorsed it in *Bear Stearns*.[30] The Second Circuit result, perhaps unwittingly, is contrary to the decisions of UNCITRAL and Congress to require a substantial economic presence in the country of the foreign proceeding as a prerequisite to recognition.

Neither the Model Law nor chapter 15 contemplated that the locus of a liquidation proceeding could substitute for the place of business operations. As earlier discussed, UNCITRAL amended the Guide to Enactment in 2013 to clarify that the foreign proceeding commencement date is the proper date to measure COMI and rejected contrary inferences that relied on the verb tense of the Model Law. The Model Law was promulgated in the first instance to promote uniformity of application around the world, a principle to which Congress subscribed in enacting section 1508.

The Second Circuit's decision on timing is not consistent with how UNCITRAL itself deems timing to function under the Model Law, and it seems doubtful that Congress, in enacting the precise language of the Model Law, expressly intended to depart from the intent of the drafters of the Model Law on this point. It is therefore appropriate to align chapter 15 with the intentions of the Model Law itself and clearly signal to U.S. courts how the timing should apply.

We recommend the following amendatory language to accomplish the foregoing:

11 U.S.C. § 1502. Definitions

(4) "foreign main proceeding" means a foreign proceeding ~~pending~~**that** **was commenced** in the country where the debtor ~~has the~~**had its** center of ~~its~~ main interests; **when the foreign proceeding was commenced**;

(5) "foreign nonmain proceeding" means a foreign proceeding, other than a foreign main proceeding, ~~pending~~ **commenced** in a country where the debtor ~~has~~**had** an establishment **when the foreign proceeding was commenced**;

11 U.S.C. § 1517. Order granting recognition

[29] *In re* Millennium Global Emerging Credit Master Fund Limited, 458 B.R. 63, 72 (Bankr. S.D.N.Y. 2011).

[30] *In re* Bear Stearns High–Grade Structured Credit Strategies Master Fund, Ltd., 374 B.R. 122, 128 (Bankr. S.D.N.Y. 2007), *aff'd,* 389 B.R. 325 (S.D.N.Y. 2008).

(b) Such foreign proceeding shall be recognized—

(1) as a foreign main proceeding if ~~it is pending in the country where~~**, when the foreign proceeding was commenced,** the debtor ~~has~~**had** the center of its main interests **in the foreign country where the proceeding was commenced**; or

(2) as a foreign nonmain proceeding if**, when the foreign proceeding was commenced,** the debtor ~~has~~**had** an establishment within the meaning of section 1502 in the foreign country where the proceeding ~~is pending~~**was commenced**.

8. 11 U.S.C. § 1511 and 28 U.S.C. § 1408

As discussed in Sections 2 and 4 above, section 1511(a) authorizes a foreign representative, upon recognition, to commence a case under section 301, 302 (if a foreign main proceeding) or 303 (if a foreign nonmain proceeding). Section 1511(b) provides:

> (b) The petition commencing a case under subsection (a) must be accompanied by a certified copy of an order granting recognition. The court where the petition for recognition has been filed must be advised of the foreign representative's intent to commence a case under subsection (a) prior to such commencement.

The Rules Committee considered two alternative approaches to address the notice requirement of section 1511(b) but failed to reach agreement on either of them, so there is currently no rule covering this notice. The NBC believes that it would be more logical and efficient to simply require that the proceeding to be commenced pursuant to section 1511 must be filed in the court that already granted recognition under chapter 15. The rules for changing venue would apply so that the 301–303 case could be transferred subsequent to filing, if appropriate.

This approach would require an addition to 28 U.S.C. § 1408 and deletion of section 1511(b). Existing 28 U.S.C. § 1408 would become subsection (a) and a new subsection (b) would be added to 28 U.S.C. § 1408, as set forth below:

> **28 U.S.C. § 1408. Venue of cases under title 11**
>
> **(a)** Except as provided in **subsection (b) of this section or in** section 1410 of this title, a case under title 11 may be commenced in the district court for the district**—**
>
> (1) in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case have been located for the one hundred and eighty days immediately preceding such commencement, or for a longer portion of such one- hundred-and-eighty-day period than the domicile, residence, or principal place of business, in the United States, or principal assets in the United States, of such person were located in any other district; or
>
> (2) in which there is pending a case under title 11 concerning such person's affiliate, general partner, or partnership.
>
> **(b) If an order granting recognition of a foreign proceeding under chapter 15 of title 11 has been entered, a case concerning the debtor in the foreign proceeding may be commenced under section 301, 302, or 303 of title 11 only in the district court for the district in which the order granting recognition has been entered.**

Section 1511(a) would be redesignated as section 1511:

11 U.S.C. § 1511. Commencement of case under section 301, 302, or 303

~~(a)~~ Upon recognition, a foreign representative may commence—

(1) an involuntary case under section 303; or

(2) a voluntary case under section 301 or 302, if the foreign proceeding is a foreign main proceeding.

~~(b) The petition commencing a case under subsection (a) must be accompanied by a certified copy of an order granting recognition. The court where the petition for recognition has been filed must be advised of the foreign representative's intent to commence a case under subsection (a) prior to such commencement.~~

9. 28 U.S.C. § 1334(c) and section 103(a)

A bankruptcy court decision involving the foreign nonmain proceedings of British American Insurance Company Limited ("BAICO"), a Bahamian insurance company in insolvency proceedings in St. Vincent and the Grenadines ("SVG"), held that section 305 is not applicable in a chapter 15 case and that 28 U.S.C. § 1334(c)(1) prohibits the bankruptcy court from abstaining from proceedings arising under title 11 or arising in or related to a case under title 11.[31] Subsequent circuit and bankruptcy court decisions agreed with the conclusion but discussed only 28 U.S.C. § 1334 and did not mention section 305.[32]

28 U.S.C. § 1334. Bankruptcy cases and proceedings provides as follows:

(c)(1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

There is no discussion of the amendment to 28 U.S.C. § 1334(c) in the legislative history of chapter 15. The recollection of the Conferees who assisted with drafting chapter 15 (Jay Westbrook and Dan Glosband) was that the chapter 15 exception was added to section 1334 to assure that a chapter 15 petition would be considered on the new, objective standards for recognition adopted by the Model Law and chapter 15 and not on the subjective "interests of justice" standard of section 1334(c). The subjective standards of former section 304 were being replaced and no alternative, back-door approach to subjective evaluation of a chapter 15 petition for recognition was to be allowed.

In the *BAICO* case, branch operations of BAICO in SVG were placed under judicial management under the SVG insurance law, and a Judicial Manager was appointed with full authority to liquidate BAICO in SVG. The Judicial Manager sought (in November 2009) and obtained (in March 2010) recognition under chapter 15 of the SVG liquidation as a foreign nonmain proceeding. Through the Judicial Manager, BAICO sued its former directors for breach of fiduciary duty. Two of the directors moved to dismiss for lack of jurisdiction on various

[31] *In re* British American Insurance Company Limited, 488 B.R. 205 (S.D. Fla. 2013).

[32] Firefighters' Retirement Sys. v. Citco Group Ltd., 796 F. 3d 520 (5th Cir. 2015); *In re* Hellas Telecommunications (Luxembourg) II SCA, 535 B.R. 543 (Bankr. S.D.N.Y. 2015). Both of these decisions refer to dicta to the same effect in the case of *In re* Fairfield Sentry Ltd., 452 B.R. 64, 83 (Bankr. S.D.N.Y. 2011), rev'd on other grounds, 458 B.R. 665 (S.D.N.Y. 2011).

theories and, in the alternative, argued that the court should abstain from the litigation under the permissive abstention provisions of 28 U.S.C. § 1334(c)(1).

The court ruled that it had jurisdiction and that 28 U.S.C. § 1334(c)(1) does not permit the court to abstain from (a) either a full chapter 15 case or (b) a matter arising under chapter 15 or arising in a chapter 15 case. The first half of this ruling is consistent with the purpose of the chapter 15 exception to 28 U.S.C. § 1334(c)(1) but the second half goes beyond that purpose. The court discusses the issue as follows:

> Section 305 is the sole statutory authority for abstention from a title 11 case.
>
> However, section 305 is not applicable in a case under chapter 15. 11 U.S.C. § 103(a). There is no provision in federal law allowing a federal court to abstain from an entire chapter 15 case. Nor is there any provision in federal law permitting abstention from matters arising under chapter 15 or arising in a chapter 15 case. To the contrary, chapter 15 and section 1334 ensure that the decision whether to recognize a foreign proceeding, and control over further relief under chapter 15, rests with a single court. Congress reinforced this by eliminating the possibility of abstention from the entire chapter 15 case and from matters arising under chapter 15 or arising in a chapter 15 case. The Court's interpretation of section 1334(c)(1) is consistent with the intent of Congress. (footnotes omitted). [*British American*, supra, at 239-240.]

Reliance on 28 U.S.C. § 1334 for abstention from a full chapter 15 case is not necessary since an equivalent result is available under chapter 15 itself: (a) unlike the filing of a voluntary petition under other chapters of the Bankruptcy Code, which constitutes an order for relief, a chapter 15 petition is an application for recognition, and recognition can be denied if the criteria of section 1517 are not satisfied; (b) after recognition, recognition can be terminated or modified under §1517(d).[33]

The *British American* court reached its conclusion based on a plausible but unintended reading of 28 U.S.C. § 1334(c)(1):

> The opposing interpretation of the opening phrase of section 1334(c)(1) [that abstention from arising under/arising in cases is permitted] takes into consideration the remaining text of that subsection. In general, subsection (c)(1) permits abstention from proceedings arising under title 11 or arising in or related to a case under title 11. That is, it permits a court to abstain from matters other than the title 11 case itself. Because subsection (c)(1) is aimed at abstention from proceedings arising in, arising under and related to a title 11 case, the words "[e]xcept with respect to a case under chapter 15 of title 11" must refer to matters arising under, arising in or related to a case under chapter 15, and not the chapter 15 case itself. Under this view, section 1334(c)(1) could not be used to abstain from any proceeding arising under a provision of chapter 15, arising in a chapter 15 case, or related to a chapter 15 case. Count I here is related to a chapter 15 case, and so section 1334(c)(1) could not be used to abstain from hearing Count I. Because this view of section 1334(c)(1) interprets the exclusionary provision in light of the entire text of the

[33] 11 U.S.C. § 1517(d): "The provisions of this subchapter do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist, but in considering such action the court shall give due weight to possible prejudice to parties that have relied upon the order granting recognition. A case under this chapter may be closed in the manner prescribed under section 350."

subsection, the Court believes this view of section 1334(c)(1) to be correct. The Court may not abstain from Count I under section 1334(c)(1). (footnote omitted.)

The reference in 28 U.S.C. §1334(c)(1) to a "case" under chapter 15 was intended to echo the phrase "cases under title 11" in 28 U.S.C. § 1334(a) and 28 U.S.C. § 157(a) and was not intended to be expanded to prevent abstention from proceedings arising in/arising under cases.

Notwithstanding the intent of the drafters, the interpretation of the *British American* judge is a plausible one based on the current wording.

Two subsequent decisions followed the *British American* interpretation. In *Firefighters' Retirement System v. Citco Group Limited*, the Fifth Circuit reversed the district court's remand to Louisiana state court of an action by three pension funds against persons and entities related to a Cayman Islands leveraged feeder fund ("Leveraged Fund") and a larger fund (the "Arbitrage Fund" and together with the Leveraged Fund, the "Offshore Funds") through which it invested.[34] The Offshore Funds were part of a master fund entity which filed a chapter 11 case in the Southern District of New York. The litigation was originally filed in state court and then removed to federal district court based on the related chapter 11 case. The court read 28 U.S.C. § 1334(c)(1) to prevent abstention from a proceeding that was related to a chapter 15 case, as opposed to preventing abstention from considering the chapter 15 case itself.[35]

A decision of the Bankruptcy Court for the Southern District of New York agreed with the *British American* and *Firefighters'* analysis.[36]

The following revision will limit section 28 U.S.C. §1334(c)(1) to its original narrowly- intended purpose of assuring that chapter 15 petitions, as applications for recognition, must be heard and granted or denied:

28 U.S.C. § 1334. Bankruptcy cases and proceedings

(c)(1) Except with respect to a **determination of an application for recognition of a foreign proceeding in a** case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

10. 11 U.S.C. § 1517(a)

Section 1517 is entitled **Order granting recognition**, and it contains the requirements for entry of an order recognizing a foreign proceeding. While "it closely tracks

[34] Firefighters' Retirement Sys. v. Citco Group Ltd., 796 F. 3d 520 (5th Cir. 2015).

[35] Id. at *527.

[36] *In re* Hellas Telecommunications (Luxembourg) II SCA, 535 B.R. 543 (Bankr. S.D.N.Y. 2015).

article 17 of the Model Law",[37] it inadvertently omitted a phrase. The pertinent part of Article 17 of the Model Law reads as follows:

> *Article 17. Decision to recognize a foreign proceeding*
>
> (1) Subject to article 6, a foreign proceeding shall be recognized if:
> (a) The foreign proceeding is a proceeding within the meaning of subparagraph (a) of article 2;
> (b) The foreign representative applying for recognition is a person or body **within the meaning of subparagraph *(d)* of article 2;** (emphasis added)

In contrast, the pertinent part of section 1517 reads:

> **11 U.S.C. § 1517 - Order granting recognition**
>
> (a) Subject to section 1506, after notice and a hearing, an order recognizing a foreign proceeding shall be entered if—
> (1) such foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502;
> (2) the foreign representative applying for recognition is a person or body;

The NBC recommends that section 1517 be conformed to Article 17 of the Model Law to avoid confusion over the unintended difference, as follows:

> **11 U.S.C. § 1517(a) - Order granting recognition**
>
> (a) Subject to section 1506, after notice and a hearing, an order recognizing a foreign proceeding shall be entered if—
> (1) such foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502;
> (2) the ~~foreign representative~~**person or body** applying for recognition is a ~~person or body~~**foreign representative**; and

11. Amendments related to avoidance of transfers and recovery of property

a. 11 U.S.C. §§ 1520, 1521 and 101(24)

Article 20 of the Model Law on Cross Border Insolvency provides as follows (with emphasis added in bold):

> 1. Upon recognition of a foreign proceeding that is a foreign main proceeding,
> (a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;
> (b) Execution against the debtor's assets is stayed; and
> **(c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended**.
> 2. The scope, and the modification or termination, of the stay and suspension referred to in paragraph 1 of this article are subject to [*refer to any provisions of law of the enacting State relating to insolvency that apply to exceptions, limitations, modifications or*

[37] H.R. Rep. at p. 113.

termination in respect of the stay and suspension referred to in paragraph 1 of this article].

The U.S. enactment of Article 20, in section 1520, made modifications and adjustments, the intention of which was to integrate the Model Law into our existing bankruptcy scheme, while altering the original intention of Article 20 as little as possible. Thus, for example, section 1520, rather than imposing a generalized moratorium upon actions in the enacting state, as does the Model Law, instead takes our pre-existing generic moratorium, section 362, and *restricts* it to property within the territorial jurisdiction of the U.S., thereby approximating the scope of the Article 20 moratorium by pruning back the extraterritorial aspect of section 362 in the chapter 15 context.

The drafters of the U.S. enactment attempted to achieve a similar end with respect to the provision in Article 20 that imposes a moratorium on the debtor's ability to transfer property (a moratorium on *debtor's* actions, if you will). Again, they enacted this provision by reference to pre-existing provisions of the U.S. Bankruptcy Code. Section 1520 says that section 549, "Postpetition transactions," applies with respect to property of the debtor within the territorial jurisdiction of the U.S., paralleling the mechanism that was used for the moratorium on creditor actions.[38] Section 549 does not *automatically* proscribe postpetition transfers of the debtor's property in the way that the moratorium on such transfers was drafted in Article 20 of the Model Law; instead it empowers a trustee to avoid those transfers.[39] It thus falls short of achieving the intended purpose of Article 20.

The reference to section 549 creates two additional problems: first, there is no trustee in a chapter 15 ancillary proceeding, but only a trustee may "avoid a transfer of property …" (courts might interpret section 1520(a)(2) such that "trustee" means "foreign representative" in the context of 1520(a)(2) but it should not be left to doubt); second, section 549 is not self-executing, and the remedial mechanism to recover avoided transfers, section 550, is not available in chapter 15.[40] Section 1521(a)(7), which prohibits use of most Bankruptcy Code avoidance

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[38] Section 1520, Effects of recognition of a foreign main proceeding, provides in pertinent part:

(a) Upon recognition of a foreign proceeding that is a foreign main proceeding—
(1) sections 361 and 362 apply with respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States;
(2) sections 363, 549, and 552 apply to a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States to the same extent that the sections would apply to property of an estate;
(3) unless the court orders otherwise, the foreign representative may operate the debtor's business and may exercise the rights and powers of a trustee under and to the extent provided by sections 363 and 552; and
(4) section 552 applies to property of the debtor that is within the territorial jurisdiction of the United States.

[39]Section 549 provides as follows:

(a) Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate—
(1) that occurs after the commencement of the case; and
(2)(A) that is authorized only under section 303 (f) or 542 (c) of this title; or
(B) that is not authorized under this title or by the court.

[40]Section 550, Liability of transferee of avoided transfer, provides in pertinent part: "…to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property…"

powers in a chapter 15 case, includes a prohibition of section 550.[41] The omission of the section 550 remedy also affects one other avoidance provision that is not excluded from chapter 15 use, section 553 dealing with the reduction in insufficiency of a setoff within 90 days pre-petition.[42]

Repairing these problems requires amendments to sections 1520, 1521 and 101(24) (the definition of foreign representative) as follows:

11 U.S.C. § 1520. Effects of recognition of a foreign main proceeding

(a) Upon recognition of a foreign proceeding that is a foreign main proceeding—

(1) sections 361 ~~and~~**,** 362**, and 552** apply with respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States;

(2) the debtor may not transfer, encumber, or otherwise dispose of any assets within the territorial jurisdiction of the United States;

(~~2~~**3**) ~~sections~~**section** ~~3~~63, ~~549, and 552 apply~~ **applies** to a transfer **by a foreign representative** of an interest of the debtor in property that is within the territorial jurisdiction of the United States to the same extent that the ~~sections~~**section** would apply to property of an estate; **and**

(~~3~~**4**) unless the court orders otherwise, the foreign representative may operate the debtor's business and may exercise the rights and powers of a trustee under and to the extent provided by sections 363 and ~~552~~**553.**

~~(4) section 552 applies to property of the debtor that is within the territorial jurisdiction of the United States.~~

11 U.S.C. § 1521. Relief that may be granted upon recognition

(a) Upon recognition of a foreign proceeding, whether main or nonmain, where necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including—

(7) granting any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a).**; and**

(8) notwithstanding subsection (a)(7) of this section, granting relief under section 550 for the purpose of permitting the foreign representative to enforce the provisions of sections 549 and 553.

11 U.S.C. § 101. Definitions

In this title the following definitions shall apply:

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[41]Section 1521, Relief that may be granted upon recognition, provides in pertinent part: "(a) Upon recognition of a

foreign proceeding, whether main or nonmain, where necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including— (7) granting any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, **550**, and 724(a). (emphasis added).

[42]The section 553/550 issue was discussed in Awal Bank, BSC v. HSBC Bank USA (*In re* Awal Bank, BSC), 455

B.R. 73, 82 (Bankr. S.D.N.Y. 2011).

(24) The term "foreign representative" means a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding **and means trustee when the foreign representative acts under the sections of this title that are referred to in sections 1520(a) or 1521(a)(8)**.

b. 11 U.S.C. § 1523

Chapter 15 should also be amended to provide explicitly that the look-back period for avoidance proceedings brought under U.S. law by or on behalf of a foreign representative should be measured from the date of the filing of the foreign proceeding. Under section 1523(a) of chapter 15 a foreign representative can bring an avoidance proceeding based on U.S. substantive law only in a plenary U.S. case under chapter 7 or chapter 11.[43] Although section 1523(a) affords the foreign representative standing to bring such a proceeding, it does not explicitly provide that the look-back period should be measured from the date of the commencement of the foreign case rather than the date of commencement of case in the United States. If we measure the look-back period from the date of the opening of U.S. case, the delay inherent in the need for the foreign representative to file proceedings in the United States would make it unlikely that a foreign representative would ever be able to bring a proceeding under U.S. law to avoid a preference, as the look-back period under section 547 of the Bankruptcy Code is ordinarily only 90 days from the filing of the "petition," (i.e., the petition under chapter 15 or the petition under chapter 7 or 11). Proceedings to avoid a fraudulent conveyance under section 548 of the Bankruptcy Code have a longer look-back period of two years from the filing of the "petition," but some avoidable conveyances would doubtless fall outside this look-back period if the period is measured from the commencement of U.S. case rather than the commencement of the foreign proceeding.

There is authority under present law that the applicable look-back period can be measured from the date of the filing of the chapter 15 petition for recognition rather than the date of the opening of a plenary proceeding. *See In re Awal Bank, BSC*, 455 B.R. 73, 88-91(Bankr. S.D.N.Y. 2011). The same result might be obtainable by virtue of the tolling provisions of section 108 of the Bankruptcy Code, which apply in a chapter 15 case.

However, it is more consonant with the cooperation principles of chapter 15 for the look- back period to date from the opening of the foreign proceeding. There should be no unfairness in assisting the foreign representative in this manner because a court will be required to determine whether it is appropriate to apply avoidance law under the facts and circumstances of the case.

For example, if a German liquidator brought an avoidance proceeding in a U.S. plenary case after chapter 15 recognition, and it was determined that it was appropriate to apply U.S. avoidance law under the principles of *Maxwell Communication Corp. v. Societe Generale*

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[43] Section 1523, Actions to avoid acts detrimental to creditors, provides:

"(a) Upon recognition of a foreign proceeding, the foreign representative has standing in a case concerning the debtor pending under another chapter of this title to initiate actions under sections 522, 544, 545, 547, 548, 550, 553, and 724(a).

(b) When a foreign proceeding is a foreign nonmain proceeding, the court must be satisfied that an action under subsection (a) relates to assets that, under United States law, should be administered in the foreign nonmain proceeding."

(In re Maxwell Communication Corp., 93 F.3d 1036 (2d Cir. 1996)), or other applicable law, the German liquidator would be able to use the avoidance look-back period under U.S. law measured from the date of the filing of the original petition in Germany.[44]

The English version of the Model Law includes this type of provision at Article 23, sections 3 and 4 of the Cross-Border Insolvency Regulations 2006.

The statutory change can be accomplished by adding a new subsection (c) to section 1523[45]:

11 U.S.C. § 1523. Actions to avoid acts detrimental to creditors

(a) Upon recognition of a foreign proceeding, the foreign representative has standing in a case concerning the debtor pending under another chapter of this title to initiate actions under sections 522, 544, 545, 547, 548, 550, 553, and 724(a).
(b) When a foreign proceeding is a foreign nonmain proceeding, the court must be satisfied that an action under subsection (a) relates to assets that, under United States law, should be administered in the foreign nonmain proceeding.
(c) For purposes of any applicable section governing an action initiated by the foreign representative under subsection (a), the term "commencement of the case" and the term "order for relief" mean the opening of the foreign proceeding, and the phrase "date of the filing of the petition" means the date of the filing of an application or the taking of other action that resulted in the opening of the foreign proceeding. The date of the opening of the foreign proceeding shall be determined in accordance with the law of the country in which the foreign proceeding is pending.

We would welcome an opportunity to discuss these amendments with you or your staffs. We believe they would substantially improve the operation of chapter 15 by reducing litigation and more closely conforming it to the purposes of the Model Law.

[44] The same measurement date should apply to foreign avoidance law that may be applied in a chapter 15 case. *See* Fogerty v. Petroquest Res. (*In re* Condor Ins. Ltd., 601 F. 3d 319, 326 (5th Cir. 2010); *Hellas Telecommunications*, supra, 535 B.R. 543 at 586-587.

[45] Section 1523, Actions to avoid acts detrimental to creditors, currently provides:

(a) Upon recognition of a foreign proceeding, the foreign representative has standing in a case concerning the debtor pending under another chapter of this title to initiate actions under sections 522, 544, 545, 547, 548, 550, 553, and 724(a).

(b) When a foreign proceeding is a foreign nonmain proceeding, the court must be satisfied that an action under subsection (a) relates to assets that, under United States law, should be administered in the foreign nonmain proceeding.

Sincerely,

/s/ Jane Vris

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National Bankruptcy Conference

A non-profit, non-partisan, self-supporting organization of approximately sixty lawyers, law professors and bankruptcy judges who are leading scholars and practitioners in the field of bankruptcy law. Its primary purpose is to advise Congress on the operation of bankruptcy and related laws and any proposed changes to those laws.

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