NORTON JOURNAL OF BANKRUPTCY LAW AND PRACTICE

Vol. 18, No. 5 (2009)

Norton Journal of Bankruptcy Law & Practice (USPS 012-091), (ISSN 1059-048X) is published bimonthly, six times per year, by West, 610 Opperman Drive, Eagan, MN 55123-1396. Subscription Price: $546.96 annually. Periodicals postage paid at St. Paul, MN, and additional mailing offices. Postmaster: send address changes to Journal of Bankruptcy Law & Practice, PO Box 64526, St. Paul, MN 55164-0526.

Managing Editor, Norton Journal of Bankruptcy Law and Practice, Thomson Reuters, 50 Broad Street East, Rochester, NY 14694, (800) 327-2665, ext. 2753, fax (585) 258-3768, gavin.phillips@thomsonreuters.com.

Mat # 40722135

Determining the Center of Main Interests Under Chapter 15

MARK LIGHTNER

This article examines the temporal framework for determining a foreign debtor's center of main interests ("COMI") under sections 1502 and 1517 of the United States Bankruptcy Code ("Code"). Bankruptcy courts[1] have identified non-exhaustive factors for determining the location of a debtor's COMI. But the opinions in this area have not, until recently, reached the question of what temporal framework bankruptcy courts should use when making COMI determinations. Recently, *In re Betcorp Limited*[2] held that COMI should be determined as of the chapter 15 petition date. The temporal framework is particularly relevant in cases where the debtor moves the COMI on the eve of chapter 15 commencement, or in cases where its COMI is moved for it by the prior appointment of a locally based administrator or liquidator with control over the debtor. Surprisingly, however, the issue was never raised in *In re Bear Stearns*,[3] a case where the bankruptcy court denied recognition to debtors under the control of Cayman Islands liquidators at the time the chapter 15 petition was filed. The timing issue will recur as case law applying sections 1502 and 1517 of the Code develops.

Part I of this article explores the statutory framework for recognition of foreign proceedings under chapter 15. It concludes that the text of chapter 15 requires bankruptcy courts to make the COMI determination as of the date a debtor files a chapter 15 petition. Part II of this article anticipates two arguments for looking beyond the text: (i) chapter 15, as a model law, should be interpreted with foreign precedents and the objectives underlying a coordinated international insolvency scheme in mind; and (ii) interpreting chapter 15 as written leads to an absurd result, for example, by permitting debtors to forum shop. Part II dispels these arguments and explains why bankruptcy courts should, absent highly unusual circumstances, construe COMI in the present. First, it identifies

Mark Lightner is Law Clerk to the Hon. Robert D. Drain, Bankruptcy Judge, Southern District of New York. This article was first published in International Corporate Rescue, Volume 6, Issue 4 and is reprinted with the permission of Chase Cambria Publishing Ltd (www.chasecambria.com).

a crucial difference between chapter 15 and the European Regulation ("EU Regulation"),[4] and it explains why bankruptcy courts should be cautious when looking to foreign decisions to resolve the timing issue. Second, it explores policy reasons for measuring COMI in the present, and it explains why measuring COMI through a lookback period could severely restrict a foreign debtor's access to American courts and thwart chapter 15's primary goal of fostering coordination and cooperation to maximize value. Finally, it explains why forum shopping is not a concern when the debtor's COMI is moved to the sovereign that created it.

Applying the COMI test as of the chapter 15 petition date, which takes into account the prior appointment of statutory liquidators or administrators, is wholly consistent with the objective of orderly and predictable insolvency proceedings. Having concluded that COMI should be measured as of the date a foreign representative files a chapter 15 petition, Part III discusses the implications of this framework to *In re Bear Stearns*.

I. The Text of Chapter 15 Requires COMI Determinations to be Made as of the Chapter 15 Petition Date

U.S. ancillary proceedings commenced before October 15, 2005 to administer assets involved in foreign proceedings or otherwise to provide assistance to foreign proceedings are governed by section 304 of the Code, which permits bankruptcy judges to issue various forms of relief based primarily on principles of comity.[5] Section 304 was repealed, however, by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") and replaced by a new chapter – chapter 15 – with a statutory framework for "recognition" as the gatekeeping mechanism for assistance. As many judges have noted, the formalities of recognition are rigid, but the remedies available to the foreign representative, if the bankruptcy judge approves the petition, are plentiful and flexible.[6] Now, when the statutory representative of the debtors that are subject to foreign proceedings wish to avail themselves of assistance in the U.S. (and, in most instances, access to American courts), they must first file a petition for "recognition" under chapter 15 and, ultimately, be "recognized."

A foreign representative[7] seeking "recognition" must jump through several procedural and substantive hoops before a bankruptcy judge will grant the foreign proceeding[8] recognition under chapter 15. Chapter 15 creates a two-step process for recognition. The first step requires[9] the bankruptcy court to enter an order recognizing the "foreign proceeding"[10] if: (1) the foreign proceeding is a "foreign main proceeding" or a "foreign nonmain proceeding;"[11] (2) the foreign representative is a

person or body;[12] and (3) the petition meets certain procedural requirements.[13] The second step requires the court to recognize, or designate, the foreign proceeding as either a "foreign main proceeding" or a "foreign nonmain proceeding."[14] If it does not qualify as either main or nonmain, the proceeding will not be recognized.

Section 1502 of the Code defines "foreign main proceeding" and "foreign nonmain proceeding." A "foreign main proceeding" "means a foreign proceeding pending in the country where the debtor has the center of its main interests."[15] A "foreign nonmain proceeding," on the other hand, "means a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment."[16] The Code does not define COMI, but it does provide that "[i]n the absence of evidence to the contrary, the debtor's registered office … is presumed to be the center of the debtor's main interests."[17] The Code defines "establishment" as "any place of operations where the debtor carries out a nontransitory economic activity."[18]

Bankruptcy courts have struggled somewhat to define COMI, in part because COMI was not, before BAPCPA, part of American law.[19] In addition, section 1508 of the Code, a provision relatively novel in American positive law, instructs bankruptcy courts to consider chapter 15's "international origin, and the need to promote an application of [it] that is consistent with the application of similar statutes adopted by foreign jurisdictions."[20] The factors underlying the determination are now generally settled, however. Bankruptcy Judge Drain, in the first published decision to interpret COMI,[21] looked to the European Court of Justice's ("EJC") decision in *Eurofood* for guidance.[22] The ECJ, in turn, looked to the recitals of the EU Regulation, which stated that COMI should "correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties."[23] Bankruptcy Judge Klein, in *In re Tri-Continental Exchange Ltd.*, compared COMI to the debtor's principal place of business,[24] and District Judge Sweet and Bankruptcy Judges Lifland and Markell have followed suit, looking to the following non-exhaustive factors: "the location of the debtor's headquarters; the location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company); the location of the debtor's primary assets; the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes."[25] Some commentators have argued that predictability and the quality of the chosen substantive law should dictate the COMI inquiry.[26] Finally, it is well settled that a COMI determination is a question of fact, and courts have felt bound to con-

duct the COMI analysis "even in the case of an unopposed petition for recognition."[27]

The unasked question in many of these cases does not concern the factors for determining the location of the debtor's COMI; rather, it is, what temporal framework must a bankruptcy court use when analyzing those factors? There are potentially five different times from which a bankruptcy court could choose. The first would be some lookback prior to the filing of the foreign insolvency proceeding (referred to as T_{0-x}). The second would be as of the date of the commencement of the foreign proceeding (referred to as T_0). The third would be as of the date the foreign representative files the chapter 15 petition (referred to as T_1). The fourth would be a lookback period prior to the filing of the petition for chapter 15 recognition (referred to as T_{1-y}). The last would be as of the date the bankruptcy court holds the hearing on, or makes, the recognition determination (referred to as T_{1+z}[28]). As illustrated below,[29] the text of chapter 15 dictates that COMI should be determined as of T_1 or T_{1+z}.

***

An analysis of the proper COMI timeframe starts with, as it must, the text of sections 1502 and 1517 of the Code. As the Supreme Court has repeatedly noted in the bankruptcy context, the analysis also must end with the text if the language is clear and does not lead to an absurd result.[30] While neither section 1502 nor section 1517 expressly discusses a temporal framework for determining COMI, the grammatical tense in which they are written provides a clear and plain answer to the question. Every operative verb is written in the present or present progressive tense.[31] Section 1502 defines "foreign main proceeding" as a "foreign proceeding pending in the country where the debtor *has* the center of its main interests,"[32] and section 1517 instructs the court to recognize a foreign proceeding as a foreign main proceeding if such proceeding "*is pending* in the country where the debtor *has* the center of its main interests."[33]

Specifically, section 1517 uses "is pending," the present progressive tense, and both sections use the present tense of the verb "to have" before "the center of its main interests." Congress's choice to use the present tense necessarily requires bankruptcy courts to view the COMI determination as instructed: in the present. If Congress had, in fact, intended bankruptcy courts to view the COMI determination through a lookback period (e.g., as of T_{0-x} or T_{1-y}), or on a specific past date (e.g., as of T_0), it could have easily said so. One cannot reconcile a lookback period with the present tense of the operative verbs in sections 1502 and 1517, however. When applying the plain meaning of the present tense of the verb "to have" to the five temporal periods identified above, Congress's words can only apply to T_1 or T_{1+z}.

Moreover, no authority has been located imposing a judicially crafted lookback period overlaid on such a clear provision of the Code. This is particularly significant because Congress is clearly capable of creating lookback periods. For example, if Congress had intended to provide a lookback period (e.g., as of T_{0-x} or T_{1-y}), it could have defined "foreign main proceeding" in section 1502(4) as follows:

> (4) "foreign main proceeding" means a foreign proceeding pending in a country where the debtor *had the center of its main interests for the 730 days immediately preceding the date of the commencement of the foreign proceeding*[34] or if the debtor's center of its main interests has not been located in a single location for such 730-day period, the place in which the debtor's center of its main interests was located for 180 days immediately proceeding the 730-day period or for the longer portion of such 180-day period than in any other place.

This hypothetical definition is anything but hypothetical. It was taken almost verbatim from section 522(b)(3)(A) of the Code,[35] which creates a specific lookback period for property exemptions. Congress added section 522(b)(3)(A) to the Code, along with chapter 15, as part of BAPCPA.[36] It is a basic tenet of statutory construction that if Congress adds specific language to one part of legislation and excludes it from another, Congress intends for the two provisions to be treated differently. Why would Congress expressly define a lookback period in one provision of BAPCPA, and, at the same time, *implicitly provide* a lookback period (notwithstanding writing in the present tense) in another provision of the same legislation? As a matter of statutory construction, this distinction is nearly impossible to reconcile. Thus, there should be little doubt that courts, when made aware of the timing issue, should find COMI to be measured as of T_1 or T_{1+z}.

II. Looking Beyond the Text to Find Temporal Meaning

There are potentially two reasons why courts may nevertheless consider ignoring the plain language of sections 1502 and 1517. First, chapter 15 was derived from the Model Law on Cross-Border Insolvency ("Model Law") promulgated by the United Nations Commission on International Trade Law. One could argue that, as with other model laws, Congress chose not to tinker with the Model Law's language fearing consequences not envisioned by its drafters. It follows that less emphasis should be given to chapter 15's text and more emphasis placed on the broader international insolvency scheme.[37] The temporal reference for making the COMI determination, therefore, might not necessarily be

dictated by the plain terms of sections 1502 and 1517, but, rather, in a way that best promotes the objectives underlying the factors that courts use when making the COMI determination in the first instance. Keeping section 1508 in mind, this inquiry would require U.S. courts to evaluate foreign courts' analysis of the EU Regulation or precedents under other variants of the Model Law. Second, one could argue that interpreting COMI as of T_1 creates an absurd result (or a result manifestly contrary to Congress's intent) because it may permit improper forum shopping.

When examined, and as discussed below, these arguments do not justify looking beyond the clear text of chapter 15, however. First, European decisions interpreting the temporal framework are of limited influence because they are made in the context of a statutory regime that requires courts to make the COMI (or "establishment") determination as a jurisdictional prerequisite at T0.[38] Second, applying a lookback approach may lead to conflicting COMI determinations and could well deny properly appointed liquidators and administrators access to American courts, casting significant doubt over the prospect (in the absence of anyone else with authority to manage the debtor's affairs) of administering assets in the U.S. for the benefit of all creditors. Third, forum shopping raises little concern when the entity-debtor moves its COMI to the sovereign that created it.

A. Looking Beyond the Code to Foreign Law

In re Betcorp Ltd. recently addressed the proper temporal reference under chapter 15, looking, consistent with section 1508, beyond the Code to find the appropriate temporal framework. There, the debtor, an Australian corporation, had hosted an online gambling platform. It owned several subsidiaries that were incorporated in various countries including Australia, Antigua, Cypress, and the United Kingdom.[39] Most of the debtor's customers were American, however, because it was illegal for Australians to gamble online.[40] After the U.S. outlawed Internet gambling, the debtor held a general meeting, as provided under Australian law, and voted to dissolve itself.[41] Australian liquidators were then appointed and began to notify creditors. Before their appointment, though, 1st Technology commenced a patent infringement suit against the debtors in the District of Nevada. After 1st Technology and Betcorp failed to resolve 1st Technology's proof of debt in the Australian proceeding, the Australian foreign representative filed a petition for recognition under chapter 15, seeking to enjoin the Nevada litigation and resolve the infringement claim through the Australian winding up process.[42]

1st Technology argued *inter alia* that COMI should be made with reference to the company's operational history, which clearly pointed

to the U.S. After all, approximately 85% of Betcorp's customers were in the U.S., most of Betcorp's operations were conducted in Antigua, and it was illegal for Australians to gamble online. Nonetheless, the bankruptcy court recognized the Australian proceeding as a foreign main proceeding, holding that COMI should be determined as of T_1. Unlike Part I of this article, the court did not analyze the text of sections 1502 and 1517. Instead, it relied on reasoning that originated from cases analyzing the EU Regulation, and concluded, when looking at chapter 15's general purpose and place in the overall international insolvency scheme, that making the COMI determination at any time other than as of T_1 "would make the determination… imprecise and often incorrect."[43] In other words:

> If courts assess COMI with an eye to a debtor's operational history, there is an increased likelihood of conflicting COMI determinations, as courts may tend to attach greater importance to activities in their own countries, or may simply weigh the evidence differently. Giving consideration to a debtor's operational history increases the possibility of competing main proceedings, thus defeating the purpose of using the COMI construct. Requiring courts to give weight to the debtor's interests over the course of its operational history may destroy the uniformity and harmonization that is the goal of employing the COMI inquiry…. [A]n inquiry into the debtor's past interests could lead to a denial of recognition in a country where a debtor's interests are truly centered, merely because of past activities.[44]

The court ultimately concluded that, as of T_1, the debtor's COMI was Australia, in part because the liquidators, who now had plenary control over the company, were located there. Indeed, Betcorp had no employees at T_1, and the company's only asset – a bank account – was also located in Australia.[45]

In making its determination that COMI should be measured as of T_1, the court also relied on *In re Ran*.[46] There, the debtor was an individual who had moved to the United States from Israel many years before the recognition petition was filed, even though (or, perhaps because) the activities giving rise to the petition occurred while the debtor was in Israel. Like *In re Betcorp*, *In re Ran* concluded that the COMI determination should be made as of T_1 (also without analyzing the text of chapter 15), which was the U.S. *In re Ran* looked to various European decisions that measured COMI as of T_0 but concluded, as above, that their logic would lead, in the chapter 15 context, to applying T1.[47]

Although *In re Betcorp* and *In re Ran* have much to commend them for their policy analysis, which this author endorses, it is surprising that they relied so heavily on European cases, which reference T0, and not the clear and unambiguous language of chapter 15. As *In re Ran* implicitly noted[48] (and as articulated in *Eurofood*), EU courts are required to make the "main" or "secondary" determination at T_0.[49] This is significant because all EU member states must recognize the proceeding as characterized by the opening court without conducting a de novo review of the COMI or establishment determination.[50] This first-in-time principle under the EU Regulation carries with it a significant implication: the law of the member state that opened the main petition applies in all other member states (unless a proceeding is opened in that other member state) as to the opening of those proceedings, their conduct, and their closure.[51]

The determination under chapter 15, on the other hand, is different in both purpose and consequence. For example, sections 361, 362, 363, 549, and 552 of the Code apply to the debtor and its estate if the court grants foreign main recognition, and the court may grant various other forms of relief whether the proceeding is main or nonmain. Indeed, the foreign representative can file an involuntary petition under section 303 of the Code if the debtor is granted recognition,[52] and if the foreign debtor is granted foreign main recognition, a voluntary case may be commenced under section 301.[53] But a recognition determination under chapter 15 only provides tools to the foreign representative to seek assistance from U.S. courts in the administration of the foreign proceeding; it does not, as a general rule, like determinations made at T_0 under the EU Regulation, chart the course for subsequent proceedings or dictate choice of law.[54]

This is not to say, of course, that EU decisions interpreting COMI at T_0 are unhelpful or unpersuasive. These decisions provide guidance on matters of statutory construction, that is, by reading the statute to focus on the present. They also support the notion that determinations based on up-to-date, present information properly focus the inquiry and further the goal of maximizing value (historical facts are not always relevant to, and, where stale, hinder the goal of maximization). Such an analysis is clearly applicable in both the chapter 15 and EU Regulation contexts as it is universally true that basing the COMI decision on historical information, which is subject to differing results depending on the chosen temporal reference, is far more problematic than focusing on the practical implications of present facts. But EU decisions can also support a different conclusion: for purposes of consistency and uniformity, bankruptcy courts could measure COMI *like the court* at T_0, which, as promulgated

by many EU decisions, is as of T_0. In short, bankruptcy courts should be mindful when analogizing to foreign decisions on this issue because, at least under the EU Regulation, they are made against the backdrop of a regime that requires courts to make the COMI (or "establishment") determination as a jurisdictional prerequisite at T0.[54A]

B. Absurd Results: Forum Shopping vs. Limited Access

To justify going beyond chapter 15's plain text, some also may argue that interpreting COMI as of T_1 or T_{1+z} would lead to an absurd result by permitting improper forum shopping prior to T1. But ignoring the text in favor of a lookback period, especially in cases where foreign administrators or liquidators are validly appointed (and the COMI is thereby "moved"), actually creates many of the problems identified in *In re Betcorp Ltd.*[55] (e.g., conflicting COMI determinations). It also ignores a potential greater evil: it deprives the foreign representative of meaningful access to American courts.

The following analysis explains why a foreign representative has limited access to American courts upon denial of recognition, and it further explains why forum shopping is of less concern when the debtor moves its COMI to the place of its incorporation, which can, in any event, be dealt with within chapter 15's flexible framework, which, among other things, permits conditional relief. Therefore, when a bankruptcy court weighs the prospect of restricted access (and the disadvantages identified in *In re Betcorp Ltd.* to applying a lookback period) against the possibility of abuse and forum shopping, bankruptcy courts should still conclude (except, perhaps, in truly outrageous cases) that COMI must be measured as of T_1 or T_{1+z}.

* * *

Although a foreign debtor can commence a case under chapter 7 or 11 upon recognition,[56] or even before a chapter 15 petition is filed,[57] a case may not be voluntarily commenced under another chapter of the Code if the bankruptcy court denies recognition.[58] In fact, a foreign representative is generally denied access to all U.S. courts if the court denies recognition.[59] As the legislative history states, "chapter 15 is intended to be the exclusive door to ancillary assistance to foreign proceedings."[60] Courts have explained that any right of access to U.S. courts, absent successful recognition, is a very limited exception to the general rule that chapter 15 concentrates "the recognition and deference process in one United States court… and empowers a court that will be fully informed of the current status of all foreign proceedings involving the debtor." In fact, bankruptcy courts, after denying recognition, have the power (and arguably the duty) to "issue any appropriate order

necessary to prevent the foreign representative from obtaining comity or cooperation from courts in the United States."[61]

The main exception to the general rule is found in section 1509(f), which permits the foreign representative "to sue in a court in the United States to collect or recover a claim which is the property of the debtor"[62] (notwithstanding an unsuccessful recognition hearing).[63] But even this exception is limited as noted in the legislative history: "[s]ubsection (f) provides a limited exception to the prior recognition requirement so that collection of a claim which is property of the debtor, for example an account receivable, by a foreign representative may proceed without commencement of a case or recognition under this chapter."[64] For all intents and purposes, therefore, should a foreign representative fail to obtain "recognition," access to American courts will be extremely limited.[65] And no one could reasonably argue that the ability of foreign representatives to avail themselves of judicial process, particularly when property of the estate exists in the U.S., is not an indispensable tool for orderly administration.

On the other hand, courts must be mindful of attempts to forum shop.[66] But forum shopping should be of less concern when the debtor moves its COMI *to* the place of its registered offices (as opposed to *away from* it) as a consequence of a statutorily mandated insolvency scheme promulgated by the same sovereign under which the debtor was organized. To be sure, Congress presumes COMI to be there,[67] and most creditors know (or can reasonably be deemed to know) the location of their debtor's registered offices. It is hard to imagine, therefore, that they would not reasonably expect to be subject to insolvency procedures there.[68] Indeed, the registration decision occurs long before insolvency and it unlikely that it is made in contemplation of insolvency. Unless debtors move their place of registration on the eve of bankruptcy (perhaps a good example of forum shopping), the world is placed on notice that dissolution may one day occur there.

It should be clear that, when weighing the possibility of limited access and the policy considerations identified in *In re Betcorp Ltd.* against the risk that debtors will forum shop by moving their COMI back to the location of their registered office, it is a desirable result to measure COMI as of T_1 or T_{1+z},[69] and, more importantly, it is not an absurd result that justifies ignoring the plain text of sections 1502 and 1517.[70]

III. The Shifting COMI in Hedge Fund Cases: *In re Bear Stearns* Explored

This section applies the foregoing analysis to *In re Bear Stearns*, a hedge fund case that never addressed the temporal framework issue.[70A]

There, joint provisional liquidators ("JPLs") of several Bear Stearns hedge funds (the "Funds")[71] filed for chapter 15 recognition. The Funds were exempted limited liability companies with registered offices in the Cayman Islands. Immediately before filing the chapter 15 petition, the boards of directors of the Funds authorized winding up procedures, and JPLs were appointed by the Cayman Grand Court under Cayman law. But most of the Funds' operational history was in the U.S.: the Funds previously had a U.S. administrator that performed day-to-day functions; all of the Funds' assets had been located in the U.S.; the Funds' books and records were maintained in the U.S.; the Funds' former asset manager was located in the U.S.; and the Funds' receivables were located in the U.S.[72] The only asset in the Cayman Islands was a bank account containing $15 million, but that account had been established after T_0.[73]

The court concluded, not surprisingly, that the Funds were not entitled to main recognition because the Funds' COMI was the U.S.[74] On appeal, the district court affirmed, implicitly recognizing that COMI (and "establishment") should be measured as of T_{0-x} or T_{1-y}. The movement of Fund money from the U.S. to the Cayman Islands after T_0 troubled the district court,[75] and it cited the legislative history to support its statement that access to American courts is predicated on "sufficient prepetition economic presence in the country of the foreign proceeding."[76]

Both the bankruptcy and district courts paid little if any attention to the fact that, after T_0, and on T_1, the debtor was under the control of, and its decisions were being made by, court-appointed Cayman Islands liquidators. No one else under the law of the debtor's jurisdiction of incorporation was authorized to make decisions for it.

Notwithstanding the denial of recognition, the bankruptcy court was clearly troubled, though, because it did not want to leave the Funds without a remedy should recognition be denied. The court stated that "[n]onrecognition of the [f]oreign [p]roceedings, however, does not leave the [p]etitions without the ability to obtain relief from U.S. courts."[77] The bankruptcy court reasoned that section 303(b)(4) of the Code, which was not modified by the BAPCPA amendments, might provide an independent basis to file an involuntary petition for chapter 7 or 11 relief.[78]

But the approach adopted by the *In re Bear Stearns* Court seems to be at odds with the text and purpose of chapter 15:[79] the foreign representative, under the logic of the court's dicta, would have had the ability to obtain the same relief as if the court had granted recognition in the first instance. If the COMI determination had been measured, instead, as of T_1 or T_{1+z}, as the text of the statute seems to require, COMI would, however, have probably pointed to the Cayman Islands in light of the control over the Fund's management exerted by the liquidators.[80] The apparent

inequity and practical problem of administering the Funds' U.S. assets, as identified in *In re Bear Stearns I*, would have also disappeared. The creditors' expectation (that an orderly insolvency proceeding would be forthcoming) would have been honored, and the goals of value maximization, certainty, predictability, and harmonization would have been furthered. The bankruptcy court could also have tailored relief based on the unique circumstances of the case if it felt that U.S. interests were not being properly protected, and clearly it would not have been bound to apply Cayman Islands law to issues properly governed by U.S. law.[81]

NOTES

1. Unless otherwise indicated, the term "bankruptcy courts" refers to United States bankruptcy courts.

2. 400 B.R. 266 (Bankr. D. Nev. 2009).

3. *In re Bear Stearns* (*In re Bear Stearns I*) 374 B.R. 122 (Bankr. S.D.N.Y. 2007), *aff'd In re Bear Stearns* (*In re Bear Stearns II*), 389 B.R. 325 (S.D.N.Y. 2008); *see also In re Basis Yield Alpha Fund*, 381 B.R. 37 (Bankr. S.D.N.Y. 2008) (holding at summary judgment that there was not enough evidence to make the COMI determination). *In re Sphinx Ltd.* (*In re Sphinx I*), 351 B.R. 103 (Bankr. S.D.N.Y. 2006), *aff'd In re Sphinx* (*In re Sphinx II*), 371 B.R. 10 (S.D.N.Y. 2007), also involved a debtor that, by the date of the chapter 15 petition, had come under the control of Cayman Islands liquidators.

4. Council Regulation 1345/2000, 2000 O.J. (L 160)(EC) [hereinafter *EU Regulation*].

5. *E.g.*, *Bank of New York v. Treco & JCPL Leasing Corp.* (*In re Treco*), 240 F.3d 148, 156-57 (2d Cir. 2001).

6. *E.g.*, *In re Bear Stearns II*, 389 B.R. at 333.

7. *See* 11 U.S.C. § 101(24) (defining "foreign representative").

8. *See* 11 U.S.C. § 101(23) (defining "foreign proceeding").

9. The Code does not require bankruptcy courts to recognize foreign proceedings if such recognition would be manifestly contrary to the public policy of the United States. 11 U.S.C. § 1506.

10. 11 U.S.C. § 1517.

11. 11 U.S.C. § 1517(a)(1). These terms are defined in 11 U.S.C. § 1502.

12. 11 U.S.C. § 1517(a)(2). The Code defines "person" in 11 U.S.C. § 101(41).

13. These include attaching to the petition itself a certified copy of the decision commencing the foreign proceeding, a certificate from the foreign court affirming the existence of the foreign proceeding, and a statement from the foreign representative identifying all other foreign proceedings known to the foreign representative. 11 U.S.C. § 1515(b), (c).

14. 11 U.S.C. § 1517(b). This step is arguably a distinction without a difference because the first step, as discussed above, requires the court to determine that the foreign proceeding is a main or a nonmain proceeding. It may, however, give the court the option to grant recognition (thus channeling subsequent U.S. litigation through the bankruptcy court, *see* 11 U.S.C. § 1509) while delaying to decide whether the case should be designated as "main" or "nonmain" as long as the court is satisfied that it is at least "nonmain," although the type of relief will differ somewhat based on the distinction. *Compare In re Loy*, 380 B.R. 154, 171 (Bankr. E.D. Va. 2007), *and In re Bear Stearns I*, 374 B.R. at 127, n.4, *with In re Schefenacker plc*, No. 07-Bk-11482 (Bankr. S.D.N.Y. filed June 15, 2007). *See also* Hon. Samuel L. Bufford, *Center of Main Interests, International Insolvency Case Venue, and Equality of Arms: The Eurofood Decision and the European Court of Justice*, 27 NW J. Int'l L. & Bus. 351 (2007) (recommending that the decision to recognize a foreign proceeding as main or nonmain should not be made precipitously).

15. 11 U.S.C. § 1502(4).

16. 11 U.S.C. § 1502(5).

17. 11 U.S.C. § 1516(c). This article uses the term "registered office" and place of incorporation interchangeably for entity-debtors. *See* H.R. Rep. No. 109-31, at 113 (2005).

18. 11 U.S.C. § 1502(2).

19. Perhaps the closest analogy under U.S. law would be venue provisions tied to a party's state of incorporation, 28 U.S.C. § 1408(1), or diversity jurisdiction, *id.* § 1332. The location of the debtor's registered office creates only a statutory presumption, however. 11 U.S.C. § 1516(c).

20. 11 U.S.C. § 1508.

21. *In re Sphinx I*, 351 B.R. at 118-19.

22. For an interesting discussion of the *Eurofood* case, see Hon. Samuel L. Bufford, *supra*, note 14.

23. *EU Regulation*, *supra*, note 4, at rec. ¶ 23; Case C-341/04, *Eurofood IFSC Ltd.*, 2005 E.C.R. ¶ 126 [hereinafter *Eurofood*]; *see also* Bufford, *supra*, note 14 (discussing *Eurofood*).

24. 349 B.R. 627, 634 (Bankr. E.D. Cal. 2006). Judge Klein cites Professor Westbrook's statement that Congress's choice to keep the term COMI, as opposed to replacing it with the more commonly known principal place of business test, was to encourage a global and uniform test, as well as to encourage other countries to adopt the model law. Jay Lawrence Westbook, *Chapter 15 at Last*, 79 Am. Bankr. L.J. 713, 719-20 (2005).

The venue provision of title 28 of the United States Code that addresses chapter 15 petitions is inconsistent with sections 1502(a)(1) and 1516(c) of the Code because it refers to the foreign debtor's "principal place of business" and not COMI. 28 U.S.C. § 1410(1), (2). It is arguable, perhaps, that the "principal place of business" concept, which appears to create an inter-district construct, is less broad than the COMI analysis, which appears to create an inter-sovereign construct. This issue is beyond the scope of this article.

25. *In re Bear Stearns II*, 389 B.R. at 336 (citing *In re Sphinx I*, 374 B.R. at 336); *see also In re Betcorp Ltd.*, 400 B.R. at __.

26. *E.g.*, Westbrook, *supra*, note 24.

27. *In re Bear Stearns II*, 389 B.R. at 336; *see also In re Basis Yield Alpha Fund*, 381 B.R. at 51.

28. This time period was included because section 1517(d) provides that "[t]he 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." 11 U.S.C. § 1517(d). This article, however, does not address the scope of section 1517(d). *But see Shierson v. Vlieland-Bobby*, I.L.Pr. 12 [2005] EWCA Civ 974 (CA (Civ Div) 2005) [hereinafter *Shierson*] (Longmore, LJ, concurring) ("It seems to me, however, that … it is not beyond the realm of argument that the correct date is the date of service of the bankruptcy petition on the debtor rather than the date of the hearing of the petition.").

29. Please note that the use of the preposition "at" before one of these time periods (e.g., "at T_0") refers to a specific period of time, whereas the use of the prepositions "as of" before one of these time periods, or instances in time (e.g., "as of T_0"), refers to the temporal framework that a court must use when making the COMI determination.

30. *E.g.*, *United States v. Ron Pair Enters. Inc.* (*In re Ron Pair Enters.*), 489 U.S. 235, 298 (1989).

31. *In re Ran* (*In re Ran II*), 2009 U.S. Dist. LEXIS 26269, at *15-16 (S.D. Tex. 2009), briefly discussed the grammatical tense argument in the context of "establishment."

32. 11 U.S.C. § 1502(4) (emphasis added).

33. 11 U.S.C. § 1517(b)(1) (emphases added).

34. In place of the date of commencement of the foreign proceeding (i.e., at T_0), the statute could reference the date of the petition for recognition (i.e., at T_1), or simply have used the past tense.

35. 11 U.S.C. § 522(b)(3)(A); *see also* 28 U.S.C. § 1408(1) (providing a lookback period for venue in bankruptcy cases).

36. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 §§ 216, 801.

37. See *supra* note 20 and surrounding text for a discussion of section 1508 of the Code, which instructs courts to consider chapter 15's international character.

38. *Shierson*, at 13 ("[B]efore [a court] can assume jurisdiction to open main insolvency proceedings, the court of a member state must be satisfied that, at the time it did so, the debtor's center of main interests was situated within the territory of that state.").

39. 400 B.R. at __.

40. Brief of 1st Technologies at 12, *In re Betcorp Ltd.*, No. 08-21594 (Bankr. D. Nev. Nov. 19, 2008).

41. *In re Betcorp Ltd.*, 400 B.R. at __.

42. *Id.* at __.

43. *Id.* at __.

44. *Id*.

45. Alternatively, the court determined that even if it looked at Betcorp's operational history, the result would not have changed.

46. 390 B.R. 257 (Bankr. S.D. Tex. 2008), *aff'd* 2009 U.S. Dist. LEXIS 26269 (S.D. Tex. 2009).

47. *Id.* In *In re Ran*, the alleged debtor moved from Israel to the United States in 1997 with the intent to permanently remain. *Id.* at 286. The Israeli courts opened an insolvency proceeding in Israel in the late 1990s, and liquidators were appointed. *Id.* The foreign representative commenced a proceeding under chapter 15, but the bankruptcy court denied recognition because the alleged debtor had relocated to the United States with the intent to permanently remain. *Id.* at 302. In part, *In re Ran* looked to European decisions that reasoned COMI is neither measured as of the time a debtor incurs the debt nor an immutable concept – that is, the debtor can change his COMI before opening insolvency proceedings, and therefore, the date as of which to determine COMI will normally be the present, or the date of case commencement. *Id.* at 267-81. The court did note, however, that courts should scrutinize COMI changes that were predicated on an imminent bankruptcy filing. *See id.* at 294. *In re Ran* cites various cases, including *Shierson*, where Lord Chadwick states that a "debtor's cent[er] of main interests is to be determined at the time that the court is required to decide whether to open insolvency proceedings" upon considering all the facts of the case. *See also Staubitz-Schreiber* (Case C-1/04), [2006] E.C.R. I-701 [2006] I.L.Pr. (ECJ Grand Chamber 2006).

Because *In re Ran* involved an individual debtor, as opposed to an entity created by statute, its holding to find the U.S. as the debtor's COMI is not wholly analogous to entity-debtor cases involving court appointed liquidators or administrators from the country of incorporation that have exclusive practical, as well as legal, control over the debtor. This would explain why, perhaps, and unlike *In re Betcorp*, the location of the Israeli receivers was not dispositive.

48. *In re Ran* noted that "under the EU Regulation, the determination of the location of the debtor's cent[er] of main interests is made at the time the petition is presented initiating the insolvency proceeding…. In contrast, [c]hapter 15 does not provide for recognition of an insolvency proceeding based on a foreign court's determination that it has jurisdiction as the location of the debtor's center of main interests…. Instead, [c]hapter 15 requires the U.S. court to make an independent evaluation of the location of the debtor's center of main interests at the time a petition for [chapter 15] recognition is presented." 390 B.R. at 267.

49. *Eurofood* at ¶ 102-05.

50. *Id.*; *see also* Bufford, *supra* note 22.

51. *EU Regulation, supra* note 4, at art. 4. The opening member's law shall determine *inter alia* "the assets which form part of the estate and the treatment of assets acquired by or devolving on the debtor after opening the insolvency proceeding;" "the respective powers of the debtor and the liquidator;" "the conditions under which set-offs may be invoked;" "the effects of

insolvency proceedings on current contracts to which the debtor is party;" "the rules governing the distribution of proceeds from the realization of assets;" "the conditions for and the effects of closure of insolvency proceedings;" and "the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors." *Id.* If, however, a secondary proceeding is opened, the laws of the member state where the secondary proceeding is pending shall apply only within that member's borders, or potentially to assets removed from that state after the secondary proceeding has been opened. *Id.* at art. 27.

52. 11 U.S.C. §§ 1511(a)(1), 1528 ("After recognition of a foreign main proceeding, a case under another chapter of this title may be commenced only if the debtor has assets in the United States."); *see also* 11 U.S.C. § 1531 ("In the absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of commencing a proceeding under section 303, proof that the debtor is generally not paying its debts as such debts become due.").

53. 11 U.S.C. § 1511(a)(2).

54. It is beyond the scope of this article whether "recognition" is a jurisdictional inquiry.

54A. After the initial publication of this article in *International Corporate Rescue*, the High Court of Justice Chancery Division Companies Court decided *In re Stanford Int'l Bank Ltd. et al*, [2009] E.W.H.C. 1441 (Ch), which addressed whether a liquidation in Antigua satisfied the COMI test under the English version of the Model Law. *In re Stanford*, contrary to the discussion above, expressly relied on the EU Regulation when examining COMI under the Model Law. *See id.* ¶¶ 45-46. The court never reached the timing issue, however, but relied on EU precedent when looking to the *factors* for making the COMI determination. Because *In re Stanford* never reached the timing issue (which is also surprising because it analyzed *In re Betcorp*), its broad readings and reliance on the EU Regulation should be viewed with caution, as discussed in the above text, in the same way as *In re Betcorp* and *In re Ran*.

55. See *supra* note 43 and surrounding text.

56. 11 U.S.C. § 1511.

57. *See* 11 U.S.C. § 1529(1)(A) (addressing coordination when a petition for recognition is filed after a petition under another chapter of the Code).

58. *See* 11 U.S.C. § 1511(b) ("The petition commencing a case under subsection (a) must be accompanied by a certified copy of an order granting recognition.") *In re Bear Stearns I* suggested in dicta that an involuntary case may be commenced under section 303(b)(4) of the Code by a foreign representative whose petition for recognition has been denied. 374 B.R. at 132-33. The plain language of section 1511(b) of the Code would seem to belie this analysis. If a foreign representative can avail herself of section 303(b)(4) after failing to win recognition under chapter 15, section 1511(a)(1) would be superfluous and section 1511(b)'s requirement of an accompanying certificate would be abrogated. *See also* 11 U.S.C. § 1512 ("*Upon recognition of a foreign proceeding*, the foreign representative in the recognized proceeding is entitled to participate as a party in interest in a case regarding the debtor under this title." (emphasis added)).

59. 11 U.S.C. § 1509(d).

60. H.R. Rep. No. 109-31, at 110 (2005).

61. 11 U.S.C. § 1509(d).

62. 11 U.S.C. § 1509(f).

63. *Iida v. Kitahara* (*In re Iida*), 377 B.R. 243, 257 n.21 (B.A.P. 9th Cir. 2007); *see also In re Loy*, 380 B.R. 154, 165 (Bankr. E.D. Va. 2007).

64. H.R. Rep. No. 109-31, at 110-11 (2005).

65. The Code's repeated use of the phrase "upon recognition" in the sections of chapter 15 that empower the court to provide relief further supports this conclusion. 11 U.S.C. §§ 1512, 1520, 1521, 1523, 1524; *see also id.* §§ 1511, 1512. It would be odd for a bankruptcy court to permit foreign representatives, after denying the recognition petition, to seek access and assistance commensurate with the relief provisions provided in chapter 15 when chapter 15 was so clearly meant to provide the gateway for such relief.

66. Even European decisions that hold COMI to be measured as of T_0 are skeptical of attempts to manufacture COMI on T_0 to creditors' detriment. *See Shierson*; *Staubitz-Schreiber*.

67. 11 U.S.C. § 1516(c); *see also* H.R. Rep. No. 109-31, at 113 (2005).

68. Concerns about forum shopping ring hollow when articulated by or on behalf of creditors who sought out the debtor for the purpose of benefiting from the location of the debtor's jurisdiction of incorporation. For example, many investors invest in hedge funds for tax purposes based, in large measure, on the place of the fund's incorporation. *See* Securities & Exchange Commission, Division of Investment Management & Office of Compliance Inspections & Examinations, *Implications of the Growth of Hedge Funds* 10 (2003) [*hereinafter* SEC Report], available at http://www.sec.gov/news/studies/hedgefunds0903.pdf (last visited Apr. 9, 2009). It would be perverse, by anyone's measure, to reap the tax benefits of the foreign country, and yet complain about being subject to insolvency proceedings in that country (even if their investment advisor was located elsewhere). Of course, creditors that are victims of interactions with the debtor through no fault of their own may be an exception.

69. Nor does permitting forum shopping between the former COMI location and the location of the debtor's registered offices manifestly violate public policy. *See* 11 U.S.C. § 1506 ("Nothing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States."). There are countless examples in American jurisprudence where a non-individual entity is subject to judicial process in the location of both its principal place of business and its place of incorporation. *E.g.*, 28 U.S.C. §§ 1408 (permitting a chapter 11 case to be commenced in the location of the debtor's domicile, residence, and principal place of business), 1332 (a corporation, for diversity jurisdiction purposes, is a "citizen of any State by which it has been incorporated and of the State where it has its principal place of business"). And considering that section 1506's public policy exception shall be narrowly construed, *e.g.*, *In re Ernst & Young, Inc*, 383 B.R. 773, 781 (Bankr. D. Co. 2008), it is unlikely that a court will find that winding up an estate in its country of incorporation, without more, manifestly violates American public policy.

70. Chapter 15, moreover, also gives bankruptcy courts considerable discretion to condition (or even deny) relief in the face of improper conduct by foreign liquidators or administrators, and to coordinate with the foreign proceeding to maximize value for the estate. *See* 11 U.S.C. § 1522(c); *see also In re Sphinx II*, 371 B.R. at 18. Moreover, the practicality inherent in chapter 15, even in this area, is highlighted by section 1517(d), which permits the court to take a second look at its COMI determination if circumstances change – again with the statutory focus on the present tense, that is, in consideration of, among other things, the present location of those administering the debtor.

70A. After the initial publication of this article in *International Corporate Rescue*, the High Court of Justice Chancery Division Companies Court decided *In re Stanford Int'l Bank Ltd. et al*, [2009] E.W.H.C. 1441 (Ch), which addressed a factually similar situation to *In re Bear Stearns I*. There, liquidators were appointed in Antigua and the English court had to decide whether to recognize the liquidation as a foreign main proceeding under the Model Law. The court started with the presumption that COMI was located in Antigua because the debtor's registered offices were located there; however, the court considered *historical facts* when rejecting arguments that the presumption had been overcome. Although the court ultimately concluded that Antigua was the COMI, it never addressed the temporal framework issue and clearly overlooked the prior appointment of liquidators as evidence of control, and thus, the debtor's present COMI. For this reason, *In re Stanford* stands with *In re Bear Stearns I* and *II* as not addressing the temporal framework for COMI determinations.

71. This article does not distinguish between the different types of funds identified in the opinion. For a thorough explanation of hedge funds and their growth in the marketplace, see SEC Report, *supra*, note 68.

72. *In re Bear Stearns I*. 374 B.R. at 129-30. One investor of the one of the funds was located in Europe. *Id.* at 130.

73. *Id.* at 131.

74. The Court also denied nonmain recognition because the Funds lacked an establishment in the Cayman Islands. *Id.*

75. *In re Bear Stearns II*, 389 B.R. at 339.

76. *Id.* 389 B.R. at 334. There is no support in the legislative history, however, that COMI is measured as of T_{0-x} or T_{1-y} because the legislative history never addressed the issue.

77. *In re Bear Stearns I*, 374 B.R. at 132.

78. The court stated that "[s]ection 303(b)(4) of the… Code specifically provides that an involuntary case may be commenced under chapter 7 or 11 of the … Code by a foreign representative of the estate in a foreign proceeding so that a foreign representative is not left remediless upon nonrecognition." *Id.*

79. See *supra* note 57 and surrounding text. In fact, there was no subsequent plenary or ancillary activity in the U.S. on behalf of the Fund (or on behalf of the debtor in *In re Basis Yield Alpha Fund*).

80. There is little question that after T_0, the JPLs were vested with exclusive, absolute, and plenary control over the Funds in them. *Id.* at 125. The Funds' COMI likely moved to the Cayman Islands at that time because the Funds' headquarters and the location of those who actually manage the debtors were now located in the Cayman Islands. At a minimum, there was probably an establishment.

81. *In re Sphinx I*, 351 B.R. at 116.