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

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

Chapter 15 is based on the Model Law on Cross Border Insolvency which had been prepared by the United Nations Commission on International Trade Law (UNCITRAL), with significant input from insolvency practitioners all over the world. *U.S. v. J.A. Jones Constr. Group, LLC*, 333 B.R. 637, 638 (E.D.N.Y. 2005). It was designed to create procedures for cooperation among foreign courts where insolvency proceedings are pending in more than one country and establish guidelines for the protection of assets internationally, while being sensitive to the political issues and differing legal systems of the countries involved. Any determination of a request for assistance under Chapter 15 must be "consistent with the principles of comity."[2] 11 U.S.C. § 1507; *see J.A. Jones*, 333 B.R. at 638.

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

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

GENERAL PROVISIONS

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

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

[2] Comity is not something you see on the Late Show with David Letterman. "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws. *Hilton v. Guyot*, 159 U.S. 113, 163-64, 16 S.Ct. 139, 143 (1895).

debtor. Venue is limited to the district in which the debtor has its principal place of business in the United States.[3]

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

SECTION 109

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

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

To summarize, a foreign corporation that is not a railroad or a banking institution and that has a residence, domicile, place of business, or property in the United States can obtain relief

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[3] It is important to note, however, that relief under Chapter 15 of the Bankruptcy Code is only necessary if a foreign representative needs judicial assistance in the United States. Unless otherwise required under state law, nothing in the Bankruptcy Code requires that a foreign representative obtain an order from a U.S. bankruptcy court to exercise ownership rights or take other similar actions in the United States. 11 U.S.C. § 1509(f); *see Iida v. Kitahara (In re Iida)*, Adv. No. 06-90059 (B.A.P. 9th Cir. Sept. 26, 2007) ("[Nothing in] the Bankruptcy Code or in Hawaii state law required the Foreign Representative to obtain any further order from a court within the United States recognizing his authority as trustee before he could proceed to exercise and act upon any rights, titles or interests of the Japanese bankruptcy estate."); *see also In re Loy*, 380 B.R. 154 (Bankr. E.D. Va. 2007) (holding that filing a *lis pendens* was not an action that required comity or cooperation of United States court and could be done without first obtaining recognition of foreign proceeding).

under Chapter 15. Additionally, notwithstanding the proscription of § 109, foreign insurance companies may also be debtors under Chapter 15.

Requirement of Domicile

A person that has a domicile in the United States may be a debtor under the Bankruptcy Code. A corporation's domicile is its state of incorporation. *Underwood v. Hilliard* (*In re Rimsat, Ltd.*), 98 F.3d 956, 960 (7th Cir. 1996) (citing *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 588, 10 L.Ed. 274 (1839); Restatement (Third) of the Foreign Relations Law of the United States § 213 (1987)). Therefore, a foreign corporation, incorporated in a foreign country, must have a residence, place of business, or property in the United States to qualify for relief under § 109. *See GMAC Inv. Funds Trust I v. Globo Comunicacoes e Participacoes S.A. (In re Globo Comunicacoes e Participacoes S.A.)*, No. 04 Civ. 2818(VM), 2004 WL 2624866, at *9 (S.D.N.Y. Nov. 17, 2004) (noting that foreign debtor with no residence or place of business in the U.S. may still qualify for relief under § 109 if it has property in the U.S.).

Requirement of Residence

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

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

Requirement of Place of Business

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

A case that followed *Carnera* in eschewing the notion that a debtor need have a formal place of business in the U.S. to qualify for bankruptcy relief was *In re Brierley*, 145 B.R. 151 (Bankr. S.D.N.Y. 1992).[4] The debtor in *Brierley* was one of the many entities related to Maxwell Communication Corporation, which was the subject of dual insolvency proceedings in the United States and England. The debtor had an accountant working in the New York office of Arthur Andersen on behalf of the joint administrators of the Maxwell companies. The accountant worked in Arthur Andersen's offices and reported to a partner at Arthur Andersen. The accountant's employment agreement with the debtor deemed her an independent contractor, although that was done on the advice of tax attorneys. The debtor's name did not appear in the building directory or on any signs. However, the accountant worked full-time for the debtor, was paid by the debtor, communicated regularly with the debtor's personnel in England, and kept in her office certain books and records of the debtor. Moreover, the debtor's location in New York was widely broadcast to third parties having business with the debtor. Therefore, "by virtue of [the accountant's] continuous presence and employment and the substantial activities conducted here by [the debtor, the debtor] has a place of business in this district, notwithstanding that its premises are contained within the larger premises of Arthur Andersen." *Id.* at 162.

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

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

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

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

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

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

<u>*Requirement of Property*</u>

A person that has property in the United States may be a debtor under the Bankruptcy Code. A foreign corporation with real property in the U.S. would have little difficulty demonstrating its entitlement to relief under § 109, as such property is both easily locatable and quantifiable. However, difficult questions still exist as what amount or form of tangible and intangible personal property is "sufficient" to warrant bankruptcy protection. Courts have conflicting answers to the question of what amount of property will suffice to warrant bankruptcy relief. *See e.g.*, *In re Aerovias Nacionales de Columbia S.A. Avianca*, 303 B.R. 1 (Bankr. S.D.N.Y. 2003) (holding that a debtor was eligible under § 109 because the debtor (i) had offices in Miami, (ii) flew from Columbia to two U.S. airports (New York and Miami), (iii) leased its planes primarily from lessors who either were based or did substantial business in the U.S., (iv) had significant structured debt governed by N.Y. law, and (v) on any given day, had significant property in the U.S. in the form of airplanes and airport rights); *In re Head*, 223 B.R. 648, 651-52 (Bankr. W.D.N.Y. 1998) (holding that "no amount of doing business in the United States will, of itself, provide a basis for eligibility under § 109," and that a contingent claim in a trust fund held for the benefit of a third-party was "too tenuous, too inchoate, and too contrived" to satisfy the requirement of § 109); *In re McTague*, 198 B.R. 428 (Bankr. W.D.N.Y. 1996) (holding that a debtor's intangible interest in $194 held in a bank account in New York satisfied the requirement of § 109); *In re Kava Bowl*, 41 B.R. 244, 247 (Bankr. D. Haw. 1984) (holding that jurisdiction was lacking when the only property the debtor had in Hawaii was cash and accounting records that had no value to any entity other than the debtor).

In *In re Global Ocean Carriers Ltd.*, discussed previously in connection with the "doing business" requirement, the Court held that notwithstanding the lack of business operations in the

United States, the debtors were still eligible to be debtors in a U.S. proceeding because the foreign corporate debtors had property in the United States in the form of funds in various bank accounts. The Court stated "[T]he bank accounts constitute property in the United States for purposes of eligibility under § 109 of the Bankruptcy Code, regardless of how much money was actually in them on the petition date."

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

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

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

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

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

The Bankruptcy Court for the Southern District of Texas expanded the concept of sufficient property under § 109 even further in *In re Yukos Oil Company*. 321 B.R. 396 (Bankr. S.D. Tex. 2005). In that case, the debtor, Yukos Oil Company, ("Yukos"), filed a petition for relief under Chapter 11 of the Bankruptcy Code, despite the fact that it had no significant assets in the United States. *Id*. at 400. Yukos was headquartered in Moscow and its employees and the majority of its oil reserves were located in Russia. *Id*. However, Yukos had one employee in the U.S. Bruce K. Misamore, Yukos' chief financial officer, had fled from Moscow and had conducted his duties as CFO from his home in Houston, Texas, since December 4, 2004, using his company-owned lap top computer. *Id*. at 402. In addition, mere hours before the bankruptcy petition was filed, Yukos incorporated a subsidiary named Yukos USA, Inc. ("Yukos USA") in

Texas. *Id*. Yukos then transferred approximately $480,000 to Yukos USA's bank account at Southwest Bank of Texas in Houston.[5] *Id*. Yukos also had lenders and investors from outside Russia, including individual and institutional investors in the U.S.[6]

Although the *Yukos* case was ultimately dismissed under § 1112(b) of the Bankruptcy Code,[7] the Bankruptcy Court rejected the argument that Yukos, as a foreign company, was not eligible to be a debtor under § 109. The court reasoned that because nominal amounts of property have been deemed sufficient to establish standing under § 109, Yukos was eligible to be a debtor due to the funds deposited in its Texas bank account before the bankruptcy petition was filed. *Id*. at 406-07. Yukos supports the theory that even a *de minimis* presence in the United States can create jurisdiction under § 109.

FOREIGN REPRESENTATIVE

Any "foreign representative" appointed in a "foreign proceeding" who is authorized to either administer the financial restructuring, liquidation or reorganization of a debtor's assets, or is authorized to act as a representative in a foreign proceeding, is authorized to file a petition seeking recognition of the foreign proceeding in the United States. *See U.S. v. J.A. Jones Constr. Group, LLC*, 333 B.R. 637, 638 (E.D.N.Y. 2005). The minimal requirements for recognition of a foreign proceeding are some type of documentation or certification from the foreign court confirming the existence of the foreign insolvency proceeding and the authority of the foreign representative to act. *See In re Artimm*, *S.R.L.*, 335 B.R. 149, 158 (Bankr. C.D. Cal. 2005) (explaining that any petition for recognition must be accompanied by (1) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; (2) a certificate from the foreign court establishing the existence of the foreign proceeding and the appointment of the representative; or (3) other acceptable evidence of the existence of the foreign proceeding and the appointment of the foreign representative). This is a less exacting standard than that which existed under prior § 304, which required some investigation into the nature and purpose of the foreign proceeding. While the definition of "foreign representative" has been modified somewhat in Chapter 15, the prior statute was interpreted broadly, and it is unlikely that the definitional changes will have much practical impact on who is a foreign representative.

DEFINITION OF FOREIGN PROCEEDING

While the definition of "foreign proceeding" has been expanded in Chapter 15, the expansion appears to be for purposes of clarification based on analysis of existing case law. A "foreign proceeding" is now a "collective judicial or administrative proceeding in a foreign

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

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

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

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

MAIN AND NONMAIN FOREIGN PROCEEDINGS

One of the most significant provisions of Chapter 15 adopted from the European Insolvency Regulation promulgated by the European Union ("EU") is the concept of determining whether a foreign proceeding is a "main" or "nonmain" proceeding. United States bankruptcy courts have used a test very similar to the "center of main interest" or "establishment" tests used in the EU in determining whether a foreign proceeding is main or nonmain.[8] However, while not meant to be a venue concept, the definitions of main and nonmain contained in Chapter 15 may create disputes similar to the venue disputes that have plagued Chapter 11 cases in the U.S.

Center of Main Interest

Section 1502(4) provides that a "foreign main proceeding" is a foreign proceeding "pending in the country where the debtor has the center of its main interests." Section 1516 provides the rebuttable presumption that the location of the debtor's registered office is the center of its main interests ("COMI"). *See In re Artimm*, 335 B.R. at 159; *In re SPhinX, Ltd.*, 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006) *aff'd* 371 B.R. 10 (S.D.N.Y. 2007) (Pursuant to the introductory clause to [§] 1516(c), however, that presumption may be rebutted.").

Section 1502(5) defines a "foreign nonmain proceeding" as a foreign proceeding "pending in a country where the debtor has an establishment." "Establishment" is defined in § 1502(2) as "any place of operations where the debtor carries out nontransitory economic activity." How these definitions will be applied in cases where a parent holding corporation is registered in one country, but its operating subsidiaries are registered in different countries and have operations in several others, are still developing issues. Some courts have conducted, and one anticipates courts will continue to conduct, a similar factual analysis to that undertaken in venue disputes, looking at factors such as the extent of business operations in a given country, the number of employees, the location of most and/or major creditors, and the like.

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

Determination of COMI

The Bankruptcy Code does not detail the types of evidence that will be required to rebut the presumption that a debtor's COMI is its place of registration of incorporation. *In re Sphinx*, 351 B.R. at 117. The court in *In re SPhinX, Ltd.*, however, issued a recent published decision that might provide some guidance. In *SPhinX*, the Bankruptcy Court for the Southern District of New York determined that the presumption that a Chapter 15 debtors' registered office, the Cayman Islands, was its COMI had been sufficiently rebutted. *Id*. at 106. The court explained that, other than having been incorporated and registered under the laws of the Cayman Island, the debtors only other contacts with the Cayman Islands were the minimal business records that were kept there, that the companies auditors had an address in the Cayman Islands, that certain investor subscriptions were received in the Cayman Islands, and that one member of the Liquidation Committee was based in the Cayman Islands. *Id*. at 119.

Instead, the evidence in the case strongly supported the conclusion that the Cayman Islands was not the debtor's COMI. *Id*. Among other things, the debtor did not conduct business in the Cayman Islands, there were no employees in the Cayman Islands, there were no assets in the Cayman Islands, and almost all of the debtor's $500 million of assets were located in the United States. *Id.* at 107-08. Additionally, multiple lawsuits were pending against various debtor entities in the United States, various debtor entities had filed proofs of claims in United States bankruptcy cases, and all of the debtor's corporate administration was handled in the United States *Id.* The *SPhinX* court also considered the fact that the Cayman court would have to seek assistance from other courts, primarily the U.S. court, to realize on the assets and ensure the proceeds of the assets were used to pay creditors. *Id*. at 119. Further, most of the creditors and investors were not located in the Cayman Islands, and the Cayman courts would have to rely on other courts to bind those parties. *Id*. All of these factors together were sufficient to rebut the presumption that the Cayman Islands was the debtor's COMI. Therefore, the *SPhinX* court refused to recognize the foreign proceeding as a foreign main proceeding, but instead recognized the foreign proceeding as a foreign nonmain proceeding.[9]

Another case decided under Chapter 15, *In re Tri-Continental Exchange, Ltd.*, 349 B.R. 627 (Bankr. E.D. Cal. 2006), demonstrates a more straightforward application of the COMI presumption. In this case, several insurance companies operating under the laws of the nation of St. Vincent and the Grenadines ("SVG") filed to wind up their operations in the SVG courts. The SVG proceeding appointed liquidators to the case. The Debtors were run by a U.S. citizen ("Brown") who had left the United States after being indicted by two different states. Brown was later convicted in absentia in Canada for fraud, and the U.S. government filed a criminal complaint against him. Brown was later arrested in Canada. Acting together, U.S. and SVG authorities shut down the Debtors' offices in Kingstown, St. Vincent. Brown died while in U.S. custody. The liquidators in the SVG case identified millions of dollars worth of assets located all over the world. The liquidators then sought recognition under Chapter 15 as a foreign proceeding. A creditor at the hearing argued that the Debtors' COMI should be the U.S. because most of the allegedly defrauded creditors were located in the U.S. The court discussed the enactment of Chapter 15 at length and held that the SVG case was a "foreign proceeding." The court also held that the fact that the Debtors were insurance companies and ineligible to be a

[9] Discussion of the *SPhinX* court's decision regarding nonmain recognition is discussed in more detail below.

debtor under the Bankruptcy Code does not affect the availability of Chapter 15 relief. *Id.* at 632. The creditors argued that the SVG case was not a foreign main proceeding, and that therefore, the Debtors were not entitled to relief under § 1520 such as the imposition of the automatic stay and the authorization to operate the Debtors' business and exercise trustee rights. The court noted that whether the Debtors' case was a foreign main proceeding turned on the location of the Debtors' COMI. The court noted that Chapter 15 does not provide a definition for this term. The court then analyzed the legislative history and intent of UNCITRAL to determine the proper application of a debtor's COMI. *Id.* at 633-35. The court held that because the Debtors conducted regular business out of their registered offices in SVG, that was the Debtors' "principal place of business" and therefore the SVG proceedings were the foreign main proceedings. The creditors also asked for additional protections over the Debtors' assets located in the U.S. The court held that the remedies under Chapter 15 were sufficient without any additional protections. *Id.* at 639-40.

One court recently recognized a foreign main proceeding over the objection of creditors. *In re Ernst & Young, Inc.*, 383 B.R. 773 (Bankr. D. Colo. 2008). In *Ernst & Young*, the Canadian court appointed Ernst & Young as the receiver of KDI and KD/CO and Ernst & Young filed a petition for recognition of foreign main proceeding in bankruptcy court in Colorado. The Securities Commissioner for the State of Colorado (the "Commissioner") argued that KD/CO perpetrated multi-national cross-border securities fraud, that the debtors' COMI was where the fraud occurred and because the investor money flowed through banks in the United States, the COMI was Colorado. *Id.* at 777-78. The court found that the persons who were the "driving force" behind KDI and KD/CO formed those companies in Canada, directed their operations of KDI and KD/CO from Canada and that the majority of the assets involved were in the name of or ultimately controlled by KDI in Canada. The court further found that the public policy exception in Chapter 15 was to be applied narrowly. *Id.* at 781. The court recognized the receivership proceeding as a foreign main proceeding. *Id.* at 782.

Unpublished Decisions Recognizing Proceedings as Foreign Main Proceedings

Many courts have recognized foreign proceedings under Chapter 15 without published decisions.[10] For example, in *In re Condor Ins. Ltd.*, Case No. 07-51045 (Bankr. S.D. Miss. Aug. 21, 2007), the court recognized a proceeding in the High Court of Justice of St. Christopher and Nevis, Nevis Circuit, as a foreign main proceeding, and found that the Nevis Court was located in the country where the foreign debtor had its center of main interests based on the evidence that Condor was incorporated in Nevis, had an office building in Nevis, and was regulated by Nevis law.

In *In re Hollinger*, No. 07-11029 (PJW) (Bankr. D. Del. Aug. 28, 2007), the court recognized a Canadian proceeding as a foreign main proceeding finding that each of the debtors was a Canadian company having substantial connection to Ontario and having its COMI in Ontario. The evidence demonstrated first that each of the debtors' registered head office was in Ontario. In addition, each of the debtors were incorporated pursuant to the laws of Canada, each

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

debtor's mailing address was an Ontario address, the directors and officers of the debtors were residents of Ontario, all decision-making and control in respect of the debtors took place at the common principal place of business of the debtors in Ontario, the debtors' principal banking arrangements were conducted in Ontario and all the debtors' administrative functions were conducted in Ontario, and all of the employees who performed those functions were in Ontario.

Courts have recognized foreign proceedings as foreign main proceedings in several other cases.[11]

European Courts and COMI

In addition to the relatively limited precedent under Chapter 15, although it is not binding precedent, U.S. Courts may find guidance in the decisions of European Courts applying the similar European COMI and establishment standards. 11 U.S.C. § 1508 ("In interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions.").[12] The issue of what qualifies as an entity's COMI has been a contentious issue for European Courts. Primarily, courts have struggled with the question of how much weight they should give the presumption that a debtor's COMI is the location of the debtor's registered office.

Some courts have considered the location of the debtor's registered office important despite evidence that could rebut the presumption. For example, in *Re Eurofood IFSC Ltd.*, the Irish High Court determined that Eurofoods, a subsidiary of the Parmalat Group, had its COMI in Ireland, notwithstanding the fact that the parent entity clearly had its COMI in Italy. [2004] BCC 383 (High Court (Ireland)), *aff'd by* [2005] I.L. Pr. 2 (Supreme Court (Ireland)). The court based its decision on the fact that the company was registered in Ireland, conducted the administration of its business interests in Ireland, and third-party creditors were under the belief

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[11] *See e.g. In re Laurence Scott & Electromotors Ltd.,* Case No. 07-12017 (Bankr. S.D.N.Y. Aug. 16, 2007) (recognizing U.K. Administration as a foreign main proceeding); *In re Daymonex Ltd.*, Case No. 07-90171 (Bankr. S.D. Ind. Feb. 26, 2007) (recognizing Canadian insolvency proceeding as foreign main proceeding); *In re Moulin Global Eyecare Holdings, Ltd.*, Case No. 06-30018 (Bankr. N.D. Cal. March 3, 2006) (recognizing winding up proceedings in Hong Kong and Bermuda as foreign main proceedings); *In re Vekoma Int'l B.V., et al.*, Case No. 06-50151 (Bankr. W.D. Tex. March 2, 2006) (recognizing liquidation proceeding in the Netherlands as a foreign main proceeding); *In re Gestion-Privee Location L.L.C.*, Case No. 06-80071 (Bankr. M.D.N.C. February 24, 2006) (recognizing Japanese bankruptcy proceeding as a foreign main proceeding); *In re Trade & Commerce Bank*, Case No. 05-60279 (Bankr. S.D.N.Y. February 16, 2006) (recognizing liquidation proceeding ongoing in the Grand Court of the Cayman Islands as a foreign main proceeding); *In re Tri Gem*, Case No. 05-50052 (Bankr. C.D. Ca. Dec. 8, 2005) (recognizing a foreign main proceeding pending in Korea based on evidence that the Debtor's main center of interest was in the Republic of Korea); *In re Ian Gregory Thow*, Case No. 05-30432 (Bankr. W.D. Wash. Nov. 10, 2005) (recognizing foreign main proceeding in British Columbia and finding that because virtually all of the Debtor's assets and creditors were located in British Columbia and British Columbia was the location of the debtor's main interests, the Thow Canadian Bankruptcy Case was a foreign main proceeding); *In re La Mutuelle du Mans Assurances IARD, U.K. Branch*, Case No. 05-60100 (Bankr. S.D.N.Y. Dec. 7, 2005), *available at* 2005 WL 3764946 (finding that the Debtor's center of main interest was located in England).

[12] Section 1508 is particularly interesting given the intense criticisms of the Supreme Court's 2005 majority opinion in *Roper v. Simmons* in which Justice Kennedy reaffirmed of the role of international law in constitutional interpretation. 543 U.S. 551, 554 (2005).

that they were doing business with an Irish company. Parmalat argued that Eurofoods' COMI was in Italy, because Eurofoods was a wholly owned subsidiary of Parmalat formed for the sole purpose of financing other members of the corporate family, company policy was determined in Italy, and the company had no employees in Ireland. The Irish courts rejected Parmalat's arguments; however, an Italian court disagreed with the findings of the Irish courts and determined that the debtor's COMI was in Italy. Tribunale Parma (February 30, 2004).

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

In a May 2, 2006 ruling that has far-reaching implications for pan-European insolvencies, the ECJ agreed with the Irish courts and determined that the liquidation of Eurofood should be carried out under Irish law. According to the ECJ, when a debtor company carries out its business in the country where its registered office is located—as opposed to merely keeping a "letterbox" or post-office address for the company there—the fact that a parent company can or may control the debtor company from another country does not rebut the presumption that COMI lies where the debtor company's registered office is located. Judgment of the Court (Grand Chamber), Case C-341/04*, Eurofood IFSC Ltd.* (May 2, 2006).

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

In *Re BRAC Rent-A-Car Int'l*, High Court of Justice Chancery Division Companies Court, EWHC (Ch.) 128--0042/2003 (February 7, 2003), the court determined that the location of the registered office of the debtor was of little importance. The Court determined that although the company was registered in the United States, the COMI was in the United

Kingdom. *Id*. at ¶ 31. The court based its decision on the fact that the company had been registered as a foreign company in the United Kingdom for many years and that the company's operations were almost completely run in the United Kingdom and almost all of its employees worked in the United Kingdom. *Id*. at ¶ 4.

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

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

<u>Lack of Foreign Main or Foreign Nonmain Proceeding</u>

A recent Chapter 15 case has raised the question of whether there are circumstances where a court could refuse to recognize a foreign proceeding as either a foreign main or a foreign nonmain proceeding. In *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122 (Bankr. S.D.N.Y. 2007), *affirmed by* Chapter 15 Case No. 07-12383, Civil Case No. 07-8730 (S.D.N.Y. May 22, 2008) [hereinafter *Bear Stearns I*], Burton R. Lifland, Honorable Bankruptcy Judge for the Southern District of New York, took up the issue of whether the provisional liquidators of Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd. and Bear Stearns High-Grade Structured Credit Strategies Enhanced Leverage Master Fund, Ltd. (together, the "Funds") could seek relief under Chapter 15 of the Bankruptcy Code as either a recognized "foreign main proceeding" under § 1517 of the Bankruptcy Code or, in the alternative, as a recognized "foreign nonmain proceedings." 374 B.R. at 127. The Court determined that the Funds' Cayman Island proceedings were not entitled to recognition as either "main" or "nonmain" proceedings, but that the Funds could still seek protection by filing an involuntary petition pursuant to § 303(b)(4) of the Bankruptcy Code. *Id*. at 132-33.

On July 31, 2007, the board of directors of the Funds authorized the winding up of the Funds by filing petitions under the Companies Law of the Cayman Islands (the "Foreign Proceedings") and joint provisional liquidators ("JPLs") were appointed. *Id.* at 125. Once appointed, the JPLs filed petitions for recognition under § 1515 seeking recognition of the Foreign Proceedings as "foreign main proceedings" as defined by § 1502(4). *Id.* Section 1502(4) provides that a "foreign main proceeding" means "a foreign proceeding pending in the

country whether the debtor has the center of its main interests." *Id.* at 127 (citing 11 U.S.C. § 1502(4). The JPLs argued simply that the Foreign Proceedings are pending in the country where the Funds have the "center of their main interests" because the Funds are Cayman Islands limited liability companies with registered offices in the Cayman Islands. *Id.* at 129. No other party had objected to the JPL's petition. *Id.*

Despite the absence of objections, the Court took up the analysis of whether the Foreign Proceedings should be recognized as either a "foreign main proceeding" or "foreign nonmain proceeding" because the Court believed that recognition under § 1517 (providing for order granting recognition) should not be rubberstamped. *Id.*

Section 1516(c) provides for a presumption that "in the absence of evidence to the contrary, the debtor's registered office, … is presumed to be the center of the debtor's main interests." 11 U.S.C. § 1516(c). Although the Bankruptcy Code does not define the type of evidence that may be used to rebut this presumption, the Court considered the following:

- The administrator of the Funds is a Massachusetts corporation.
- The books and records of the Funds are kept in Delaware.
- Bear Stearns Asset Management Inc., a New York company, is the Funds' investment. manager and manages assets located in New York.
- The Funds' investor registers are located in Dublin, Ireland.

Id. at 129.

The Court concluded that the only connection to the Cayman Islands was their registration in the Cayman Islands. Accordingly, the Funds did not have their center of main interest in the Cayman Islands, and thus, the Foreign Proceedings could not be recognized as "foreign main proceedings." *Id.* at 132.

The JPLs also petitioned for recognition of the Foreign Proceedings as "foreign nonmain proceedings." A "foreign nonmain proceeding" means a "foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment." 11 U.S.C. § 1502(5). The JPLs could not establish that the Funds had an "establishment" in the Cayman Islands (*i.e.*, "a local place of business"), and the Court concluded that the Foreign Proceedings were not "foreign nonmain proceedings." The Court commented that, "Chapter 15, …, imposes a rigid procedural structure for recognition of foreign proceedings as either main or nonmain and thus the jurisprudence developed under § 304 is of no assistance in determining the issues relating to the presumption for recognition under chapter 15." *Bear Stearns I*, 374 B.R. at 17. In short, Judge Lifland's recognition of a Chapter 15 petition as foreign main or nonmain is a threshold prerequisite to receiving any relief from the Bankruptcy Court. In so holding, Judge Lifland parted with dicta in the *SPhinX* decision, discussed above regarding COMI, "opining that if the parties in interest had not objected to the Cayman Islands proceeding being recognized as main, recognition would have been granted under the sole grounds that no party objected and no other proceeding had been initiated anywhere else." *Id.* at 130.

Interestingly, the Court stated that the alternative for foreign representatives where no foreign main or nonmain proceeding exists is to an involuntary petition under Chapter 7 or Chapter 11 of the Bankruptcy Code. *Id*. at 132. The Court went on to state that the JPLs could find relief by filing an involuntary petition under § 303(b)(4) of the Bankruptcy Code. *Id*. Section 303(b)(4) provides that an involuntary petition may be commenced "by a foreign representative of the estate in a foreign proceeding concerning such person." 11 U.S.C. § 303(b)(4). The Court determined that § 303 does not require that the foreign proceeding be recognized as either main or nonmain, allowing the JPLs relief despite the lack of recognition of the Foreign Proceedings. *Bear Stearns I*, 374 B.R. at 132-33. Section 1511, which governs commencement of a case under § 301 or § 303 by a foreign representative, expressly requires that an involuntary case may be commenced by a foreign representative "upon recognition." 11 U.S.C. § 1511(a)(1). Judge Lifland's reading of § 303 is at odds with § 1511, and it appears that Judge Lifland at least recognized this potential complication in his opinion. *Bear Stearns I*, 374 B.R. at 132

On appeal, the Honorable District Court Judge Robert W. Sweet, affirmed the Judge Lifland's decision. *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, Chapter 15 Case No. 07-12383, Civil Case No. 07-8730 (S.D.N.Y. May 22, 2008) [hereinafter *Bear Stearns II*]. In *Bear Stearns II* Judge Sweet agreed with Judge Lifland that even absent objection, a foreign debtor seeking Chapter 15 assistance in the US must do more than demonstrate there is an insolvency proceeding in its home jurisdiction. The foreign debtor must actually prove that it conducts substantial non-transitory business in its home jurisdiction. Judge Sweet made clear that in his opinions principals of comity cannot be considered when the plain language of the statute in question, here Chapter 15, is clear.

If *Bear Stearns I* and *Bear Stearns II* are correct, and as Judge Sweet writes, recognition is "a condition to nearly all court access and consequently . . . a condition to granting comity," *Bear Stearns II* at *18, Chapter 15 is narrower in the relief it offers than its predecessor § 304 and stands in stark contrast to US law regarding the eligibility of foreign debtors to be the subject of plenary Chapter 11 and Chapter 7 proceedings.[13]

Another Southern District of New York decision, *In re SPhinX*, discussed previously in regards to COMI determination and issued by the Honorable Bankruptcy Judge Robert D. Drain, has been criticized for its failure to reach the same conclusion as the *Bear Stearns I* and *Bearn Stearns II* decisions. *See* Glosband, Daniel M. et al., *SPhinX Chapter 15 Opinion Misses the Mark*, AM. BANKR. INST. J. Vol. XXVI, No. 10, at 44 (Dec./Jan 2007), *available at* www.abiworld.org. In *In re SPhinX, Ltd.* 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006) *aff'd* 371 B.R. 10 (S.D.N.Y. 2007) [hereinafter *SPhinX I*], Judge Drain held that a foreign proceeding was not a foreign main proceeding despite the presumption of COMI in the foreign locality. The *SPhinX* court proceeded to recognize the foreign proceeding as a foreign nonmain proceeding without any analysis of whether an "establishment" existed at all in the foreign locality. Critics suggest that *SPhinX* wrongfully makes recognition a separate step from the determination of

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[13] *See* Judith Elkin, et al., *Sauce for the Goose? Dual Standard Emerging in Cross Border Insolvencies: Domicile Not Enough to Recognize Foreign Proceedings*, presented at the ABI 2009 Caribbean Insolvency Symposium, Feb. 5-7, 2009; John A. Brunjes, et al., *Update: SDNY Confirms Bearish Opinion on Off-Shore Hedge Fund Use of Chapter 15*, May 28, 2008.

whether a foreign main or nonmain proceeding exists. Glosband, *supra*, at 46. Supporters of the *Bear Stearns* approach explain that "[s]evering recognition from the application of the definitional requirements of foreign main proceedings and foreign [nonmain] proceedings results in the court ignoring whether [the funds] are foreign proceedings eligible for chapter 15 recognition." *Id*. at 46. At the heart of this argument is that the *SPhinX I* court determined that the debtor's COMI was in the United States. *SPhinX I*, 351 B.R. at 119. The court did not then determine that an establishment existed in the Cayman Islands, and arguably, the facts did not support such a determination. *Id*. Therefore, the debtor could not establish that its foreign proceeding in the Cayman Islands was a foreign main or a foreign nonmain proceeding by definition. A commentator explains that "[t]his should have ended the matter. The Cayman Islands proceeding, while a foreign proceeding, is not eligible for chapter 15 recognition at all." Glosband, *supra*, at 46.

Judge Sweet affirmed the bankruptcy court decision in *SPhinX I* without addressing the fact that the debtors apparently had no establishment in the Cayman Islands. Instead, the district court focused on the facts rebutting the presumption of COMI and on the fact that the improper purpose and objective factors discussed by the bankruptcy court supported recognizing the proceeding as nonmain. *In re SPhinX, Ltd*, 371 B.R 10 (S.D.N.Y. 2007) [hereinafter *SPhinX* II].

In an attempt to reconcile his two seemingly inconsistent opinions in *SPhinX II* and *Bear Stearns II*, Judge Sweet, notes that there was no opposition to foreign nonmain recognition in the *SPhinX* case and that "any language in [the *SPhinX II*] opinion bearing on the bankruptcy court's nonmain determination must be viewed as dicta." *Bear Stearns II*, at *21. Judge Sweet also recognized that a remand to the bankruptcy court to re-consider nonmain recognition in *SPhinX II* would have been appropriate. *Id*. In light of *Bear Stearns II*, *SPhinX I* and *SPhinX II* will likely be inconsequential in future discussions on the issue of recognition.

Other courts will have to determine whether a foreign proceeding is entitled to recognition as a foreign nonmain proceeding, despite the fact that no establishment exists in the foreign locality, where no party-in-interest objects to such recognition and no proceedings have been instituted. Robert E. Gerber, Honorable Bankruptcy Judge for the Southern District of New York has addressed this issue and agreed with Judge Lifland's opinion in *Bear Stearns*:

> [R]ecognition under Section 1517 is not a rubber stamp exercise. Rather, consistent with Judge Lifland's determination and the views of the drafters of chapter 15 and the UNCITRAL Model Law on which chapter 15 was based, the Court rules that a court engaging in a recognition determination under Section 1517 is not bound by parties' failures to object; may, if it is so advised, consider any and all relevant facts (including facts not yet presented); and that the circumstances here make further factual inquiry necessary and appropriate.

In re Basis Yield Alpha Fund (Master), No. 07-12762 (REG), at *3 (Bankr. S.D.N.Y. Jan. 16, 2008) (slip op.), errata order (January 22, 2008).

Much like in *Bear Stearns*, shareholders authorized the liquidation of the Basis Yield fund under the laws of the Cayman Island and appointed JPLs. *Id*. at *3. Further, just as the

JPLs did in *Bear Stearns*, the Basis JPLs argued that "because Basis Yield's registered office is in the Cayman Islands, the Cayman Islands is presumed to be the COMI, under [§] 1516 of the Code . . . and that with no objections having been filed, there is no evidence to the contrary." *Id.* at *6. The court rejected the JPLs' arguments. Instead, the court explained that the JPLs had failed to put on any evidence that the Cayman Islands was the COMI of the fund. *Id.* at *14. Although there was a presumption that the Cayman Islands was the COMI of the fund, because the fund's registered office was located in the Cayman Islands, the court determined that evidence existed that was contrary to the presumption, *id.* at *15-17, and, more importantly, that the court has the power to inquire into the facts surrounding a Chapter 15 debtor's COMI, *id.* at *17. The court explained that courts are entitled to rely on the presumption in § 1516 of the Bankruptcy Code, but are not required or bound to rely upon that presumption. *Id.* at *18-19. Finally, the court rejected any argument that failure to object by other parties-in-interest binds the court to the debtor's claim of entitlement to recognition. *Id.* at *19-22.

The determination of whether a foreign proceeding is main or nonmain (or perhaps neither) dictates the extent to which certain relief can be granted and the extent of the rights granted the foreign representative. Section 1517(b) contemplates that a court will determine whether a foreign proceeding is main or nonmain if it enters an order granting recognition of the foreign proceeding. A petition for recognition should be determined at the earliest time possible. 11 U.S.C. § 1517(c).

RELIEF AVAILABLE PENDING RECOGNITION

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

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

Procedurally, it may even be possible for a foreign representative to receive all the relief needed from a bankruptcy court under Chapter 15 prior to recognition of a foreign proceeding as main or nonmain. For example, on April 13, 2006, a foreign representative of Yukos Oil Company ("Yukos") filed a Chapter 15 petition for recognition of a foreign proceeding pending in the Arbitrazh Court of the City of Moscow as a foreign main proceeding. *In re Yukos Oil Co.*, Case No. 06-10775 (Bankr. S.D.N.Y.). The proceedings were conducted under the provisional terms of Section 1519, thereby allowing the sale of certain assets of the debtor to proceed.[14] Because time was of the essence and because all relevant relief was eventually granted, the court never ruled on the issue of whether the case was a foreign main proceeding.

EFFECT OF RECOGNITION OF A FOREIGN MAIN PROCEEDING

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

Chapter 15 seems to give courts greater discretion in fashioning relief while making the recognition of a foreign main proceeding easier. An order of recognition as a foreign main proceeding automatically grants the following relief: (i) automatic stay of actions against the debtor (subject to the limitations contained in § 362 of the Bankruptcy Code); (ii) secured creditors will be entitled to receive adequate protection akin to § 361 of the Bankruptcy Code; (iii) the foreign representative will be able to sue and be sued in the United States; (iv) the court will be able to order the examination of witnesses akin to a Rule 2004 examination; and (v) the foreign representative may be permitted to administer and realize on some or all of the debtor's U.S. assets. 11 U.S.C. § 1520.; *see J.A. Jones*, 333 B.R. at 638; *In re Artimm*, 335 B.R. at 159. An order of recognition as a foreign nonmain proceeding does not allow the foreign representative to automatically take advantage of these specific provisions of the Bankruptcy Code, but upon such recognition, the court may grant certain relief, including, but not limited to, staying the commencement or continuation of certain actions against the debtor, and suspending the right of others to transfer or otherwise dispose of the debtor's assets. 11 U.S.C. § 1521. Relief granted under § 1520 is automatic, whereas relief under § 1521 will only be granted if "the interests of the creditors and other interested entities, including the debtor, are sufficiently protected." 11 U.S.C. § 1522(a). Additionally, any provisional relief granted under § 1519 prior to recognition as a foreign main or nonmain proceeding is extended upon entry of the order of recognition of the foreign proceeding.

[14] This was also in cooperation with a Dutch bankruptcy court where proceedings for the sale of shares in a subsidiary of the debtor were pending. The Dutch Court ultimately refused to honor the request to sell and ordered further proceedings on the sale.

An example of a case granting additional relief under § 1521 is *Ephedra Products v. Aguilar (In re Ephedra Products)*. In *In re Ephedra Products*, the District Court for the Southern District of New York had previously entered an order recognizing a Canadian insolvency proceeding as a foreign main proceeding. 349 B.R. 333, 334 (S.D.N.Y. 2006). In the Canadian proceedings, the court had recognized a procedure by which all claims against the debtor, including claims of Ephedra consumers and potential plaintiffs would be assessed and valued. *Id*. at 334. Subsequently, the Chapter 15 debtor requested that the bankruptcy court recognize and enforce the Canadian order approving of the procedure. *Id*. Relying on the power under Section 1521 to grant any appropriate relief necessary to effectuate the purpose of Chapter 15, the bankruptcy court granted the debtor's requested relief, dismissing arguments that the relief requested was contrary to public policy of the United States. *Id*. at 334-35, 337.

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

AVAILABILITY OF ADDITIONAL ASSISTANCE

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

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

CONCURRENT PROCEEDINGS

Once a foreign main proceeding is recognized in the United States, the foreign representative may file a case under Chapter 11 or Chapter 7, provided the debtor has assets in the United States. 11 U.S.C. § 1528. The effect of the concurrent Chapter 11 or Chapter 7 is restricted to the assets of the debtor within the territorial jurisdiction of the United States and to the extent necessary to implement cooperation and coordination, the United States court may include other assets of the debtor that are within the court's jurisdiction under § 541(a) and 28 U.S.C. § 1334(e) unless those assets are already subject to a recognized foreign proceeding. 11 U.S.C. § 1528. Subchapters IV and V of Chapter 15 provide somewhat detailed procedures for cooperation and coordination of the simultaneous proceedings, including determinations of insolvency, distribution of assets and coordination of rulings to prevent inconsistent rulings and results. *In re Artimm*, 335 at 159-60.

SECTION 305 AND ABSTENTION

Section 305(a) of the Bankruptcy Code provides that a bankruptcy court may dismiss or abstain from hearing a case under title 11 if:

> (1) the interest of creditors and the debtor would be better served by such dismissal or suspension; or
>
> (2)
>
> > (A) a petition under § 1515 for recognition of a foreign proceeding has been granted and
> >
> > (B) the purposes of Chapter 15 would be best served by dismissal or abstention.

11 U.S.C. § 305(a). A foreign representative is specifically authorized to seek relief under § 305(a)(2). 11 U.S.C. § 305(b). There is some question, however, as to whether a foreign representative is only authorized to proceed under § 305(a)(2), as opposed to seeking relief under § 305(a)(1). The limited case law concerning relief under § 305 and foreign representatives fails to shed light on this issue, and ultimately, the existing cases apply § 305(a)(1) without regard to §§ 305(a)(2) or (b).

For example, in *In re Compañía de Alimentos Fargo, S.A.*, 376 B.R. 427 (Bankr. S.D.N.Y. 2007), Fargo, Argentina's largest producer and packager of bread products, had its operations centered in Argentina, all 1300 of its employees in Argentina, and nearly all of its customers, sales, and suppliers in Argentina. Fargo's ties to the United States were limited to a single trademark and three pending trademark applications, as well as unsecured notes issued under U.S. law. After the value of the peso plummeted in 2002, Fargo defaulted on interest payments to its noteholders and instituted a *concurso preventivo* insolvency proceeding in Argentina, triggering an automatic stay. After a controversial decision of the bankruptcy court, the *concurso* was stayed to allow certain parties to exhaust the appeals process.

During the stay, three off-shore funds filed an involuntary bankruptcy petition under Chapter 11 of the Bankruptcy Code against Fargo in the Southern District of New York. The funds also requested discovery against Grupo Bimbo, a Fargo competitor that had indirectly purchased Fargo's senior secured debt and equity. The funds asserted that Grupo Bimbo had seized control of the *concurso* proceeding for its own benefit rather than for the benefit of all creditors.

Fargo filed a motion to dismiss the involuntary bankruptcy under Section 305(a)(1) of the Bankruptcy Code. The court noted that when another, foreign bankruptcy proceeding is pending with respect to a debtor, U.S. bankruptcy courts typically dismiss or abstain in favor of the foreign court on comity grounds if the foreign forum provides a fair and equitable procedure for resolution of the parties' rights. Curiously, the issue of whether the representatives of Fargo were "foreign representatives" and whether foreign representatives must be recognized and are required to use § 305(a)(2) rather than § 305(a)(1) does not appear to have been addressed. The soundness of the court's decision rests on the assumption that relief under § 305(a)(1) is available to foreign representatives in foreign proceedings that have not been granted recognition under Chapter 15 of the Bankruptcy Code.

Despite the court's failure to consider Fargo's standing under § 305(a)(1), the decision court seems to nonetheless reach the right outcome. The bankruptcy court dismissed challenges to the fairness and efficiency of the Argentine judicial system, noting that the *concurso* proceeding was similar to a Chapter 11 case because it provided for an automatic stay; it contained claims allowance procedures; and it allowed for the avoidance of fraudulent and preferential transfers. The court explained that although the *concurso* did not provide for equitable subordination of claims—a remedy the funds wanted to use against Grupo Bimbo—there were other remedies to address any harm caused by Grupo Bimbo or Fargo's insiders.

The court also dismissed the funds arguments that questionable decisions by the Argentine court of appeals justified the relief requested in the U.S. bankruptcy court, explaining that the challenged ruling was still subject to an appeal, and that "a mistake does not automatically imply partiality, or worse, corruption." *Id*. at 436. Additionally, the court set aside challenges to the Argentine bankruptcy system based on the lengthy delay in the *concurso* proceeding, which had been pending since 2002. The court reasoned that delays in the *concurso* that were attributable to the appeals process appeared to be over, and it was not clear that a U.S. court would have moved any quicker.

In addition to dismissing the funds' arguments, the court noted the difficulties with pursing a parallel Chapter 11 case in the United States. Fargo's business operations, customers, employees, and substantially all of its assets were located in Argentina. The U.S. bankruptcy court did not appear to have jurisdiction over all of Fargo's creditors, and any confirmed plan in the United States would have to be taken to Argentina to be enforced, where enforcement would be difficult considering that the filing of the involuntary petition in the U.S. was a violation of the Argentine imposed automatic stay.

Similarly, in *In re Monitor Single Lift I, Ltd*., No. 07-13708 (MG) (Bankr. S.D.N.Y. Feb. 4, 2008) (Memorandum Opinion and Order Denying Motion to Abstain Pursuant to Bankruptcy

Code § 305(a)), a London based parent company with stock traded on the Norwegian over-the-counter market ("PLC") and two of its subsidiaries, one a Cayman Island based subsidiary with its headquarters in New York and the other a subsidiary incorporated in Delaware with an office in New York, filed for protection under Chapter 11 of the Bankruptcy Code when the companies could no longer pay under their prepetition bond loan agreement. On the bankruptcy petition date, the bondholders' trustee, appointed prepetition to oversee the bond loan agreement, also filed insolvency proceedings in the Cayman Islands and Scotland. Days later an ad hoc committee composed primarily of the bondholders filed a motion to abstain under § 305 in PLC's Chapter 11 bankruptcy case.[15] The bondholders' motivation in moving for abstention in the U.S. proceedings was a perceived difference in the treatment of the PLC's prepetition secured debt and cash collateral under U.S. and Scottish law.

The U.S. bankruptcy court declined to abstain, and in doing so, articulated a seven factor test to be applied to determine whether abstention was proper under § 305(a)(1).[16] Although the analysis of the court includes concerns of comity and deference to foreign proceedings, the court fails to discuss the application of §§ 305(a)(2) or (b).

<u>OTHER DEVELOPMENTS INVOLVING CHAPTER 15</u>

There is limited case law addressing the provisions and effect of Chapter 15. Most of the case law has been discussed in the above paragraphs regarding the features of Chapter 15. Only a handful of other published cases have directly based their holdings on the provisions of Chapter 15 since it became effective.

In re Lee, 348 B.R. 799 (Bankr. W.D. Wa. 2006), dealt with an interesting procedural issue: whether a foreign representative must file an adversary proceeding in order to enforce a permanent injunction against creditors. The Debtor was a Korean company that filed a bankruptcy case in Korea and had its plan confirmed by the Korean court. Samsong was a secured creditor of the Debtor and later filed a suit in Delaware against a Delaware subsidiary of the Debtor. The Debtor filed a Petition for Recognition of Foreign Main Proceeding seeking recognition of its Korean bankruptcy case and sought the entry of an order granting recognition

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[15] The ad hoc committee did not ask that the bankruptcy court abstain in the Chapter 11 cases of either subsidiary.

[16] The seven factors set forth by the court are:

(1) the economy and efficiency of administration;
(2) whether another (non-U.S.) forum is available to protect the interests of both parties or there is already a pending proceeding;
(3) whether federal (or non-U.S.) proceedings are necessary to reach a just and equitable solution;
(4) whether there is an alternative means of achieving an equitable distribution of assets;
(5) whether the debtor and the creditors are able to work out a less expensive out-of-court arrangement that better serves all interests;
(6) whether a non-federal (or in this case non-U.S.) insolvency proceedings has so far developed that it would be costly and time consuming to start over; and
(7) the purpose for which bankruptcy jurisdiction has been sought.

Id. at *14.

as a foreign main proceeding under Chapter 15. The Bankruptcy Court for the Western District of Washington granted recognition as a foreign main proceeding and held that any right to transfer, encumber or dispose of debtor's property was suspended. The Debtor later sought a permanent injunction to keep Samsong from recovering any amounts in excess of what was provided for under plan. The only issue raised by Samsong was the procedural issue that the Debtor was required under Chapter 15 to seek a permanent injunction by way of an adversary proceeding. The court noted that it was not aware of any decision where a permanent injunction has been granted under Chapter 15. *Id.* at 801. But, the court acknowledged that a permanent injunction is possible under § 1521(e). Ultimately, the court held that a foreign representative may seek a permanent injunction by filing a motion, as opposed to an adversary proceeding.

Another interesting issue was discussed in *Bancredit Cayman Ltd. v. Santana (In re Bancredit Cayman Ltd.)*, Adv. No. 08-1147, 50 B.C.D. 257 (Bankr. S.D.N.Y. Nov. 25, 2008): whether the concept of *forum non conveniens* applies to adversary proceedings in a Chapter 15 case. In *Bancredit*, a Bancredit Cayman Ltd ("Bancredit"), a defunct financial institution that did business in the Dominican Republic, was the subject of a liquidation proceeding in the Cayman Islands. *Id*. at *1. The foreign representatives in the Cayman liquidation filed a Chapter 15 petition for recognition, and the foreign proceeding was recognized by the U.S. bankruptcy court. *Id*. The foreign representatives brought an adversary proceeding against two defendants to recover the unpaid balance on a bank loan. *Id*. The defendants moved to dismiss the complaint on several grounds, including *forum non conveniens*. The defendants were an Dominican Republic corporation and an individual who was a citizen and resident of the Dominican Republic. *Id*. The note was issued in the Dominican Republic and the debtor acquired the note by assignment. *Id*. Prior to the commencement of the bankruptcy court, the defendants were sued in Dominican courts, and those actions were still pending and being actively litigated. *Id*. at *2.

In granting the defendant's motion to dismiss on the basis of *forum non conveniens*, the court explained that although venue and jurisdiction may have been proper in the United States court, the alternative forum of the Dominican Republic was adequate because (i) the defendants were amenable to service of process there; (ii) the forum permitted litigation of the subject matter of the dispute; and (iii) the potential delay in the Dominican courts was no reason to rule otherwise. *Id*. at 3-4. The overriding reason for the Court's dismissal, however, was that the adversary proceeding involved an effort to enforce a note executed in the Dominican Republic by Dominican nationals and the parties and witnesses and relevant documents were not in the United States. *Id*. at 6-7.

Conclusion

Chapter 15 expressly provides that in interpreting this chapter, the courts shall consider its international origin and the need to promote its application consistent with the application of similar statutes adopted by foreign jurisdictions.[17] 11 U.S.C. § 1508. The international aspects of the new law have received little attention outside of legal circles. The changes codified in Chapter 15 could make cross border filings easier to accomplish and multi-national cases easier

[17] For more information on cases analyzing similar statutes visit www.eir-database.com.

to administer. This would result in significant benefits to the global economy in terms of financial market stability, saved jobs and stronger global companies.