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# **WHY TWO FACETS OF CHAPTER 15 RULINGS HINDER CROSS-BORDER INSOLVENCY PETITIONS IN THE UNITED STATES**

## **ABSTRACT**

*Chapter 15 of the United States Bankruptcy Code, in its first decade, provided considerable relief for foreign debtors and their representatives in the American judicial system. Eventually, though, various United States courts disagreed upon two matters that impacted whether foreign debtors were able to acquire relief from the Bankruptcy Code. First, courts disagreed about whether § 109(a), governing who could be a debtor in United States courts, applied to chapter 15 petitions for recognition. Second, courts used two separate dates to determine the debtor's center of main interests, dealing with the level of connectedness to a country. Some courts chose the date of the petition for chapter 15 recognition; other courts looked further back and chose the beginning date of the foreign proceeding. For various reasons, § 109(a) was not supposed to apply to chapter 15 petitions, and the commencement date of the foreign proceeding was the correct date to determine a debtor's center of main interests.*

## INTRODUCTION

Since chapter 15 became part of the Bankruptcy Code, there has been an increase in annual filings under it.<sup>1</sup> One might ask: Why are foreigners petitioning United States courts? For debtors and their foreign representatives, obtaining chapter 15 recognition of a foreign proceeding delivers great relief in the United States.<sup>2</sup>

There are several reasons to apply for chapter 15 recognition of a foreign proceeding, including the automatic stay and trustee powers.<sup>3</sup> In one case, a foreign representative sought chapter 15 recognition because he wanted to prevent a creditor “from dissipating assets of [an] E-Trade account until final determination of the ownership thereof” had been determined in the foreign proceeding.<sup>4</sup>

Chapter 15 allots automatic relief through 11 U.S.C. § 1520.<sup>5</sup> Additionally, § 1521 grants a bankruptcy court discretion to provide supplementary relief that may be necessary to protect a debtor or its creditors.<sup>6</sup> Supplemental relief covers a lengthy range from gathering evidence to examining witnesses, even to giving a foreign representative administrative powers over a debtor’s assets.<sup>7</sup> Once chapter 15 recognition has been granted to a foreign proceeding,

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<sup>1</sup> See *Chapter 15 Filings (2005–Present)*, AM. BANKR. INST., [http://abi-org.s3.amazonaws.com/Newsroom/Bankruptcy\\_Statistics/Chapter15Filings-Thru2Q2014.pdf](http://abi-org.s3.amazonaws.com/Newsroom/Bankruptcy_Statistics/Chapter15Filings-Thru2Q2014.pdf) (last modified Jan. 26, 2015); see also Van C. Durrer II, David M. Turetsky & Glenn S. Walter, *Expanding Use of Chapter 15 Tests Its Protections and Limits*, FINANCIER WORLDWIDE MAG., Jan. 2013, at 1.

<sup>2</sup> At times, this Comment uses “debtor” and “foreign representative” interchangeably. They may refer to the same person, but not always. In the context of chapter 15 cases, there may be a debtor who has been involved in a foreign proceeding. Out of that proceeding, a court appoints a foreign representative (sometimes the debtor himself) to file for chapter 15 recognition of the foreign proceeding in the United States.

<sup>3</sup> See *In re Tien Chiang*, 437 B.R. 397, 402 (Bankr. C.D. Cal. 2010) (“The recognition of a foreign proceeding . . . brings certain statutory benefits to the debtor. Section 1520(a) specifies that, upon recognition: (a) the automatic stay provisions of §§ 361 and 362 apply with respect to a debtor’s U.S. property within the territorial jurisdiction of the United States; (b) §§ 363, 549 and 552 apply to a transfer of interest of the debtor in U.S. property; (c) the foreign representative may operate the debtor’s business in the United States and may exercise the powers of a trustee pursuant to §§ 363 (use, sale or lease of property) and 552 (postpetition effect of security interests); and (d) § 552 applies to U.S. property of the debtor.”). Legislative history indicates that § 542, not § 552, applies when chapter 15 recognition has been granted. See *id.* at 402 n.13 (citing H.R. REP. NO. 109-31, pt. 1, at 115 (2005), reprinted in 2005 U.S.C.C.A.N. 88, 177).

<sup>4</sup> *Id.* at 402–03.

<sup>5</sup> See *In re Rede Energia S.A.*, 515 B.R. 69, 89 (Bankr. S.D.N.Y. 2014) (“If a foreign case is recognized . . . , certain relief automatically goes into effect, pursuant to 11 U.S.C. § 1520.”).

<sup>6</sup> See *id.* at 89 (“[U]nder section 1521, a bankruptcy court may grant ‘any appropriate relief’ in order to ‘effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors.’”).

<sup>7</sup> See *id.* at 89–90.

§ 1507(a) permits a court to offer a foreign representative any additional support available in the Code or in any other United States law.<sup>8</sup>

Two topics among chapter 15 decisions have garnered opposing views in recent years. First, courts have speculated whether § 109(a), which governs who may be a debtor under the Code, applies to chapter 15 petitions.<sup>9</sup> Second, courts have disagreed about when to determine a foreign party's center of main interests ("COMI"), which is a phrase dealing with a petitioner's level of connectedness to a foreign country.<sup>10</sup> Some courts determine COMI on the chapter 15 petition date in the United States.<sup>11</sup> Other courts, however, determine COMI by looking back to the petitioner's status at the beginning of the foreign proceeding (a "lookback period").<sup>12</sup>

This Comment proposes the following thesis: Chapter 15 recognizes bankruptcy's intricacies in a globalized age. Courts in such an age should hold that § 109(a) does not apply to chapter 15 and that COMI is determined through a lookback period to the commencement of the foreign proceeding.

## I. BACKGROUND

### A. Chapter 15's International Predecessors

During the twentieth century, European Community Member States were treaty-bound "to enter into negotiations with each other" regarding court recognition and enforcement of judgments from among the Member States.<sup>13</sup> That duty inspired creation of the 1968 Brussels Convention on jurisdiction and judgment enforcement, which excluded insolvency proceedings but further developed cross-border cooperation among European courts.<sup>14</sup> Between 1963

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<sup>8</sup> See *id.* at 90 (citing 11 U.S.C. § 1507(a)–(b) (2012); *In re Toft*, 453 B.R. 186, 190 (Bankr. S.D.N.Y. 2011); H.R. REP. NO. 109-31).

<sup>9</sup> See 11 U.S.C. § 109; *e.g.*, *Drawbridge Special Opportunities Fund LP v. Barnet (In re Barnet)*, 737 F.3d 238 (2d Cir. 2013); Transcript of Hearing, *In re Bemarmara Consulting a.s.*, 13-13037-KG (Bankr. D. Del. Dec. 17, 2013) (LexisNexis, Federal Bankruptcy Law) [hereinafter Transcript of *Bemarmara* Hearing].

<sup>10</sup> See 11 U.S.C. §§ 1502(4), 1516(c).

<sup>11</sup> See, *e.g.*, *Lavie v. Ran (In re Ran)*, 607 F.3d 1017, 1025 (5th Cir. 2010).

<sup>12</sup> See, *e.g.*, *In re Millennium Glob. Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 72 (Bankr. S.D.N.Y. 2011), *aff'd*, 474 B.R. 88 (S.D.N.Y. 2012).

<sup>13</sup> Case C-1/04, *Susanne Staubitz-Schreiber*, 2006 E.C.R. I-701, I-704, Opinion of AG Ruiz-Jarabo Colomer.

<sup>14</sup> See *id.* at I-704–05.

and 1980, a committee of European Community experts drafted two proposals to regulate cross-border insolvency, but they never agreed on the proposals.<sup>15</sup>

International work toward the Model Law on Cross-Border Insolvency (“Model Law”) accelerated with the European Union Convention on Insolvency Proceedings (“Convention”).<sup>16</sup> During the mid-1990s, a group of national experts developed the Convention, which was simpler and less rigid than its attempted predecessors.<sup>17</sup> In November 1995, the Convention was finalized and ready to go into force, but the United Kingdom did not sign it by the required deadline.<sup>18</sup> As a result, the Convention did not become law.<sup>19</sup>

Then, Germany and Finland reintroduced the failed Convention as the European Union Council Regulation on Insolvency Proceedings (“Regulation”).<sup>20</sup> That initiative drew authority from the 1997 Treaty of Amsterdam and converted the unsuccessful Convention into a regulation that binds all European Union Member States (except Denmark).<sup>21</sup> The Convention’s content was unaltered; only the legal status of the document changed.<sup>22</sup>

After decades of trying to create cross-border insolvency laws, Europe succeeded with the Regulation. Subsequently, the United Nations provided

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<sup>15</sup> See *id.* at I-705.

<sup>16</sup> See *Lavie v. Ran*, 406 B.R. 277, 281 n.2 (S.D. Tex. 2009) (“[T]he drafters of the Model Law consulted the Convention’s terminology.”), *aff’d sub nom. In re Ran*, 607 F.3d 1017.

<sup>17</sup> See *Staubitz-Schreiber*, 2006 E.C.R. at I-705.

<sup>18</sup> See Case C-341/04, *Eurofood IFSC Ltd.*, 2006 E.C.R. I-3813, I-3817, Opinion of AG Jacobs.

<sup>19</sup> See *Staubitz-Schreiber*, 2006 E.C.R. at I-705–06.

<sup>20</sup> See *Eurofood*, 2006 E.C.R. at I-3818; see also Initiative of the Federal Republic of Germany and the Republic of Finland with a View to the Adoption of a Council Regulation on Insolvency Proceedings, Submitted to the Council on 26 May 1999, 1999 O.J. (C 221) 6, 8. See generally Council Regulation 1346/2000 of 29 May 2000 on Insolvency Proceedings, 2000 O.J. (L 160) 1 (EU).

<sup>21</sup> See *Staubitz-Schreiber*, 2006 E.C.R. at I-706 (“[T]he impulse for that transformation flourished in the fertile ground of Articles 61(c) EC . . . and 67(1) EC, . . . which were ‘communitarised’ under the Treaty of Amsterdam, thereby constituting one of the Treaty’s main achievements.”); *Insolvency proceedings*, EUR-LEX, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:I33110> (last updated Sept. 2, 2014) (“This law lays down common rules for cross-border insolvency proceedings in European Union (EU) countries, except Denmark.”); see also *Eurofood*, 2006 E.C.R. at I-3818 (“The Regulation was adopted on the basis of Articles 61(c) EC and 67(1) EC, on the initiative of Germany and Finland.”). See generally Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1.

<sup>22</sup> See *Staubitz-Schreiber*, 2006 E.C.R. at I-706; *Eurofood*, 2006 E.C.R. at I-3817 (“The text of the Regulation is . . . identical in all material respects to the text of the Convention.”). Even before the Regulation was adopted, EU Member States had embraced a “process of mutual recognition and enforcement of judgments in bankruptcy proceedings by means of bilateral treaties.” *Staubitz-Schreiber*, 2006 E.C.R. at I-705. Those treaties are listed in Regulation Article 44(1) and are replaced by the Regulation. See *id.*

cross-border insolvency laws to the global community by using many of the Regulation's concepts.<sup>23</sup>

The United Nations Commission on International Trade Law ("UNCITRAL") Model Law was introduced to the United Nations on December 15, 1997, and the General Assembly accepted it on January 30, 1998.<sup>24</sup> Since then, the United Nations has published and updated an enactment guide, produced in 2014 most recently.<sup>25</sup> While the Model Law and the Convention—and the Regulation—are not identical completely, “the drafters of the Model Law consulted the Convention’s terminology.”<sup>26</sup> As of 2016, forty-one nations have adopted the Model Law in forty-three jurisdictions.<sup>27</sup> UNCITRAL’s Working Group V (Insolvency Law) has proposed a change to

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<sup>23</sup> See *In re Tien Chiang*, 437 B.R. 397, 401 (Bankr. C.D. Cal. 2010) (stating that the Regulation and the Model Law have common concepts).

<sup>24</sup> See G.A. Res. 52/158 (Jan. 30, 1998).

<sup>25</sup> See G.A. Res. 68/107 (Dec. 18, 2013); U.N. COMM’N ON INT’L TRADE LAW, UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION, U.N. Sales No. E.14.V.2 (2014).

<sup>26</sup> *Lavie v. Ran*, 406 B.R. 277, 281 n.2 (S.D. Tex. 2009) (citing U.N. Comm’n on Int’l Trade Law, Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, 30th Sess., May 12–30, 1997, ¶ 75, U.N. Doc. A/CN.9/442 (Dec. 19, 1997) (noting definition inspiration from the Convention)), *aff’d sub nom. Lavie v. Ran* (*In re Ran*), 607 F.3d 1017 (5th Cir. 2010). Additionally,

the Convention is better understood by consulting the Virgos-Schmit Report. Although the language of the Virgos-Schmit Report and Convention may not be identical to that in the Bankruptcy Code, the corresponding sections of both the Virgos-Schmit Report and the Convention [or Regulation] give insight into the origin of the terms used.

*Id.* (citing H.R. REP. NO. 109-31, pt. 1, at 109 (2005), reprinted in 2005 U.S.C.C.A.N. 88, 172). Compare Council Regulation 1346/2000, *supra* note 20, and *Virgós-Schmit Report on the Convention on Insolvency Proceedings*, at 1, Council Document 6500/96 (May 3, 1996), with UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION, *supra* note 25, and 11 U.S.C. §§ 1501–1532 (2012).

<sup>27</sup> See *Status UNCITRAL Model Law on Cross-Border Insolvency (1997)*, UNCITRAL, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/1997Model\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html) (last visited May 2, 2016) (listing the nations alphabetically as Australia (2008), Benin (2015), Burkina Faso (2015), Cameroon (2015), Canada (2005), Central African Republic (2015), Chad (2015), Chile (2013), Colombia (2006), Comoros (2015), Congo (2015), Côte d’Ivoire (2015), Democratic Republic of the Congo (2015), Equatorial Guinea (2015), Gabon (2015), Greece (2010), Guinea (2015), Guinea-Bissau (2015), Japan (2000), Kenya (2015), Malawi (2015), Mali (2015), Mauritius (2009), Mexico (2000), Montenegro (2002), New Zealand (2006), Niger (2015), Philippines (2010), Poland (2003), Republic of Korea (2006), Romania (2002), Senegal (2015), Serbia (2004), Seychelles (2013), Slovenia (2007), South Africa (2000), Togo (2015), Uganda (2011), United Kingdom of Great Britain and Northern Ireland: British Virgin Islands (2003), Gibraltar (2014), and Great Britain (2006), United States of America (2005), Vanuatu (2013)).

the Model Law that will affect how courts determine COMI; this Comment discusses that proposal later.<sup>28</sup>

### *B. Chapter 15's History in the United States*

In 2005, Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA”), which added chapter 15 to the Code.<sup>29</sup> Congress adopted the Model Law as chapter 15 with very few changes.<sup>30</sup>

Simultaneously, BAPCPA repealed § 304,<sup>31</sup> which was the former bankruptcy section that dealt with foreign proceedings.<sup>32</sup> In its entirety, § 304 conveyed a broad generality about cases ancillary to foreign proceedings and contained slightly more than 250 words, whereas chapter 15 is intricate and has over five thousand words.<sup>33</sup> A corresponding Senate report to § 304 confirms a preference for simplicity by stating that the guidelines were “designed to give the court the maximum flexibility in handling ancillary cases.”<sup>34</sup>

### *C. Chapter 15's Relevant Provisions in the Bankruptcy Code*

Section 1501 declares that the purpose of chapter 15 “is to incorporate the Model Law . . . to provide effective mechanisms for dealing with cases of cross-border insolvency.”<sup>35</sup> Among its objectives are fairness, efficiency, and cooperation between United States courts and courts in other nations.<sup>36</sup> To accomplish those objectives, § 1501 applies to several specified categories,

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<sup>28</sup> See *In re Gerova Fin. Grp., Ltd.*, 482 B.R. 86, 92 (Bankr. S.D.N.Y. 2012) (citing U.N. Comm’n on Int’l Trade Law, Working Group V (Insolvency Law), Rep. on its 41st Sess., Apr. 30–May 4, 2012, ¶ 60, U.N. Doc. A/CN.9/742 (May 8, 2012) [hereinafter Rep. on Working Group V’s 41st Sess.] (stating that a proposed change to the Model Law to clarify that the COMI determination be made as of the date of the commencement of the foreign insolvency proceeding “received wide support”).

<sup>29</sup> See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 801, 119 Stat. 23, 134–45.

<sup>30</sup> Compare *id.*, with UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION, *supra* note 25.

<sup>31</sup> See *In re Ran*, 607 F.3d at 1020 (“[BAPCPA] replaced former Section 304 of the Bankruptcy Code. . .”).

<sup>32</sup> See *In re Millennium Glob. Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 69 n.6 (Bankr. S.D.N.Y. 2011) (“Chapter 15 was adopted, effective October 17, 2005, replacing § 304 of the Bankruptcy Code, which was repealed.”).

<sup>33</sup> See 11 U.S.C. § 304 (2000); 11 U.S.C. §§ 1501–1532 (2012).

<sup>34</sup> S. REP. NO. 95-989, at 35 (1978) (“Principles of international comity and respect for the judgments and laws of other nations suggests that the court be permitted to make the appropriate orders under all of the circumstances of each case, rather than being provided with inflexible rules.”).

<sup>35</sup> 11 U.S.C. § 1501.

<sup>36</sup> See *id.*

including when assistance is sought by a foreign court or a foreign representative and when cases are pending concurrently in the United States and abroad.<sup>37</sup>

Interestingly, § 1501 states that it does not apply to § 109(b) and (e), but this Comment focuses heavily on whether nearby § 109(a) applies to chapter 15 cases.<sup>38</sup> Section 109(a) states that a debtor must be “a person that resides or has a domicile, a place of business, or property in the United States, or a municipality.”<sup>39</sup>

When a debtor seeks chapter 15 status, he turns to § 1515, which contains the rules to applying for recognition of the foreign proceeding.<sup>40</sup> In this scenario, “[a] foreign representative applies to the court for recognition of a foreign proceeding in which the foreign representative has been appointed.”<sup>41</sup> Various documents accompany the application, including one that identifies all judicial proceedings in which the petitioner is involved outside of the United States.<sup>42</sup> If a court believes that § 1515’s requirements are met, then it will grant recognition of the foreign proceeding under § 1517.<sup>43</sup>

Finally, § 1508 guides any court that interprets chapter 15.<sup>44</sup> The section directs that “the court shall consider [chapter 15’s] international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions.”<sup>45</sup>

## II. ANALYSIS

Multiple circuits disagree about two issues in current chapter 15 case law: (1) the applicability of § 109(a) to chapter 15; and (2) the proper time to

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<sup>37</sup> *See id.* (“This chapter applies where – (1) assistance is sought in the United States by a foreign court or a foreign representative in connection with a foreign proceeding; (2) assistance is sought in a foreign country in connection with a case under this title; (3) a foreign proceeding and a case under this title with respect to the same debtor are pending concurrently; or (4) creditors or other interested persons in a foreign country have an interest in requesting the commencement of, or participating in, a case or proceeding under this title.”).

<sup>38</sup> *See id.* The contents of § 109(b) and (e) are not relevant to this Comment.

<sup>39</sup> 11 U.S.C. § 109.

<sup>40</sup> *See* 11 U.S.C. § 1515.

<sup>41</sup> *Id.*

<sup>42</sup> *See id.*

<sup>43</sup> *See* 11 U.S.C. § 1517. Section 1517 states, however, that an order granting recognition is subject to § 1506, which lets courts refuse to act in a way manifestly contrary to United States public policies. 11 U.S.C. §§ 1506, 1517.

<sup>44</sup> *See* 11 U.S.C. § 1508.

<sup>45</sup> *Id.*

determine COMI in a cross-border insolvency case. This Comment discusses two sides of each issue, respectively, and concludes that § 109(a) does not apply to chapter 15 and that COMI is determined through a lookback period to the commencement of the foreign proceeding.

#### *A. Section 109(a) Requirements in the United States*

Section 109(a) requires a person petitioning for bankruptcy to reside or have a domicile, a place of business, or property in the United States.<sup>46</sup> Regardless of whether Congress considered how this section affects chapter 15, a question emerges: Does § 109(a) apply to cases filed under chapter 15 of the Code? The following subsections discuss how courts have addressed that question in recent years, concluding that § 109(a) does not apply to chapter 15 recognition petitions.

##### *1. Section 109(a) Applies to Chapter 15*

Even though chapter 15 became part of the Code in 2005, courts did not address whether general provision § 109(a) applies to chapter 15 proceedings until late 2013.<sup>47</sup> In December 2013, the Second Circuit addressed § 109(a)'s applicability in *Drawbridge Special Opportunities Fund LP v. Barnet (In re Barnet)*.<sup>48</sup> The court declared that § 103(a) applies all of chapter 1 to the Code, including to chapter 15.<sup>49</sup> By simple extrapolation then, § 109, within chapter 1, must apply to chapter 15.<sup>50</sup> Consequently, § 109(a) “creates a requirement that must be met by any debtor,” regardless of the controlling chapter.<sup>51</sup> Courts are unable to grant chapter 15 recognition of a foreign proceeding until the debtor satisfies § 109(a).<sup>52</sup>

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<sup>46</sup> See 11 U.S.C. § 109.

<sup>47</sup> See *Drawbridge Special Opportunities Fund LP v. Barnet (In re Barnet)*, 737 F.3d 238, 247 (2d Cir. 2013); see also *In re Octaviar Admin. Pty Ltd.*, 511 B.R. 361, 367 (Bankr. S.D.N.Y. 2014) (“[T]he Second Circuit issued its decision, holding for the first time that a debtor that is the subject of a foreign proceeding must meet the requirements of section 109(a) of the Bankruptcy Code before a bankruptcy court may grant recognition of the foreign proceeding.”).

<sup>48</sup> See 737 F.3d at 246.

<sup>49</sup> See *id.* at 247 (“Section 103(a) of ‘Title 11 provides that, other than for an exception not relevant here, Chapter 1 ‘of this title . . . appl[ies] in a case under chapter 15.’”).

<sup>50</sup> See *id.* (“Section 109 . . . is within Chapter 1 of Title 11 and so, by the plain terms of the statute, it applies ‘in a case under chapter 15.’”).

<sup>51</sup> *Id.*

<sup>52</sup> See *id.* (“The debtor . . . must meet the requirements of Section 109(a) before a bankruptcy court may grant recognition of the foreign proceeding.”).

The Second Circuit acknowledged that the Model Law “does not contain an express requirement akin to Section 109(a).”<sup>53</sup> The Model Law allows adopting states, however, to modify, or even omit, sections that they do not want in their national laws.<sup>54</sup> UNCITRAL omitting any language similar to § 109(a) does not outweigh Congress’s plain language in chapter 1.<sup>55</sup> Without citing any evidence, the court speculated that Congress may have wanted to limit chapter 15’s relief because of additional relief available in other chapters.<sup>56</sup> Therefore, the Second Circuit held that § 109(a) applies to chapter 15, and in the particular case, the matter was remanded to determine if the debtor satisfied § 109(a).<sup>57</sup>

In the remanded case, *In re Octaviar Administration Pty Ltd.*, the bankruptcy court reiterated that the Code’s plain language led to an understanding that § 109(a) sets certain eligibility requirements, even for chapter 15 petitions.<sup>58</sup> The *Octaviar* court pointed out that the Second Circuit’s *Barnet* holding was the first time a court said that a debtor subject to a foreign proceeding had to meet § 109(a)’s requirements.<sup>59</sup> To align with *Barnet*, and chapter 15 generally, the court stated that fostering international cooperation in bankruptcy proceedings is possible *once* a debtor makes a showing of a domicile, place of business, or property in the United States.<sup>60</sup> Only then may courts grant recognition under § 1517.<sup>61</sup> The court examined numerous arguments and held that the debtor had property in the United States to meet § 109(a)’s requirements.<sup>62</sup>

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<sup>53</sup> *Id.* at 251 (citing UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION, *supra* note 25).

<sup>54</sup> *See id.* (“[T]he Model Law also states that ‘a State may modify or leave out some of its provisions.’” (quoting UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION, *supra* note 25, at Part 2 ¶ 12)).

<sup>55</sup> *See id.* (“[T]he omission of Section 109(a), or its equivalent, from the Model Law does not suffice to outweigh the express language Congress used in adopting Sections 109(a) and 103(a).”).

<sup>56</sup> *Id.* (“Congress . . . may have intended to limit the relief provided by Chapter 15 because it knew that additional relief was already available outside of Chapter 15.”).

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

<sup>58</sup> *See* 511 B.R. 361, 364 (Bankr. S.D.N.Y. 2014) (“[U]nder a plain reading of the relevant statutory provisions, a petition in a chapter 15 case is required to meet the eligibility requirements set forth in section 109(a) of the Bankruptcy Code.”).

<sup>59</sup> *See id.* at 367.

<sup>60</sup> *See id.* at 369.

<sup>61</sup> *See id.*

<sup>62</sup> *See id.* at 375 (“The Court concludes that because Octaviar’s claims and causes of action against Drawbridge constitute property located in the United States, the Foreign Representatives satisfy the eligibility requirements of section 109(a) of the Bankruptcy Code. . . . Drawbridge does not dispute that the funds in the Client Trust Account constitute property in the United States pursuant to section 109(a) of the Bankruptcy

Later in the same year, the *In re Suntech Power Holdings Co.* court applied § 109(a) to a chapter 15 petition.<sup>63</sup> Evidence demonstrated that a Bank of New York account existed before the chapter 15 proceeding.<sup>64</sup> The court held that a bank account is enough to satisfy § 109(a).<sup>65</sup> Furthermore, the court declared that § 109(a) rejects drawn-out investigations into how the bank account was acquired and what amount of money it contains, thus lowering the restrictive bar set by § 109(a) and allowing the easily-demonstrable existence of a bank account to satisfy connection to the United States.<sup>66</sup>

In 2015, the Bankruptcy Court for the Southern District of New York expanded eligibility that satisfies § 109(a) in *In re Berau Capital Resources PTE Ltd.*<sup>67</sup> The court noted that scholars have criticized courts' application of § 109(a) to chapter 15, but *Barnet* makes the application binding precedent in the Second Circuit, causing the court to apply it.<sup>68</sup> The court looked to contract law and found that contracts create intangible property rights for a debtor.<sup>69</sup> From there, the court was able to show that § 109(a) can be satisfied by an attorney retainer agreement between a foreign representative and an attorney in the United States or by a debtor holding an indenture for a large amount of U.S. currency.<sup>70</sup>

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Code. . . . Notably, Drawbridge concedes that prepetition retainers and transfers of property can serve as a basis for section 109(a) compliance and do not, in and of themselves, constitute grounds for a finding of bad faith.”)

<sup>63</sup> See 520 B.R. 399, 411 (Bankr. S.D.N.Y. 2014) (“This [§ 109(a)] requirement applies to foreign debtors seeking relief under chapter 15.” (citing Drawbridge Special Opportunities Fund LP v. Barnet (*In re Barnet*), 737 F.3d 238, 247 (2d Cir. 2013))).

<sup>64</sup> See *id.* at 412.

<sup>65</sup> *Id.* (citing *In re Octaviar*, 511 B.R. at 372–73; *In re Yukos Oil Co.*, 321 B.R. 396, 407 (Bankr. S.D. Tex. 2005)).

<sup>66</sup> See *id.* at 413 (citing *In re Octaviar*, 511 B.R. at 373).

<sup>67</sup> See 540 B.R. 80 (Bankr. S.D.N.Y. 2015).

<sup>68</sup> See *id.* at 81–82 (citing Daniel M. Glosband & Jay Lawrence Westbrook, *Chapter 15 Recognition in the United States: Is a Debtor “Presence” Required?*, 24 INT’L INSOLVENCY REV. 28 (2015)).

<sup>69</sup> See *id.* at 83 (“Contracts create property rights for the parties to the contract. A debtor’s contract rights are intangible property of the debtor. (citing Slater v. Town of Albion (*In re Albion Disposal, Inc.*), 217 B.R. 394, 407–08 (W.D.N.Y. 1997) (“[I]t is well-established . . . that a debtor’s contractual rights—including rights arising under post-petition contracts—are included in the property of the estate.”); U.S. Bank N.A. v. Am. Airlines, Inc., 485 B.R. 279, 295 (Bankr. S.D.N.Y. 2013), *aff’d*, 730 F.3d 88 (2d Cir. 2013); Wallach v. Nowak (*In re Sherlock Homes of W.N.Y., Inc.*), 246 B.R. 19, 23–24 (Bankr. W.D.N.Y. 2000) (stating that listing contracts between the debtor/broker dealer and prospective sellers bestowed contractual rights upon the parties and the contract rights were assets of the debtor))).

<sup>70</sup> See *id.* at 82.

## 2. Section 109(a) Does Not Apply to Chapter 15

Four cases apply § 109(a) to chapter 15, but two other cases argue against applying it.<sup>71</sup> All of these rulings have been handed down since late 2013, creating a stage for a possible circuit split.<sup>72</sup>

A mere six days after the Second Circuit issued *Barnet*, the Bankruptcy Court for the District of Delaware issued *In re Bemarmara*, which questions § 109(a)'s place in chapter 15 petitions.<sup>73</sup> The court acknowledged that the Second Circuit applied chapter 1 eligibility requirements to a debtor in a foreign proceeding.<sup>74</sup> The *Bemarmara* court interpreted *Barnet* as saying that a debtor who does not have assets in the United States is disqualified from applying for chapter 15 recognition.<sup>75</sup> The bankruptcy court did not hesitate to disagree with the Second Circuit because *Barnet* was not controlling precedent.<sup>76</sup> In fact, the court declared “that there is a strong likelihood that the Third Circuit, likewise, would not agree with that [*Barnet*] decision.”<sup>77</sup>

The *Bemarmara* court explained its disagreement with the Second Circuit by turning to the language of § 109(a) first, which “provides for *Debtors* under this title.”<sup>78</sup> The court illustrated that a debtor is not petitioning for recognition; instead, a foreign representative seeks recognition of a foreign proceeding.<sup>79</sup> A foreign representative's task is to aid the foreign proceeding.<sup>80</sup> Accordingly, § 109(a) does not regulate foreign representatives.<sup>81</sup> The lack of discussion in chapter 15 about § 109(a) may be an error, and there may have been Congressional intent to exclude the section from applying to chapter 15.<sup>82</sup>

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<sup>71</sup> Compare *Drawbridge Special Opportunities Fund LP v. Barnet (In re Barnet)*, 737 F.3d 238 (2d Cir. 2013), and *In re Berau*, 540 B.R. 80, and *In re Suntech*, 520 B.R. at 412, and *In re Octaviar*, 511 B.R. 361, with *In re Soundview Elite, Ltd.*, 503 B.R. 571 (Bankr. S.D.N.Y. 2014), and Transcript of *Bemarmara* Hearing, *supra* note 9.

<sup>72</sup> Compare *In re Barnet*, 737 F.3d 238, with *In re Octaviar*, 511 B.R. 361, and *In re Soundview Elite*, 503 B.R. 571, and Transcript of *Bemarmara* Hearing, *supra* note 9.

<sup>73</sup> See Transcript of *Bemarmara* Hearing, *supra* note 9, at 8 (stating that the case was from December 11, 2013).

<sup>74</sup> See *id.*

<sup>75</sup> See *id.* (“[T]he absence of assets in the United States disqualifies a Chapter 15 filing.”).

<sup>76</sup> See *id.* (“[T]his Court does not agree with the decision of the Second Circuit.”).

<sup>77</sup> *Id.* at 8–9.

<sup>78</sup> *Id.* at 9 (emphasis added).

<sup>79</sup> See *id.* (“[A] Foreign Representative . . . is petitioning the Court, not the Debtor in the foreign proceeding.”).

<sup>80</sup> See *id.* (“The Foreign Representative is asking for recognition in aid of that foreign proceeding.”).

<sup>81</sup> See *id.* (“[T]he requirements of Section 109(a) do not control.”).

<sup>82</sup> See *id.* (omitting evidence or a source for this claim against applying § 109(a) to chapter 15).

The court turned to § 1502 for a second reason not to apply § 109(a).<sup>83</sup> The court emphasized that § 1502 “defines Debtor as an entity that is the subject of a foreign proceeding.”<sup>84</sup> Importantly, § 1502’s definition does not create any asset-ownership requirement in the United States.<sup>85</sup> The definition is straightforward: “A Debtor is an entity that is involved in a foreign proceeding” without any requirement of having assets in the United States.<sup>86</sup>

### 3. *Why This Comment Suggests § 109(a) Does Not Apply to Chapter 15*

When addressing the question of whether § 109(a) applies to chapter 15 cases, courts should hold that the section has no bearing on the recognition of cross-border proceedings for at least three reasons.

First, the structure of chapter 15, especially §§ 1515 through 1524 about recognition, contains everything that a court needs to handle a cross-border bankruptcy case.<sup>87</sup> Regarding statutory interpretation, scholars have noted that

statutory language is the most solid indication of what legislators were trying to do. If the mental-state intentions of legislators are important, they are most straightforwardly represented in the statutory words. This does not mean we can move easily from the words of a statute to the dominant intentions of most legislators. Because few legislators review statutory language carefully, and most may have little idea what it contains, the precise terms of any single

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<sup>83</sup> See *id.* (“I would also read to you from Section 1502 which is the definition section for Chapter 15 . . .”).

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

<sup>85</sup> See *id.* (“[T]here was nothing in that definition . . . [that] reflects upon a requirement that [the] Debtor have assets.”).

<sup>86</sup> *Id.* Note that the *Soundview Elite* decision may create a tangential problem for determining who may be a debtor under the Code. See 503 B.R. 571 (Bankr. S.D.N.Y. 2014). The Bankruptcy Court for the Southern District of New York issued *Soundview Elite* in January 2014, in between the *Barnet* and *Octaviar* decisions of December 2013 and June 2014, respectively. See 737 F.3d 238 (2d Cir. 2013); 511 B.R. 361, 372 (Bankr. S.D.N.Y. 2014); 503 B.R. 571. The *Octaviar* court applied § 109(a) to a chapter 15 proceeding, but before then, the *Soundview Elite* court stated explicitly that chapter 15 “[r]ecognition . . . is not governed by domicile.” 503 B.R. at 595 n.67; see also 511 B.R. at 364 (stating that 11 U.S.C. § 109(a) applies to chapter 15). Instead, recognition of the foreign proceeding is determined by the debtor’s COMI. See *In re Soundview Elite*, 503 B.R. at 595 n.67 (“[R]ecognition . . . turns on the COMI of the foreign debtor.” (citing 11 U.S.C. § 1517(a)(1) (2012))); *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 127–28 (Bankr. S.D.N.Y. 2008), *aff’d*, 389 B.R. 325 (S.D.N.Y. 2008)). At least in the Southern District of New York then, § 109(a)’s reference to domicile may not apply to chapter 15 cases, even though § 109 discusses eligibility, and § 1517 discusses recognition. Compare *In re Soundview Elite*, 503 B.R. at 595 n.67, with 11 U.S.C. §§ 109, 1517.

<sup>87</sup> See 11 U.S.C. §§ 1501–1532; see also *In re Soundview Elite*, 503 B.R. at 595 n.67 (“Recognition under U.S. law, [is] determined under Bankruptcy Code sections 1515 through 1524 . . .”).

provision may tell us rather little about what most legislators wanted; but it often remains true that no other guides to intentions are more reliable.<sup>88</sup>

Congress likely did not consider making significant changes to chapter 15 because it is a model international law, and “[a]ny departures from the actual text of the Model Law . . . were as narrow and limited as possible.”<sup>89</sup>

Section 1509(a), which governs a right of direct access, states that a foreign representative commences a case when he files a chapter 15 petition with a court.<sup>90</sup> If the court recognizes that foreign proceeding, then it grants comity to the foreign representative and cooperates with him.<sup>91</sup> Section 1517(a) states that a court will grant recognition if certain criteria are met.<sup>92</sup> The foreign representative must be a person or body.<sup>93</sup> Additionally, the petition must meet § 1515’s requirements.<sup>94</sup> Section 1517 does not mention any of the criteria set forth in § 109(a).<sup>95</sup> Throughout chapter 15, however, Congress referred to various sections of the Code.<sup>96</sup>

Applying the *expressio unius est exclusio alterius* interpretive canon of construction, which states that mentioning one matter excludes another matter,

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<sup>88</sup> KENT GREENAWALT, LEGISLATION: STATUTORY INTERPRETATION: 20 QUESTIONS 37 (Found. Press 1999).

<sup>89</sup> Tacon v. Petroquest Res. Inc. (*In re Condor Ins. Ltd.*), 601 F.3d 319, 322 & n.15 (5th Cir. 2010) (quoting Jay Lawrence Westbrook, *Chapter 15 at Last*, 79 AM. BANKR. L.J. 713, 720 (2005) [hereinafter Westbrook, *Chapter*]).

<sup>90</sup> See 11 U.S.C. § 1509(a) (“A foreign representative may commence a case under section 1504 by filing directly with the court a petition for recognition of a foreign proceeding under section 1515.”); see also *id.* § 1504 (“A case under this chapter is commenced by the filing of a petition for recognition of a foreign proceeding under section 1515.”).

<sup>91</sup> See *id.* § 1509(b)(3) (“If the court grants recognition under section 1517 . . . a court in the United States shall grant comity or cooperation to the foreign representative.”).

<sup>92</sup> See *id.* § 1517(a).

<sup>93</sup> *Id.* § 1517(a)(2).

<sup>94</sup> *Id.* § 1517(3).

<sup>95</sup> See *id.* § 1517.

<sup>96</sup> See, e.g., *id.* § 1501(c)(1) (referring to § 109(b)); *id.* § 1501(c)(2) (referring to § 109(e)); *id.* § 1505 (referring to § 541); *id.* § 1509(e) (referring to § 306); *id.* § 1511 (referring to §§ 301–303); *id.* § 1513(b)(1) (referring to §§ 507 and 726); *id.* § 1517(d) (referring to § 350); *id.* § 1519(f) (referring to § 362(a), (b), and (n)); *id.* § 1520(a)(1) (referring to §§ 361 and 362); *id.* § 1520(a)(2) (referring to §§ 363, 549, and 552); *id.* § 1520(a)(3) (referring to §§ 363 and 552); *id.* § 1520(a)(4) (referring to § 552); *id.* § 1521(a)(7) (referring to §§ 522, 544, 545, 547, 548, 550, and 724(a)); *id.* § 1521(f) (referring to § 362(a), (b), and (n)); *id.* § 1522(d) (referring to § 322); *id.* § 1523(a) (referring to §§ 522, 544, 545, 547, 548, 550, 553, and 724(a)); *id.* § 1528 (referring to 11 U.S.C. § 541(a) and 28 U.S.C. § 1334(e)); *id.* § 1529(4) (referring to § 305); *id.* § 1531 (referring to § 303); see also *id.* § 304 (repealed 2005) (not referring to § 109(a) nor any other section, for that matter).

allows courts to hold that § 109(a) does not apply to chapter 15 because Congress omitted any reference to the section and its requirements.<sup>97</sup> In addition, unique § 1508 instructs courts to consider the international origin of chapter 15 “and the need to promote an application of [chapter 15] that is consistent with the application of similar statutes adopted by foreign jurisdictions.”<sup>98</sup> That pronouncement encourages courts not to look outside of chapter 15 for additional provisions that might be applicable to cross-border proceedings.<sup>99</sup>

The United Nations wanted the Model Law to be adopted with very few changes (if any at all) to achieve international legal harmony.<sup>100</sup> If a court applies a provision to chapter 15, then the court defeats § 1508’s objective of consistency among nations adopting the Model Law.<sup>101</sup>

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<sup>97</sup> See *ImagePoint, Inc. v. JPMorgan Chase Bank, N.A.*, No. 12 Civ. 7183 (LAK) (GWG), 2014 U.S. Dist. LEXIS 87695, at \*40 (S.D.N.Y. June 25, 2014) (“Under that doctrine [of *expressio unius*], ‘when certain matters are mentioned . . . , other similar matters not mentioned were intended to be excluded.’” (quoting *Plumbers & Steamfitters Local No. 150 Pension Fund v. Vertex Const. Co.*, 932 F.2d 1443, 1449 (11th Cir. 1991)) (citing *In re Celotex Corp.*, 487 F.3d 1320, 1334 (11th Cir. 2007); *Covington Square Assocs., LLC v. Ingles Mkt., Inc.*, 641 S.E.2d 266 (Ga. Ct. App. 2007)); see also *Rushton v. ANR Co. (In re C.W. Mining Co.)*, 740 F.3d 548, 560 (10th Cir. 2014) (“Common sense, reflected in the canon *expressio unius est exclusio alterius*, suggests that the specification of [one provision] implies the exclusion of others.” (quoting *Elwell v. Okla. ex. rel. Bd. of Regents of the Univ. of Okla.*, 693 F.3d 1303, 1312 (10th Cir. 2012)); *Tacon v. Petroquest Res. Inc. (In re Condor Ins. Ltd.)*, 601 F.3d 319, 324 & n.22 (5th Cir. 2010) (“Generally where there are enumerated exceptions ‘additional exceptions are not to be implied, in the absence of a contrary legislative intent.’ And the oft recited maxim *expressio unius est exclusio alterius* carries weight.” (quoting *Andrus v. Glover Const. Co.*, 446 U.S. 608, 616–17 (1980)) (citing *Tex. Oil & Gas Ass’n v. EPA*, 161 F.3d 923, 938–39 (5th Cir. 1998)); *Neidich v. Lorenzo (In re Lorenzo)*, No. 13-23100-CIV-ROSENBAUM, 2014 U.S. Dist. LEXIS 64321, at \*10–11 (S.D. Fla. May 8, 2014) (citing *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) (“Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.”); *In re Sunahara*, 326 B.R. 768, 781 (B.A.P. 9th Cir. 2005) (using *expressio unius est exclusio alterius* to state that § 1329(b) applies some “Code sections to plan modifications but does not apply § 1325(b)”; *In re Davis*, 439 B.R. 863, 867 (Bankr. N.D. Ill. 2010)).

<sup>98</sup> 11 U.S.C. § 1508; see also *British Am. Ins. Co. v. Fullerton (In re British Am. Ins. Co.)*, 488 B.R. 205, 212 (Bankr. S.D. Fla. 2013) (“International uniformity is a primary goal of the Model Law and thus of chapter 15.” (citing 11 U.S.C. §§ 1501(a), 1508)); *Lavie v. Ran*, 406 B.R. 277, 281 (S.D. Tex. 2009) (“Unique to the interpretation of Chapter 15 of the Bankruptcy Code, ‘the court shall consider its international origin, and the need to promote an application of [Chapter 15] that is consistent with the application of similar statutes adopted by foreign jurisdictions.’” (citing 11 U.S.C. § 1508 (2006)), *aff’d sub nom. Lavie v. Ran (In re Ran)*, 607 F.3d 1017 (5th Cir. 2010).

<sup>99</sup> See 11 U.S.C. § 1508 (2012).

<sup>100</sup> See *In re British Am. Ins. Co.*, 488 B.R. at 212 (“UNCITRAL expressed the desire that the Model Law be enacted by adopting countries with as few changes as possible ‘in order to achieve a satisfactory degree of harmonization and certainty.’” (citing GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY, *supra* note 25, at ¶ 12)).

<sup>101</sup> See 11 U.S.C. § 1508.

Second, *Bemarmara* addresses something that was overlooked previously.<sup>102</sup> Section 109(a) determines who may be a debtor under the Code, but chapter 15 considers recognition of a foreign representative, not of a debtor from a foreign proceeding.<sup>103</sup> Once a foreign court concludes a debtor's insolvency proceeding, that court appoints a foreign representative to other nations' courts to ensure that the debtor's applicable assets and affairs are liquidated or reorganized according to the foreign proceeding.<sup>104</sup> Section 109(a) does not control because it regulates a person who is not seeking recognition in chapter 15.<sup>105</sup>

Chapter 15 provides examples of Congress distinguishing between debtors and foreign representatives. In § 1502's definitions, the term "debtor" is used several times, but the definitions never state, claim, or even insinuate that a debtor is also a foreign representative.<sup>106</sup> Section 1524 handles intervention by a foreign representative and distinguishes between the two terms by saying that "the foreign representative may intervene in any proceedings . . . in which the debtor is a party."<sup>107</sup> Section 1518(2) requires prompt filing of any status change caused by any of a debtor's foreign proceedings.<sup>108</sup> Section 1521(b) allows a court to grant asset-distribution powers to a foreign representative.<sup>109</sup> Several more sections address debtors and foreign representatives, but in all of the sections, chapter 15 treats them as separate individuals.<sup>110</sup>

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<sup>102</sup> See Transcript of *Bemarmara* Hearing, *supra* note 9, at 9 (discussing the applicability of § 109(a)).

<sup>103</sup> See 11 U.S.C. § 109(a); Transcript of *Bemarmara* Hearing, *supra* note 9, at 9.

<sup>104</sup> See 11 U.S.C. § 101(24).

<sup>105</sup> See Transcript of *Bemarmara* Hearing, *supra* note 9, at 9. Even if § 109(a) did apply, in the context of a business, courts have held that "[a] principal place of business is not required to satisfy Section 109(a)'s requirement, rather it is merely 'a' place of business." *In re Zais Inv. Grade Ltd. VII*, 455 B.R. 839, 844 (Bankr. D.N.J. 2011) (citing *In re Paper I Partners, L.P.*, 283 B.R. 661, 672 (Bankr. S.D.N.Y. 2002)).

<sup>106</sup> See 11 U.S.C. § 1502.

<sup>107</sup> *Id.* § 1524.

<sup>108</sup> See *id.* § 1518(2) ("From the time of filing the petition for recognition of a foreign proceeding, the foreign representative shall file with the court promptly a notice of change of status concerning . . . any other foreign proceeding regarding the debtor that becomes known to the foreign representative.").

<sup>109</sup> See *id.* § 1521(b) ("[T]he court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in the United States to the foreign representative or another person.").

<sup>110</sup> See, e.g., *id.* § 1509(f) ("Notwithstanding any other provision of this section, the failure of a foreign representative to commence a case or to obtain recognition under this chapter does not affect any right the foreign representative may have to sue in a court in the United States to collect or recover a claim which is the property of the debtor."); *id.* § 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."); *id.* § 1515(c) ("A petition for recognition shall also be accompanied by a statement identifying all foreign proceedings with respect to the debtor that are known to the foreign representative."); *id.* § 1519(a) ("From the time of filing a petition for recognition until the court rules on the petition, the court may, at the

What if a foreign representative is also the debtor? Nothing in chapter 15 precludes that scenario.<sup>111</sup> How does the application of § 109(a) change if the debtor and the foreign representative are the same? Quite simply, the analysis does not change. Section 109(a)'s perspective focuses on who may be a debtor under the Code.<sup>112</sup> Separately, chapter 15 focuses on whether recognition of a foreign proceeding will be granted because of the foreign representative's petition.<sup>113</sup> The debtor, regardless of whether he is also the foreign representative, is a debtor in another jurisdiction already. The petition to the United States is to recognize the foreign proceeding so that the debtor's United States assets can be managed according to the foreign proceeding.<sup>114</sup> From a statutory angle, that scenario should never matter because one section pertains to a debtor, and the other section pertains to a foreign representative.<sup>115</sup>

This Comment emphasizes that courts should not apply § 109(a) to chapter 15 proceedings. Chapter 15 contains all necessary requirements for granting recognition to a foreign proceeding, and *Bemarmara* illustrates that uses of "debtor" and "foreign representative" are exclusive of one another in various sections of the Code.<sup>116</sup>

### *B. Center of Main Interests Date Determination*

Courts disagree about when to determine COMI under chapter 15. The concept appears only three times in chapter 15.<sup>117</sup> Despite appearing in the

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request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature . . ."); *id.* § 1519(a)(2) ("[E]ntrusting the administration or realization of all or part of the debtor's assets located in the United States to the foreign representative or another person . . ."); *id.* § 1520(a)(3) ("[T]he foreign representative may operate the debtor's business and may exercise the rights and powers of a trustee under and to the extent provided by sections 363 and 552."); *id.* § 1521(a) ("Upon recognition of a foreign proceeding, . . . where necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief . . ."); *id.* § 1521(a)(5) ("[E]ntrusting the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States to the foreign representative or another person . . ."); *id.* § 1523(a) ("Upon recognition of a foreign proceeding, the foreign representative has standing in a case concerning the debtor pending under another chapter of this title . . .").

<sup>111</sup> See *id.* §§ 1501–1532.

<sup>112</sup> See *id.* § 109(a).

<sup>113</sup> See *id.* § 1517.

<sup>114</sup> Or, *vice versa*, where a foreign proceeding seeks assistance with a case that arose under chapter 15, another category where chapter 15 applies. See *id.* § 1501(b)(2).

<sup>115</sup> See *id.* §§ 109(a), 1517.

<sup>116</sup> See *id.* §§ 109(a), 1501–1532; Transcript of *Bemarmara* Hearing, *supra* note 9.

<sup>117</sup> See 11 U.S.C. § 1502(4) ("[F]oreign main proceeding" means a foreign proceeding pending in the country where the debtor has the center of its main interests . . ."); *id.* § 1516(c) ("[T]he debtor's registered

Code infrequently, COMI has generated discussion in many chapter 15 case opinions, and the following sections analyze the two timing options and assert the correct time to determine a debtor's COMI in bankruptcy proceedings.

### 1. *COMI Determined at Chapter 15 Petition Date*

In *Lavie v. Ran*, the District Court for the Southern District of Texas examined various COMI aspects and presumed that a business debtor's registered office or an individual debtor's habitual residence is its COMI— noting, however, that the presumption can be defeated by contrary evidence.<sup>118</sup> The court turned to European courts that interpreted COMI in several cases as an individual debtor's habitual or permanent residence because chapter 15 (specifically § 1502) fails to define COMI.<sup>119</sup> Then, the court addressed a question of COMI timing as it relates to chapter 15.<sup>120</sup>

The district court felt required “to make an independent finding *at the time the petition for recognition [was] filed* in the U.S. court,” instead of looking back to the beginning of the foreign proceeding because the chapter 15 is written in present tense.<sup>121</sup> Additionally, courts analyze COMI when recognition petitions are filed, and so, the analysis should focus on the present,

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office, or habitual residence in the case of an individual, is presumed to be the center of the debtor's main interests.”); *id.* § 1517(b)(1) (“Such foreign proceeding shall be recognized—as a foreign main proceeding if it is pending in the country where the debtor has the center of its main interests . . .”).

<sup>118</sup> See 406 B.R. 277, 283 (S.D. Tex. 2009), *aff'd sub nom.* *Lavie v. Ran* (*In re Ran*), 607 F.3d 1017 (5th Cir. 2010) (“[T]he debtor's registered office, or habitual residence in the case of an individual, is presumed to be the center of the debtor's main interests.” (quoting 11 U.S.C. § 1516(c) (2006)) (citing *In re Tri-Continental Exch.*, 349 B.R. 627, 634 (Bankr. E.D. Cal. 2006))).

<sup>119</sup> See 11 U.S.C. § 1502; *Lavie*, 406 B.R. at 283 (citing Case C-452/93, *Pedro Magdalena Fernández v. Comm'n*, 1994 E.C.R. 4295; Case 13/73, *Anciens Établissements D. Angenieux fils aîné v. Hakenberg*, 1973 E.C.R. 935). To European courts, habitual residence depends on whether the debtor intends to stay in the location permanently, on the length of time spent in the location, and on the occupational or familial ties to the area. See *Lavie*, 406 B.R. at 283 (citing Case 41/84, *Pinna v. Caisse d'allocations familiales de la Savoie*, 1986 E.C.R. 1). These factors are not determinative, however, if other evidence establishes clearly that the debtor's COMI is somewhere else. See *id.* (citing Case 284/87, *Schäfflein v. Comm'n*, 1988 E.C.R. 4475).

<sup>120</sup> See *Lavie*, 406 B.R. at 283–84.

<sup>121</sup> *Id.* at 283–85 (citing *In re SPhinX, Ltd.*, 351 B.R. 103, 120 n.22 (Bankr. S.D.N.Y. 2006), *aff'd*, 371 B.R. 10 (S.D.N.Y. 2007)) (“The use of the present tense implies that the court's . . . analysis should focus on whether the debtor has [a presence] in the foreign country when the foreign representative files for recognition under Chapter 15.”). Additionally, “[t]he *Bear Stearns* court agreed, noting that “[i]f the debtor does not have its center of main interests or at least an establishment in the country of the foreign proceedings, the bankruptcy court should not grant recognition . . .” *Id.* at 285 (citing *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 334 (S.D.N.Y. 2008); *In re SPhinX*, 351 B.R. at 120 n.22).

not a lookback period.<sup>122</sup> Therefore, *Lavie* instructs that COMI is determined when a foreign representative files a chapter 15 petition for recognition.<sup>123</sup>

On appeal, the appellant argued for studying the appellee's operational history because the appellee was located in Israel before filing a petition for chapter 15 recognition, but the Fifth Circuit disagreed.<sup>124</sup> The court looked to § 1502, like the lower court had done, and when the court did not find a timeframe associated with COMI, the court decided that § 1502's verb tense provided an answer.<sup>125</sup> The court declared that Congress's use of the present and present progressive tenses "requires courts to view the COMI determination . . . at the time the petition for recognition was filed."<sup>126</sup>

The court believed that Congress would have created a lookback period for chapter 15 if it had wanted to include one, especially because it had created lookback periods in other parts of the Code.<sup>127</sup> Therefore, a court fulfills chapter 15's purpose by studying COMI on the recognition petition date.<sup>128</sup> Lastly, the court worried that if courts focus on lookback periods, then they would come to different, conflicting results.<sup>129</sup> The Fifth Circuit affirmed the lower court's ruling.<sup>130</sup>

In *In re Betcorp Ltd.*, a bankruptcy court in Nevada pondered two options for the correct time to determine COMI.<sup>131</sup> A party in the case argued for

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<sup>122</sup> See *id.* at 285 ("Because courts undertake the . . . analysis when the foreign representative files for recognition, it follows that the court should weigh only the evidence as it exists at the time of filing in the U.S. court.").

<sup>123</sup> See *id.* at 283–84, 285.

<sup>124</sup> *In re Ran*, 607 F.3d at 1025.

<sup>125</sup> See *id.* ("[T]he grammatical tense in which [§ 1502] is written provides guidance.").

<sup>126</sup> *Id.*

<sup>127</sup> See *id.* ("If Congress had, in fact, intended bankruptcy courts to view the COMI determination through a lookback period or on a specific past date, it could have easily said so. This is particularly significant because Congress is clearly capable of creating lookback periods in the Bankruptcy Code." (citing 11 U.S.C. § 522(b)(3)(A) (2006) (creating a lookback provision for property exemptions))). The Fifth Circuit's argument is flawed in two ways, discussed later in this Comment.

<sup>128</sup> See *id.* (reiterating that "[c]hapter 15 was implemented by Congress in an attempt to harmonize transnational insolvency proceedings," but failing to state why examining a debtor's COMI when a chapter 15 petition for recognition is filed satisfies chapter 15's purpose).

<sup>129</sup> See *id.* ("[T]here would be 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.").

<sup>130</sup> See *id.* at 1028.

<sup>131</sup> See 400 B.R. 266, 286 (Bankr. D. Nev. 2009) ("[S]hould COMI be determined as of the time of the filing of the petition for recognition, or should the court look back and determine COMI in light of a debtor's operational history?").

looking at COMI beyond the chapter 15 petition date, but the court called that argument flawed.<sup>132</sup> The court speculated that adopting a lookback period would disrupt the Model Law's intent to create legal harmony<sup>133</sup> and then referenced an example of why courts cannot use a lookback period to determine COMI.<sup>134</sup> In that example, a court used a common sense argument that looking back may create conflicting COMI determinations, and the *Betcorp* court agreed.<sup>135</sup>

The bankruptcy court also looked to English cases that interpreted the Regulation and found that they used a time close to the relevant proceeding.<sup>136</sup> Additionally, those English cases found “that the identity of the country in which an individual debtor's debts were incurred was not a relevant consideration in establishing where COMI might be.”<sup>137</sup> Thus, the *Betcorp* court addressed COMI on the chapter 15 petition date.<sup>138</sup>

During *In re British American Isle of Venice (BVI), Ltd.*, the Bankruptcy Court for the Southern District of Florida analyzed COMI by studying third-party perceptions of where a company could be located.<sup>139</sup> Some courts had equated COMI with principal place of business.<sup>140</sup> Some even connected COMI analysis “to the ‘nerve center’ analysis described” by the Supreme Court.<sup>141</sup> The court did not state explicitly when to determine COMI, but it

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<sup>132</sup> See *id.* at 290.

<sup>133</sup> See *id.* (“[A lookback period] would frustrate the goals of using COMI to ‘harmonize’ insolvency proceeding recognition transnationally, and it would make the determination of COMI imprecise and often incorrect.”).

<sup>134</sup> See *id.* at 290–91 (“[I]n his past, Mr. Ran had substantial interests in Israel, but on the date of the petition for recognition, he had effectively no interests in that country.” (citing *In re Ran*, 390 B.R. 257, 260 (Bankr. S.D. Tex. 2008))).

<sup>135</sup> See *id.* at 291 (“[Giving] 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.” (citing *In re Ran*, 390 B.R. 257, 300 (Bankr. S.D. Tex. 2008))).

<sup>136</sup> See *id.* at 292 (“[English cases] seem to select a time linked to the commencement or service of the relevant insolvency proceeding.” (citing *Shierson v. Vlieland-Boddy*, [2005] EWCA (Civ) 974 [39], [55] (Eng.); *Re Collins & Aikman Corp. Grp.*, [2005] EWHC (Ch) 1754 [39] (Eng.))).

<sup>137</sup> *Id.* (citing *Shierson*, [2005] EWCA (Civ) at [39]; *Official Receiver v. Eichler*, [2007] BPIR (Ch D.) 1636 (Eng.)).

<sup>138</sup> See *id.*

<sup>139</sup> See 441 B.R. 713 (Bankr. S.D. Fla. 2010).

<sup>140</sup> See *id.* at 720 (“Several courts have likened COMI to the ‘principal place of business’ concept under United States law.” (citing *In re British Am. Ins. Co.*, 425 B.R. 884, 908–09 (Bankr. S.D. Fla. 2010); *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 129 (Bankr. S.D.N.Y. 2007), *aff'd*, 389 B.R. 325 (S.D.N.Y. 2008))).

<sup>141</sup> *Id.* (equating a “nerve center” with a corporation's headquarters (citing *Hertz Corp. v. Friend*, 559 U.S. 77, 95 (2010); *In re Fairfield Sentry Ltd.*, 440 B.R. 60 (Bankr. S.D.N.Y. 2010))).

considered the locations of the debtor's headquarters and its managers.<sup>142</sup> The court looked at the debtor's assets on the chapter 15 petition date also.<sup>143</sup>

Importantly, the court observed third-party expectations and found that those third parties considered the foreign representative's location to be the location of the debtor's business, even the foreign representative remained in one location for an extended period and then relocated the debtor's business activities.<sup>144</sup> When third parties focus on the foreign representative's location, courts have acknowledged that COMI can shift.<sup>145</sup> The court held that its case did not involve an opportunistic shift or any biased distortion of COMI.<sup>146</sup> Therefore, the debtor's COMI could be where third parties considered the foreign representative to be located, which was determined at the time of filing for chapter 15 recognition in the United States.<sup>147</sup>

If the debtor's COMI is unclear, a court, such as the *In re British American Insurance* court, looks for alternate methods to determine COMI.<sup>148</sup> There was evidence in that case to rebut § 1516(c)'s presumption that COMI is the debtor's registered office or habitual residence, which caused the court to expand its analysis.<sup>149</sup>

Petitioners asked the court to determine COMI on the chapter 15 petition date; the opposing party asked the court to determine COMI when the petitioners were appointed in foreign proceedings or through a lookback period of the debtor's operational history.<sup>150</sup> To help choose an option, the court consulted prior cases and gave particular attention to how they rejected using a lookback period because of possible conflicts among decisions from country to country that might undermine international uniformity.<sup>151</sup> The court also found support for its position in the text of chapter 15.<sup>152</sup>

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<sup>142</sup> See *id.* (“The court first considers the location of the Debtor’s headquarters and the location of those who actually manage the Debtor.”).

<sup>143</sup> See *id.* at 721.

<sup>144</sup> See *id.* at 722–23 (citing *In re British Am. Ins. Co.*, 425 B.R. at 914; *In re Fairfield Sentry*, 440 B.R. 60).

<sup>145</sup> See *id.* at 723 (citing *In re British Am. Ins. Co.*, 425 B.R. at 914; *In re Fairfield Sentry*, 440 B.R. 60).

<sup>146</sup> See *id.* (citing *In re Fairfield Sentry*, 440 B.R. at 66).

<sup>147</sup> See *id.* (citing *In re Fairfield Sentry*, 440 B.R. at 66).

<sup>148</sup> See 425 B.R. at 909.

<sup>149</sup> See *id.* at 908.

<sup>150</sup> See *id.* at 909.

<sup>151</sup> See *id.* at 909–10 (“[There was] concern for the possibility of conflicting COMI determinations in various countries arising from different analyses of a debtor’s historical activities”).

<sup>152</sup> See *id.* at 910 (“Chapter 15 itself provides guidance on the temporal focus of the COMI analysis.”).

The court used the present verb tense in § 1517(b)(1) as proof of Congressional intent to determine COMI on the chapter 15 petition date.<sup>153</sup> Additionally, a foreign representative has to notify the court “of ‘any substantial change’” to his appointment or to the foreign proceeding, which causes a court to account for any change in the location of the debtor’s COMI that may occur after a chapter 15 petition is filed but before recognition is granted.<sup>154</sup> Promoting international uniformity and consistency is a court’s primary goal and can be achieved by “[s]electing the latest possible date for the COMI analysis.”<sup>155</sup>

Outside of the United States, the Federal Court in Australia also studied its national implementation of UNCITRAL’s Model Law and noted that it needed to choose a date to determine COMI.<sup>156</sup> The case’s main proceeding occurred in the United States, and the foreign representative sought recognition in Australia.<sup>157</sup> Ultimately, the Federal Court decided similarly to how U.S. had decided so far: COMI was determined at the time the court in Australia was called upon to make a decision, not by looking back to the commencement of the foreign proceeding.<sup>158</sup>

When the Second Circuit examined COMI in 2013, it declared that identifying the relevant time meant considering the Code, federal court holdings, and international sources.<sup>159</sup> The Code, however, does not define COMI.<sup>160</sup> Instead, the court, like prior courts, focused on the use of present tense throughout chapter 15’s COMI-related verbs.<sup>161</sup>

The Second Circuit drew authority from the Supreme Court, who said that Congress’s choice of verb tense can determine “a statute’s temporal reach.”<sup>162</sup> During another case in the Second Circuit, the court had been influenced by

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<sup>153</sup> See *id.* (“[Because a] chapter 15 case is commenced by the filing of a petition for recognition under section 1504[, t]he present, for purposes of a court making a determination under section 1517(b)(1), can be no earlier than the date that chapter 15 petition was filed.”).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> See *In re Australian Equity Investors* [2012] FCA 1002 (5 Sept. 2012) (Austl.).

<sup>157</sup> See *id.*

<sup>158</sup> See *id.*

<sup>159</sup> See *Morning Mist Holdings Ltd. v. Kryss (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 133 (2d Cir. 2013).

<sup>160</sup> See *id.*

<sup>161</sup> See *id.*

<sup>162</sup> *Id.* at 133–34 (citing *Carr v. United States*, 560 U.S. 438 (2010); *Dobrova v. Holder*, 607 F.3d 297, 301 (2d Cir. 2010) (relying on Congress’s use of present perfect tense in statutory construction)).

the Code's verb tense.<sup>163</sup> To the court, § 1517's use of present and present progressive tenses mattered to a relevant time frame analysis.<sup>164</sup> In addition, the court distinguished that the Code does not compel COMI determination at the beginning of the foreign proceeding because that "proceeding 'is pending' only after it has been commenced."<sup>165</sup> As a result, the Code favors using the chapter 15 petition date in COMI analysis.<sup>166</sup>

The *Morning Mist* court was influenced by other federal courts analyzing COMI on the chapter 15 petition date.<sup>167</sup> The Second Circuit looked at other appellate courts first and found support in the Fifth Circuit *Ran* decision that rejected a lookback period.<sup>168</sup> Congress could put a lookback period in the Code, but it did not put one in chapter 15.<sup>169</sup> Furthermore, studying a range of time could muddle a discernible COMI.<sup>170</sup>

When the *Morning Mist* court looked beyond appellate courts, it found that most other courts used the chapter 15 petition date as well.<sup>171</sup> One court had looked to § 304 (chapter 15's predecessor) for language supporting using "the

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<sup>163</sup> See *id.* at 134 ("[The court was] guided by the tense used in a provision of the Bankruptcy Code allowing bankruptcy trustees to hire professionals . . . as long as the professionals 'do not hold or represent an interest adverse to the estate.'" (quoting *Bank Brussels Lambert v. Coan (In re AroChem Corp.)*, 176 F.3d 610, 623 (2d Cir. 1999))).

<sup>164</sup> See *id.* (citing 11 U.S.C. § 1517(b)(1) (2012)).

<sup>165</sup> *Id.* ("COMI determination based on the date of the *initiation* of the foreign proceeding is not compelled by the statute [because a] foreign proceeding 'is pending' only after it has been commenced." (emphasis added) (quoting 11 U.S.C. § 1517(b)(1))).

<sup>166</sup> See *id.* ("Under the text of the statute, therefore, the filing date of the Chapter 15 petition should serve to anchor the COMI analysis.").

<sup>167</sup> See *id.* ("Nearly every federal court to address this [temporal] question has determined that COMI should be considered as of the time the Chapter 15 petition is filed.").

<sup>168</sup> See *id.* ("Every operative verb is written in the present or present progressive tense. . . . Congress's choice to use the present tense requires courts to view the COMI determination in the present, i.e. at the time the petition for recognition was filed. If Congress had, in fact, intended bankruptcy courts to view the COMI determination through a look-back period or on a specific past date, it could have easily said so." (emphasis omitted) (citing *Lavie v. Ran (In re Ran)*, 607 F.3d 1017, 1025 (5th Cir. 2010))).

<sup>169</sup> See *id.* (referring to a lookback period in § 522(b)(3)(A) (citing *In re Ran*, 607 F.3d at 1025)).

<sup>170</sup> See *id.* ("[L]ooking at a company's full operational history could make it more difficult to pinpoint a single COMI.").

<sup>171</sup> See *id.* at 135 ("[Courts] throughout the country appear to have examined a debtor's COMI as of the time of the Chapter 15 petition." (citing *In re Fairfield Sentry Ltd.*, No. 10 Civ. 7311 (GBD), 2011 U.S. Dist. LEXIS 105770, at \*6 (S.D.N.Y. Sept. 16, 2011); *In re British Am. Isle of Venice (BVI), Ltd.*, 441 B.R. 713, 720–21 (Bankr. S.D. Fla. 2010); *In re British Am. Ins. Co.*, 425 B.R. 884, 909–10 (Bankr. S.D. Fla. 2010); *In re Betcorp Ltd.*, 400 B.R. 266, 290–92 (Bankr. D. Nev. 2009))). *But see In re Millennium Glob. Emerging Credit Master Fund Ltd.*, 474 B.R. 88, 92 (S.D.N.Y. 2012) ("COMI should be determined as of the date of the commencement of the foreign proceeding, rather than—as most of the courts that have looked at the issue have concluded—the date on which the Chapter 15 petition was filed.").

time of the commencement of the foreign liquidation proceeding,” but the court disregarded this approach because BAPCPA repealed § 304.<sup>172</sup>

Following § 1508’s directive to promote international unity, the *Morning Mist* court studied how foreign jurisdictions analyze COMI.<sup>173</sup> The Regulation “employs the present tense,” as does chapter 15.<sup>174</sup> Additionally, the Regulation promotes regular and ascertainable interpretations of COMI.<sup>175</sup> The Second Circuit conveyed unease, however, that the link between COMI and a “place where the debtor conducts the administration of his interests on a regular basis” might invoke a broader time period.<sup>176</sup> Nevertheless, chapter 15 and the Regulation were not perfect analogs to the court because chapter 15 requires a recognition petition, whereas an EU proceeding applies in each Member State.<sup>177</sup> The court conceded that the Regulation may refer to a broader COMI time period, but it rejected the Regulation’s influence when interpreting chapter 15.<sup>178</sup>

English courts chose times around the proceeding’s commencement, but the Second Circuit thought that the language relied upon was too ambiguous to be influential.<sup>179</sup> European courts look for a COMI that “is regular and ascertainable.”<sup>180</sup> Those courts have expressed concern about COMI tampering, but a regular and ascertainable COMI is not moved easily.<sup>181</sup>

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<sup>172</sup> *In re Fairfield Sentry*, 714 F.3d at 136.

<sup>173</sup> *See id.*

<sup>174</sup> *Id.*

<sup>175</sup> *See id.*

<sup>176</sup> *Id.* (citing Council Regulation 1346/2000, *supra* note 20, at Preamble ¶ 13).

<sup>177</sup> *See id.* (“[A] proceeding in one EU member state is automatically recognized by all other EU member states.” (citing Council Regulation 1346/2000, *supra* note 20, at art. 16)). Furthermore,

In *In re Millennium Global*, the bankruptcy court observed that “[t]he EU Regulation does not contemplate the commencement of a separate ancillary proceeding to seek recognition of a foreign insolvency case, as in the Model Law and chapter 15, as the members of the Union are automatically required to recognize foreign proceedings from the date of their opening.” But that conclusion does not persuade us that we should determine COMI under Chapter 15 based on the date of commencement of the foreign proceeding as the bankruptcy court held in that case; rather, it suggests that the EU Regulation may be a poor analog for interpreting Chapter 15.

*Id.* at 136 n.9 (citing *In re Millennium Glob. Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 74 (Bankr. S.D.N.Y. 2011), *aff’d*, 474 B.R. 88 (S.D.N.Y. 2012)).

<sup>178</sup> *See id.* at 136 (“Although the EU Regulation might refer to a broader time frame for considering a debtor’s COMI, [the Regulation] is not a fit for construing Chapter 15.”).

<sup>179</sup> *See id.* at 134 n.8 (citing *Lavie v. Ran (In re Ran)*, 607 F.3d 1017, 1026 (5th Cir. 2010)).

<sup>180</sup> *Id.* at 136–37 (citing Case C-341/04, *Eurofood IFSC Ltd.*, 2006 E.C.R. I-3813, ¶ 33; *Stanford Int’l Bank Ltd.*, [2010] EWCA (Civ) 137, [54–56] (Eng.)).

<sup>181</sup> *See id.* at 137 (“A COMI that is regular and ascertainable is not easily subject to tactical removal.” (citing *Eurofood*, 2006 E.C.R. at ¶ 35)).

Overall, the Second Circuit believed that international sources were not very useful and held that COMI should be analyzed on the chapter 15 petition date, except when there is evidence of bad faith manipulation.<sup>182</sup>

In April 2014, the Bankruptcy Court for the District of Delaware emphasized the exception for possible COMI manipulation.<sup>183</sup> The *In re Irish Bank Resolution Corp.* court stated that the Code's plain language directs courts to study matters presently on the chapter 15 petition date, not historically to prior proceedings.<sup>184</sup> Citing the Second Circuit, the court stressed chapter 15's use of present tense.<sup>185</sup> Evidence of possible COMI manipulation, however, allows a court to observe the period starting from the chapter 15 petition date and going back to the foreign proceeding's beginning, but no further.<sup>186</sup>

In 2015 and 2016, courts did not discuss the timing issue in as much depth. In fact, the cases that mentioned it stated in one manner-of-fact sentence each that the chapter 15 petition date is the date courts should use.<sup>187</sup>

## 2. COMI Determined Through Lookback Period

Despite decisions by other courts, the Bankruptcy Court for the Southern District of New York offered its own interpretation of when to determine COMI, and the court has reaffirmed its position more than once.<sup>188</sup>

To start, determining COMI is a two-step process.<sup>189</sup> First, the court decides upon the appropriate date for COMI analysis, and second, the court uses factors to locate the debtor's COMI.<sup>190</sup> Immediately, the court noted that

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<sup>182</sup> See *id.* (“[I]nternational sources are of limited use in resolving whether U.S. courts should determine COMI at the time of the Chapter 15 petition or in some other way.”).

<sup>183</sup> See *In re Ir. Bank Resolution Corp.* (In Special Liquidation), No. 13-12159 (CSS), 2014 Bankr. LEXIS 1990 (Bankr. D. Del. 2014).

<sup>184</sup> See *id.* at \*36 (“The plain language of the statute clearly indicates that the relevant time period to consider is the date of filing of the Chapter 15 petition, not the debtor’s ‘entire operational history.’” (citing *In re Fairfield Sentry*, 714 F.3d at 133)).

<sup>185</sup> See *id.* (citing *In re Fairfield Sentry*, 714 F.3d at 134).

<sup>186</sup> See *id.* (citing *In re Fairfield Sentry*, 714 F.3d at 133). Sometimes, COMI will be the same under either scenario. See, e.g., *id.* at \*36–37.

<sup>187</sup> See *In re Creative Fin. Ltd.*, 543 B.R. 498, 518–19 (Bankr. S.D.N.Y. 2016); *In re OAS S.A.*, 533 B.R. 83, 100 (Bankr. S.D.N.Y. 2015) (citing *In re Fairfield Sentry*, 714 F.3d at 133).

<sup>188</sup> See *In re Kemsley*, 489 B.R. 346 (Bankr. S.D.N.Y. 2013); *In re Gerova Fin. Grp., Ltd.*, 482 B.R. 86 (Bankr. S.D.N.Y. 2012); *In re Millennium Glob. Emerging Credit Master Fund Ltd.*, 458 B.R. 63 (Bankr. S.D.N.Y. 2011), *aff’d*, 474 B.R. 88 (S.D.N.Y. 2012).

<sup>189</sup> See *In re Millennium*, 458 B.R. at 71.

<sup>190</sup> See *id.*

relevant cases identify COMI on the chapter 15 petition date.<sup>191</sup> Those cases rely on verb tense and belief that another date would endanger COMI interpretations.<sup>192</sup>

Nevertheless, the court opted to conflict with other courts on grounds that the plain meaning of the Code does not require using the chapter 15 petition date and that using the chapter 15 petition date is actually inconsistent with the Code.<sup>193</sup> Even though prior cases emphasize the use of present tense, they do not explain why present tense favors a chapter 15 date over the beginning of a foreign proceeding.<sup>194</sup> Chapter 15 proceedings are secondary to foreign proceedings,<sup>195</sup> and its legislative history illustrates that point.<sup>196</sup> In fact, the date when the foreign representative applies for recognition “is a matter of happenstance.”<sup>197</sup> For instance, in *Millennium*, three years separated the chapter 15 petition and the liquidation proceeding in Bermuda.<sup>198</sup> With such a gap between proceedings, the court determined COMI at the beginning of the foreign proceeding.<sup>199</sup>

The *Millennium* court also translated COMI into plain English and demonstrated how the term can be clear.<sup>200</sup> Generally, in the United States, COMI is associated with principal place of business.<sup>201</sup> A drafter of the Model Law and of chapter 15 explained that

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<sup>191</sup> See *id.* (“[T]he few cases on point (both business and individual) have determined the COMI of an entity . . . as of the date of the filing of the chapter 15 petition.” (citing *Lavie v. Ran* (*In re Ran*), 607 F.3d 1017, 1025 (5th Cir. 2010) (individual); *In re Fairfield Sentry, Ltd.*, 440 B.R. 60 (Bankr. S.D.N.Y. 2010) (business); *In re British Am. Ins. Co.*, 425 B.R. 884, 909–11 (Bankr. S.D. Fla. 2010) (business); *In re Betcorp Ltd.*, 400 B.R. 266, 290–92 (Bankr. D. Nev. 2009) (business))).

<sup>192</sup> See *id.* (“[A]ny other date in the past would create a serious chance of conflict with the decisions of other courts.” (citing *In re Ran*, 607 F.3d at 1025, 1026)).

<sup>193</sup> See *id.* at 72.

<sup>194</sup> See *id.* (“[T]he courts do not explain why they assume that the statute refers to the filing of the chapter 15 petition rather than the filing of the petition in the case for which recognition is sought.”).

<sup>195</sup> See *id.* (“[T]he U.S. case is ancillary or secondary to the foreign proceeding.” (citing 11 U.S.C. § 1504 (2006); *In re Toft*, 453 B.R. 186, 189 (Bankr. S.D.N.Y. 2011))).

<sup>196</sup> *Id.* at 72 n.20 (“[T]here is a ‘United States policy in favor of a general rule that countries other than the home country of the debtor, where a . . . proceeding would be brought, should usually act through ancillary proceedings in aid of the . . . [foreign] proceedings. . . .’” (quoting H.R. REP. NO. 109-31, pt. 1, 107–08 (2005), reprinted in 2005 U.S.C.C.A.N. 88 (commentary relating to 11 U.S.C. § 1504 (2006))).

<sup>197</sup> *Id.* at 72.

<sup>198</sup> See *id.*

<sup>199</sup> See *id.* (“The substantive date for the determination of the COMI issue is at the date of the opening of the foreign proceeding for which recognition is sought.”).

<sup>200</sup> See *id.*

<sup>201</sup> See *id.*

Chapter 15 was drafted to follow the Model Law as closely as possible, with the idea of encouraging other countries to do the same. One example is use of the phrase “center of main interests,” which could have been replaced by “principal place of business” as a phrase more familiar to American judges and lawyers. The drafters of Chapter 15 believed, however, that such a crucial jurisdictional test should be uniform . . . .<sup>202</sup>

Courts have used COMI and principal place of business interchangeably.<sup>203</sup> If a court switches the terms, then it would locate a debtor’s business (or residence for individuals) on a date before liquidation.<sup>204</sup>

Once a court orders liquidation, the business stops, and there is no more principal place of business.<sup>205</sup> Courts distinguish principal place of business in reorganization cases by noting that the new place relates to “the reorganizing entity, not the debtor.”<sup>206</sup> The *Millennium* court recognized both that a liquidating business no longer has a principal place and that reorganization proceedings are rare outside of the United States—illustrating why UNCITRAL would not have based the Model Law’s universal terms on uncommon proceedings.<sup>207</sup>

The *Millennium* court also looked at the Code prior to BAPCPA and found a requirement for courts “to consider the ‘principal place of business’ or ‘principal assets’ of a debtor when determining whether to recognize a foreign proceeding.”<sup>208</sup> Section 101(23) of the Code defined a foreign proceeding as

<sup>202</sup> *Id.* (quoting Westbrook, *Chapter*, *supra* note 89, at 719–20); *see also id.* at 72 n.21 (citing Jay Lawrence Westbrook, *Locating the Eye of the Financial Storm*, 32 BROOK. J. INT’L L. 1019, 1020 n.9 (2007) (“COMI is similar to standards like ‘principal place of business,’ ‘chief executive office,’ or ‘real seat’ that one finds in many statutes in the United States and elsewhere.”)); *In re Tri-Continental Exch.*, 349 B.R. 627, 633 (Bankr. E.D. Cal. 2006) (quoting Westbrook, *Chapter*, *supra* note 89, at 719–20).

<sup>203</sup> *See In re Millennium*, 458 B.R. at 72 (citing *In re Betcorp Ltd.*, 400 B.R. 266, 287–88 (Bankr. D. Nev. 2009); *In re Basis Yield Alpha Fund (Master)*, 381 B.R. 37, 48 (Bankr. S.D.N.Y. 2008)).

<sup>204</sup> *See id.* (“[T]he date for determining an entity’s place of business refers to the business of the entity before it was placed into liquidation.”).

<sup>205</sup> *See id.* (“A debtor does not continue to have a principal place of business after liquidation is ordered and the business stops operating.”).

<sup>206</sup> *Id.* at 73.

<sup>207</sup> *See id.* at 73, 73 n.22 (“[T]he drafters of the Model Law would not have employed the term with a reorganization case in mind because reorganization is rare in most countries outside the United States.”) (citing Terence C. Halliday, *Legitimacy, Technology, and Leverage: The Building Blocks of Insolvency Architecture in the Decade Past and the Decade Ahead*, 32 BROOK. J. INT’L L. 1081, 1094 (2007); Christoph G. Paulus, *Global Insolvency Law and the Role of Multinational Institutions*, 32 BROOK. J. INT’L L. 755 n.18 (2006–2007); U.N. COMM’N ON INT’L TRADE LAW, UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW, U.N. Pub. Sales No. E.05.V.10 (2005)).

<sup>208</sup> *Id.* at 73.

one “in a foreign country in which the debtor’s . . . principal place of business or principal assets were located at the commencement of the proceeding, but which is convened for the purpose of liquidation or debt adjustment . . . or reorganization.”<sup>209</sup> That definition means that courts use a date from the commencement of the foreign proceeding.<sup>210</sup> The Model Law contains a simpler definition, but there is no evidence that Congress meant to change court practices.<sup>211</sup>

The Regulation does not account for separate ancillary proceedings because they are unnecessary in the EU; Member States recognize foreign proceedings automatically.<sup>212</sup> The insolvency proceeding’s commencement date is what the Regulation’s drafters had to consider for COMI.<sup>213</sup> The *Millennium* court acknowledged that some English cases use times around the commencement of insolvency proceedings, but in subsequent cases, English courts have rejected determining COMI at times after a business fails.<sup>214</sup>

Next, the court addressed an argument used in prior decisions: Establishing a date before the chapter 15 filing “would be bad policy” for COMI determination.<sup>215</sup> Instead of creating a vague inquiry, using an insolvency proceeding’s commencement date actually falls within the plain meaning of the Code.<sup>216</sup> The court demonstrated that whereas chapter 15 had been used in the United States to deny recognition, a New Zealand court had used statutory language to recognize an English proceeding.<sup>217</sup>

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<sup>209</sup> *Id.* (citing 11 U.S.C. § 101(23) (1990) (amended by Pub. Law. No. 109-8 (2005))).

<sup>210</sup> *See id.* (“[T]he determination as to ‘principal place of business’ [is] to be made as of ‘the commencement of the proceeding,’ *i.e.*, the foreign proceeding.”).

<sup>211</sup> *See id.* at 73, 73 n.23 (“The Model Law simplified and shortened the definition . . . , but there is no indication in chapter 15 or the legislative history that Congress intended to change the prior bankruptcy practice of looking to the date when foreign proceedings were first commenced.” (citing Mark Lightner, *Determining the Center of Main Interests Under Chapter 15*, 18 J. BANKR. L. & PRAC. 5 Art. 2, n.76 (2009) (stating that there is no legislative history on the issue))).

<sup>212</sup> *See id.* at 74; *see also id.* at 73 n.25 (citing Case C-444/07, MG Probud Gdynia, sp. z o.o., 2010 E.C.R. I-417 (requiring recognition of a Polish insolvency proceeding in Germany)).

<sup>213</sup> *See id.* at 74.

<sup>214</sup> *See id.* at 74 n.26 (citing *Stanford Int’l Bank Ltd.*, [2010] EWCA (Civ) 137, [54], [56(4)] (Eng.); *Shierson v. Vlieland-Boddy*, [2005] EWCA (Civ) 974, [38], [55], [71] (Eng.); Lightner, *supra* note 211 (recognizing that the EU Regulation requires a COMI determination as of the date of the opening of insolvency proceedings)).

<sup>215</sup> *Id.* at 74–75 (citing *Lavie v. Ran (In re Ran)*, 607 F.3d 1017, 1025 (5th Cir. 2010); *In re Betcorp*, 400 B.R. at 291–92).

<sup>216</sup> *See id.* at 75.

<sup>217</sup> *See id.* at 75 n.27 (citing *Williams v Simpson* HC Hamilton CIV 2010-419-1174, 12 Oct. 2010 (N.Z.)). The *Millennium* court stated

COMI determination should not be used to bar foreign representatives because that would contradict chapter 15's purpose: cooperation.<sup>218</sup> In fact, using a chapter 15 petition date could lead to forum shopping because it recognizes a change of residence since the original proceeding began.<sup>219</sup> The safest, uniform, and most importantly, correct, date for COMI is the beginning of a foreign insolvency proceeding.<sup>220</sup>

Slightly more than a year after *Millennium*, the Bankruptcy Court for the Southern District of New York discussed when to determine COMI again.<sup>221</sup> The court affirmed determining COMI at the beginning of a foreign proceeding, noting that since *Millennium*, UNCITRAL had endorsed determining COMI at the commencement of a foreign proceeding and was working on an amendment to the Model Law's enactment guide to incorporate that date.<sup>222</sup>

In early 2013, the same bankruptcy court addressed proper COMI timing for a third time.<sup>223</sup> The court stressed that determining the appropriate date for COMI was "not just a theoretical concern" because two available options would yield different results.<sup>224</sup> The court agreed with its own rulings to use a date from the beginning of the foreign proceeding.<sup>225</sup> An "opportunity for cross-border cooperation first came into being" when a petition was filed to commence proceedings in the United Kingdom.<sup>226</sup> That date was certain and easy to verify.<sup>227</sup> The chapter 15 petition date, however, was not as fixed.<sup>228</sup>

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Otherwise, the result might have been to prevent an English estate administrator from any relief in New Zealand and possibly to allow the debtor, who had apparently moved from England to New Zealand, to retain some or all of the millions of dollars in gold that was found buried in his basement.

*Id.* (citing *Williams* CIV 2010-419-1174).

<sup>218</sup> *See id.* at 75 n.28 (citing 11 U.S.C. § 1501(a)(1) (2006); *In re Atlas Shipping A/S*, 404 B.R. 726, 738 (Bankr. S.D.N.Y. 2009)).

<sup>219</sup> *See id.* at 75.

<sup>220</sup> *See id.* at 76.

<sup>221</sup> *See In re Gerova Fin. Grp., Ltd.*, 482 B.R. 86 (Bankr. S.D.N.Y. 2012).

<sup>222</sup> *See id.* at 92 (citing Rep. on Working Group V's 41st Sess., *supra* note 28, at ¶ 60 (stating that a proposed change to the Model Law to clarify that the COMI determination be made as of the date of the commencement of the foreign insolvency proceeding "received wide support")). The *Gerova* court held that even if it analyzed COMI on the chapter 15 petition date, its conclusion would be the same. *See id.* at 93.

<sup>223</sup> *See In re Kemsley*, 489 B.R. 346 (Bankr. S.D.N.Y. 2013).

<sup>224</sup> *Id.* at 353.

<sup>225</sup> *See id.* at 354.

<sup>226</sup> *Id.*

<sup>227</sup> *See id.*

With that understanding, a court determines COMI on a specific date, not a potential date.<sup>229</sup>

Additionally, the *Kemsley* court studied COMI decisions in other jurisdictions, especially the Fifth Circuit's *Ran* decision.<sup>230</sup> The court harped that *Ran*'s focus on the present tense "places too much emphasis on an otherwise neutral verb tense."<sup>231</sup> Section 1502(4) does not specify a date to analyze COMI and can be interpreted legitimately as the commencement date of a foreign proceeding.<sup>232</sup> Furthermore, the court declared that the Fifth Circuit's analysis may support studying COMI once a chapter 15 petition is filed, but that same analysis does not instruct what time to use.<sup>233</sup> The *Kemsley* court attached the debtor's COMI to the start of the foreign insolvency proceeding.<sup>234</sup>

During 2014, the Federal Court in Australia examined to its prior analysis of COMI timing and changed its opinion.<sup>235</sup> Like in its 2012 case, the court had a debtor with a main proceeding in the United States and a foreign representative who was seeking recognition in Australia. The court considered three dates on which to determine COMI: the date of application for recognition in Australia, the foreign proceeding's commencement date, and the date the court considered the application for recognition.<sup>236</sup> Of those choices, the court decided to use the foreign proceeding commencement date.<sup>237</sup> The court believed that the foreign commencement date was advantageous and that the other options would lead to various outcomes in different nations, which would not meet the goals of cooperation and promoting greater legal certainty in cross-border insolvency law.<sup>238</sup>

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<sup>228</sup> See *id.* ("[The chapter 15 date] can vary greatly depending on circumstances and the diligence of the foreign representative.").

<sup>229</sup> See *id.* at 356 ("Life is fluid, but COMI is a concept that is determined as of a fixed date . . . based on the circumstances that then existed.").

<sup>230</sup> See *id.* at 359 (citing *Lavie v. Ran (In re Ran)*, 607 F.3d 1017, 1025 (5th Cir. 2010)).

<sup>231</sup> *Id.* (citing *In re Ran*, 607 F.3d at 1025).

<sup>232</sup> See *id.*

<sup>233</sup> See *id.*

<sup>234</sup> See *id.* at 359, 360.

<sup>235</sup> See *In re Edelsten Kapila* [2014] FCA 1112 (10 Oct. 2014) (Austl.).

<sup>236</sup> See *id.*

<sup>237</sup> See *id.*

<sup>238</sup> See *id.*

### 3. *Why This Comment Suggests Determining COMI Through a Lookback Period*

This Comment cites four reasons to use a lookback period when deciding whether to analyze COMI on the chapter 15 petition date or the foreign proceeding date.

First, applying textualism to chapter 15 reveals that the proper date to determine COMI is the foreign proceeding date. As *Millennium* demonstrates, chapter 15's plain meaning does not require using the chapter 15 petition date.<sup>239</sup> Courts begin with the plain statutory meaning because a “common theme in the Supreme Court’s bankruptcy jurisprudence . . . is that courts must apply the plain meaning of the Code unless its literal application would produce a result demonstrably at odds with” Congressional intent.<sup>240</sup> Section

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<sup>239</sup> See 458 B.R. 63, 72 (Bankr. S.D.N.Y. 2011), *aff’d*, 474 B.R. 88 (S.D.N.Y. 2012).

<sup>240</sup> *Chase Manhattan Mortg. Corp. v. Shapiro (In re Lee)*, 530 F.3d 458, 470 (6th Cir. 2008) (citing *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (“[W]hen the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.”); *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (“[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.”); *United States v. Ron Pair Enters.*, 489 U.S. 235 (1989) (“[W]here, as here, the statute’s language is plain, the sole function of the courts is to enforce it according to its terms.”)). The plain meaning analysis has been applied by the Supreme Court in at least eleven additional cases since 1991. See *In re Lee*, 530 F.3d at 470 n.10 (citing *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443 (2007); *Till v. SCS Credit Corp.*, 541 U.S. 465, 486 (2004) (Thomas, J., concurring); *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004); *FCC v. NextWave Pers. Commc’ns Inc.*, 537 U.S. 293, 304 (2003); *Rake v. Wade*, 508 U.S. 464, 473 (1993); *Patterson v. Shumate*, 504 U.S. 753, 757–58 (1992); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 642–43 (1992); *Union Bank v. Wolas*, 502 U.S. 151, 158 (1991); *Toibb v. Radloff*, 501 U.S. 157, 160 (1991)); see also *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 69 (2011) (looking to dictionary definitions to obtain a statute’s ordinary meaning (citing *Hamilton v. Lanning*, 560 U.S. 505 (2010))); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 252 (2010) (declining to view a statute in a way contrary to its plain meaning). The plain meaning theme has been reiterated by courts numerous times. See, e.g., *Ford Motor Co. v. United States*, 768 F.3d 580, 587 (6th Cir. 2014) (explaining that a court looks to the statute’s plain language first (citing *Nat’l Air Traffic Controllers Ass’n v. Sec’y of the DOT*, 654 F.3d 654, 657 (6th Cir. 2011); *Menuskin v. Williams*, 145 F.3d 755, 768 (6th Cir. 1998))); *Drawbridge Special Opportunities Fund LP v. Barnet (In re Barnet)*, 737 F.3d 238, 250 (2d Cir. 2013) (“A properly limited contextual analysis of statutory language is encompassed within the ambit of a textual analysis.” (citing *In re Application of N.Y. Times Co. to Unseal Wiretap & Search Warrant Materials*, 577 F.3d 401, 406 (2d Cir. 2009) (“[W]e examine the text of the statute itself, interpreting provisions in light of their ordinary meaning and their contextual setting.”); *United States v. Magassouba*, 544 F.3d 387, 404 (2d Cir. 2008) (“In determining whether statutory language is ambiguous, we ‘reference the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.’”)); *Kulakowski v. Walton (In re Kulakowski)*, 735 F.3d 1296, 1300 (11th Cir. 2013) (“In analyzing the Bankruptcy Code, we begin with the text of the relevant provision . . . and confine our analysis to the plain language of the statute.” (citing *United States v. Zuniga-Arteaga*, 681 F.3d 1220, 1223 (11th Cir. 2012)));

1502(4) discusses a “proceeding pending in the country where the debtor has” a COMI, and there is no reason to assume that the present verb tense refers to the chapter 15 petition date instead of the date of the foreign proceeding.<sup>241</sup> Courts may interpret § 1502(4) to mean the date of the foreign proceeding because the section is silent about when to determine COMI.<sup>242</sup>

COMI should not be used as a bar against recognition, which is a distinct possibility when courts use the chapter 15 petition date.<sup>243</sup> Plus, using the chapter 15 date is inconsistent with a textual reading of the Code because that date contradicts the chapter’s purpose (and the Model Law’s purpose for that matter).<sup>244</sup> Chapter 15’s purpose, stated in § 1501 and by various courts, is to promote cooperation between United States courts and foreign courts relating to cross-border insolvency cases.<sup>245</sup> Therefore, courts should regard the chapter

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Morning Mist Holdings Ltd. v. Krys (*In re* Fairfield Sentry Ltd.), 714 F.3d 127, 136 (2d Cir. 2013) (“[T]he statutory text controls, first and ultimately . . .”); *Ad Hoc Grp. of Vitro Noteholders v. Vitro SAB De CV* (*In re* Vitro SAB De CV), 701 F.3d 1031, 1047 (5th Cir. 2012) (“[Courts] interpret statutes according to their plain meaning.” (citing *Gaddis v. United States*, 381 F.3d 444, 472 (5th Cir. 2004))); *In re Ran*, 607 F.3d at 1025 (“In the bankruptcy context, the analysis must end with the text if the language is clear and does not lead to an absurd result.” (citing *Ron Pair Enters.*, 489 U.S. at 238)); *Lavie v. Ran*, 406 B.R. 277, 281 (S.D. Tex. 2009) (“[T]he ‘plain meaning’ of words should be utilized when interpreting an ambiguous statute or when terms are not otherwise defined.” (citing *Mead Corp. v. Tilley*, 490 U.S. 714, 715 (1989); *Bankamerica Corp. v. United States*, 462 U.S. 122, 122–23 (1983))), *aff’d sub nom. In re Ran*, 607 F.3d 1017; *In re Octaviar Admin. Pty Ltd.*, 511 B.R. 361, 373 (Bankr. S.D.N.Y. 2014) (“[T]he Court must abide by the plain meaning of the words in the statute.” (citing *In re Barnet*, 737 F.3d 238)).

<sup>241</sup> 11 U.S.C. § 1502(4) (2012); *see also In re Millennium*, 458 B.R. at 72 (“[T]he courts do not explain why they assume that the statute refers to the filing of the chapter 15 petition rather than the filing of the petition in the case for which recognition is sought”).

<sup>242</sup> *See In re Kemsley*, 489 B.R. at 359 (“The section is silent regarding the ‘as of’ date for analyzing COMI and can be properly read to mean the country where a debtor has his, her or its COMI as of the date of opening of the foreign proceeding. The textual analysis adopted by the Fifth Circuit suggests that the language supports testing for COMI when the chapter 15 petition is filed but does not provide meaningful temporal guidance for using that date.”).

<sup>243</sup> *See In re Millennium*, 458 B.R. at 83 (“The COMI requirement should not be applied in [such] a manner that would effectively establish a presumption *against* recognition of cases . . .”).

<sup>244</sup> *See id.* at 72.

<sup>245</sup> *See* 11 U.S.C. § 1501; *see also In re Barnet*, 737 F.3d at 250–51 (citing 11 U.S.C. § 1501(a)); *In re Ran*, 607 F.3d at 1020–21 (“The statutory intent to conform American law with international law is explicit in the text of Section 1501(a), and is also expressed in Section 1508, which states that ‘[i]n interpreting this chapter, the court shall consider its international origin, and the need to promote an application of similar statutes adopted by foreign jurisdictions.’” (citing 11 U.S.C. § 1508 (2006); H.R. REP. NO. 109-31, pt. 1, at 105 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 169 (“[Chapter 15] incorporates the Model Law on Cross-Border Insolvency to encourage cooperation between the United States and foreign countries with respect to transnational insolvency cases . . .”)); 8 COLLIER ON BANKRUPTCY ¶ 1501.01 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2008) (explaining the basis for Chapter 15)); *Tacon v. Petroquest Res. Inc. (In re Condor Ins. Ltd.)*, 601 F.3d 319, 322 (5th Cir. 2010) (“The Model Law was ‘expressly designed to be integrated into local insolvency law’ and Chapter 15 closely hewed to the text of the enactment. ‘Any

15 petition date as “a matter of happenstance” because a chapter 15 case in the United States is secondary to a foreign proceeding.<sup>246</sup>

Second, when a court translates the debatably ambiguous COMI, it uncovers connections to a principal place of business.<sup>247</sup> Courts have held that “[a] statute is ambiguous if it is susceptible to more than one reasonable interpretation *or* more than one accepted meaning,” which applies to COMI because courts have determined two different dates on which to apply the concept.<sup>248</sup> Section 1516(c) creates a presumption that a debtor’s principal place of business is its COMI.<sup>249</sup> Determining COMI as of the foreign proceeding, therefore, is more favorable than determining it at the chapter 15 petition date because there is no principal place of business once a foreign court has ordered liquidation.<sup>250</sup>

Under § 101(23) before BAPCPA, a foreign proceeding existed in a country where the debtor had a principal place of business at the beginning of the insolvency proceeding.<sup>251</sup> Supreme Court precedent states that when Congress amends the Code, the Court does not depart from major

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departures from the actual text of the Model Law . . . were as narrow and limited as possible.’ All this being part of an effort by the United States to harmonize international bankruptcy proceedings for the benefit of American businesses operating abroad. As directed by Congress, we mind this background as we discern the Chapter’s reach.” (citing LIEF M. CLARK, ANCILLARY AND OTHER CROSS-BORDER INSOLVENCY CASES UNDER CHAPTER 15 OF THE BANKRUPTCY CODE: A COLLIER MONOGRAPH § 2[4] (2008); Westbrook, *Chapter, supra* note 89, at 720)); *Lavie*, 406 B.R. at 281 (“It is axiomatic that statutes should not be construed in a way that defeats the statutory intent.” (citing *United States v. Braverman*, 373 U.S. 405, 408 (1963))); *In re Betcorp Ltd.*, 400 B.R. 266, 276 (Bankr. D. Nev. 2009) (“The statutory intent to meld American law into international law is explicit . . .” (citations omitted)).

<sup>246</sup> *In re Millennium*, 458 B.R. at 72 (citing 11 U.S.C. § 1504 (2006); *In re Toft*, 453 B.R. 186, 189 (Bankr. S.D.N.Y. 2011)); *see also id.* at 72 n.20 (citing H.R. REP. NO. 109-31, at pt. 1, 107–08 (“[In] the chapter 15 legislative history, . . . there is a ‘United States policy in favor of a general rule that countries other than the home country of the debtor, where a . . . proceeding would be brought, should usually act through ancillary proceedings in aid of the . . . [foreign] proceedings . . .”).

<sup>247</sup> *See id.* at 72.

<sup>248</sup> *In re Condor*, 601 F.3d at 321 n.7 (emphasis added) (quoting *United States v. Valle*, 538 F.3d 341, 345 (5th Cir. 2008)).

<sup>249</sup> *See In re Tri-Continental Exch.*, 349 B.R. 627, 634 (Bankr. E.D. Cal. 2006) (“The statutory presumption created by § 1516(c), on close examination, confirms that an entity’s ‘principal place of business’ in United States jurisprudence is that entity’s ‘center of main interests’ for purposes of § 1502(4).”). Other courts have equated COMI and principal place of business as well. *See In re Betcorp*, 400 B.R. at 287–88; *In re Basis Yield Alpha Fund (Master)*, 381 B.R. 37, 48 (Bankr. S.D.N.Y. 2008).

<sup>250</sup> *See In re Millennium*, 458 B.R. at 72 (“A debtor does not continue to have a principal place of business after liquidation is ordered and the business stops operating.”).

<sup>251</sup> *See id.* at 73 (“[A foreign proceeding is] a proceeding . . . in a foreign country in which the debtor’s . . . principal place of business or principal assets were located at the commencement of the proceeding . . .” (quoting 11 U.S.C. § 101(23) (1990), *amended by* Pub. L. No. 109-8 (2005))).

interpretations of the Code, unless Congress indicates clearly that such a departure is intended.<sup>252</sup> Neither chapter 15 nor its legislative history, however, contains an indication that Congress wanted to change bankruptcy practices that affect COMI.<sup>253</sup> Furthermore, UNCITRAL Working Group V (Insolvency Law) has proposed an amendment to the Model Law that adopts *Millennium*'s determination that COMI should be analyzed through a lookback period.<sup>254</sup>

Third, determining COMI on the chapter 15 date allows a foreign representative to shop forums.<sup>255</sup> The foreign proceeding commencement date is certain and verifiable.<sup>256</sup> The chapter 15 petition date, however, is not fixed and may vary among cases.<sup>257</sup> One of the reasons the date can fluctuate is because it recognizes “a change of residence between the date of opening proceedings in the foreign nation and the chapter 15 petition date.”<sup>258</sup> When the *Millennium* court addressed the forum shopping issue, it noted that three years had passed since the foreign proceeding before a chapter 15 petition for recognition was filed in the United States.<sup>259</sup> Courts should determine COMI by looking back to the commencement date of the foreign proceeding to avoid a potential forum shopping strategy that would subvert the purpose of chapter 15.<sup>260</sup>

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<sup>252</sup> See *id.* at 83 (citing *Dewsnup v. Timm*, 502 U.S. 410, 419 (1992) (“When Congress amends the bankruptcy laws, it does not write ‘on a clean slate’ . . . . This Court has been reluctant to accept arguments that would interpret the Code . . . to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history.”); *Pa. Dep’t of Pub. Welfare v. Davenport*, 495 U.S. 552, 562 (1990) (“We will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.”)).

<sup>253</sup> *Id.* at 73 n.23 (“[T]here is no indication in chapter 15 or the legislative history that Congress intended to change the prior bankruptcy practice of looking to the date on which foreign proceedings were first commenced.” (citing Lightner, *supra* note 211 (stating that there is no legislative history on the issue))).

<sup>254</sup> See *In re Gerova Fin. Grp., Ltd.*, 482 B.R. 86, 92 (Bankr. S.D.N.Y. 2012) (citing Rep. on Working Group V’s 41st Sess., *supra* note 28, at ¶ 60 (stating that a proposed change to the Model Law to clarify that the COMI determination be made as of the date of the commencement of the foreign insolvency proceeding “received wide support”)); see also *id.* at 92 n.10 (citing U.N. Comm’n on Int’l Trade Law, Working Group V (Insolvency Law), Interpretation and Application of Selected Concepts of the UNCITRAL Model Law on Cross-Border Insolvency Relating to Centre of Main Interests (COMI), 42d Sess., Nov. 26–30, 2012, ¶ 128C, U.N. Doc. A/CN.9/WG.V/WP.107 (Sept. 13, 2012) (stating that use of the commencement date of the foreign proceeding is consistent with the evidence required to apply for recognition and the “relevance accorded the decision commencing the foreign proceeding and appointing the foreign representative”)).

<sup>255</sup> See *In re Millennium*, 458 B.R. at 75.

<sup>256</sup> See *In re Kemsley*, 489 B.R. 346, 354 (Bankr. S.D.N.Y. 2013).

<sup>257</sup> See *id.*

<sup>258</sup> *In re Millennium*, 458 B.R. at 75.

<sup>259</sup> See *id.* at 72.

<sup>260</sup> See 11 U.S.C. § 1501 (2012).

Fourth, § 1508 of the Code directs courts to consider chapter 15's international origin and a need for cross-border uniformity.<sup>261</sup> The only date that courts throughout the EU may consider is the commencement date in a foreign proceeding.<sup>262</sup> That date is the only one they can consider because the Regulation, binding on all Member States, “does not contemplate the commencement of a separate ancillary proceeding to seek recognition of a foreign insolvency case, as in the Model Law and chapter 15.”<sup>263</sup> Instead, EU Member States recognize each other's proceedings automatically.<sup>264</sup> If United States courts intend to follow § 1508's instruction to consult chapter 15's international foundation, then they should hold that the correct time to determine COMI is on the foreign proceeding's commencement date.

### CONCLUSION

Chapter 15 has been a great addition to the Code, providing opportunities for many distressed foreign debtors. With time, though, two strands of decisions among courts have made relief more difficult to obtain for foreign representatives and debtors. Requiring courts to apply § 109(a) to chapter 15 is not only incorrect, but it is also alarming because it provides courts with an easy way to bar recognition of foreign proceedings instead of promoting international cross-border insolvency cooperation called for in § 1501(a).<sup>265</sup>

Second, determining COMI at the chapter 15 petition date is both inaccurate and deceptive. A straightforward reading of chapter 15 uncovers enough ambiguity that courts could decide to determine COMI at either the chapter 15 petition date or through a lookback period, but since chapter 15 became part of the Code, international sources have indicated clearly (through cases and a proposed Model Law amendment) that the start of the foreign proceeding is when to determine COMI. Using a chapter 15 petition date creates a possibility for foreign representatives and debtors to swindle the American legal system by establishing a genuine COMI in the United States

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<sup>261</sup> See *id.* § 1508.

<sup>262</sup> See *In re Millennium*, 458 B.R. at 74 (“The date of the opening of initial insolvency proceeding is the only date that the original drafters of the term [COMI] for the EU Regulation could have contemplated.”); see also *Lavie v. Ran (In re Ran)*, 607 F.3d 1017, 1026 (5th Cir. 2010) (“This is consistent with English cases interpreting the European Union Regulation, which seem to select a time linked to the commencement or service of the relevant insolvency proceeding.” (citing *Shierson v. Vlieland-Boddy*, [2005] EWCA (Civ) 974, [39], [55] (Eng.); *Re Collins & Aikman Corp. Grp.*, [2005] EWHC (Ch) 1754, [39] (Eng.))).

<sup>263</sup> *In re Millennium*, 458 B.R. at 74.

<sup>264</sup> See *id.*

<sup>265</sup> See 11 U.S.C. § 1501(a).

after a foreign proceeding has concluded. Analyzing COMI through a lookback period avoids such an illusory shift in a party's COMI.

Ultimately, chapter 15 is valuable to foreign representatives and debtors and will continue to grow.<sup>266</sup> Before it grows too much, though, courts should halt current trends and declare that § 109(a) has no applicability to chapter 15 and that COMI is determined through a lookback period to the foreign proceeding's commencement date.

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<sup>266</sup> See U.N. Comm'n on Int'l Trade Law, Working Group V (Insolvency Law), Cross-Border Recognition and Enforcement of Insolvency-Related Judgements, 48th Sess., Dec. 14–18, 2015, U.N. Doc. A/CN.9/WG.V/WP.135 (Oct. 2, 2015) (discussing language for a new model law regarding recognizing and enforcing foreign insolvency judgments); Parliament & Council Regulation 2015/848 of 20 May 2015 on Insolvency Proceedings (Recast), 2015 O.J. (L 141) 19 (EU) (implementing years of insolvency amendments and applying to courts on June 26, 2017).

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