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## The Scorecard so Far: Emerging Issues in Cross-Border Insolvencies Under Chapter 15 of the U.S. Bankruptcy Code

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# The Scorecard so Far: Emerging Issues in Cross-Border Insolvencies Under Chapter 15 of the U.S. Bankruptcy Code

*Megan R. O’Flynn*\*

*Abstract: Chapter 15 of the U.S. Bankruptcy Code was modeled after the Model Law on Cross-Border Insolvency, drafted by the United Nations Commission on International Trade and Law (UNCITRAL) in 1997. Despite the relatively small number of cases commenced in U.S. Courts under Chapter 15 since its adoption, no other section of the current Bankruptcy Code has broader implications for international business transactions and global foreign business relations than the provisions of Chapter 15. Moreover, since the United States has long been an innovator at the forefront of international insolvency law, interpretation of key provisions of the Chapter and related UNCITRAL Model Law complements by U.S. courts could provide meaningful guidance for foreign policymakers and courts as well as foreign and domestic businesses operating globally. This Comment provides a brief history of international insolvency law, focusing on the development of the UNCITRAL Model Law and the eventual adoption of Chapter 15 into U.S. Bankruptcy Code and its impacts on substantive U.S. law. It then examines two major emerging legal issues facing U.S. courts since Chapter 15’s adoption, namely, the development of the “Center of Main Interests” analysis and the “Public Policy Exception,” and analyzes these issues within the framework of the stated goals of the Chapter as defined in the Code and based on the Model Law.*

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The Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA or the Act), signed into law by President George W. Bush on April 20, 2005, represented the “largest overhaul of the Bankruptcy Code since its enactment in 1978.”<sup>1</sup> BAPCPA’s overall purpose was to “improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors.”<sup>2</sup> While the majority of the Act focused on personal consumer bankruptcy actions, parts of the Act had significant effects on commercial bankruptcies. Specifically, the new Chapter 15 addressed the filing of a petition for recognition of a foreign proceeding and replaced the repealed Bankruptcy Code Section 304 (Section 304).<sup>3</sup> Despite the sweeping changes indicated by BAPCPA overall, commentators noted prior to its adoption that enactment would not likely make substantial changes to the treatment of cross-border insolvencies in U.S. courts.<sup>4</sup>

Chapter 15 was modeled after and incorporated the Model Law on Cross-Border Insolvency, drafted by the United Nations Commission on International Trade and Law (UNCITRAL) in 1997 and officially adopted by the U.N. General Assembly in January 1998.<sup>5</sup> Since Chapter 15’s

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<sup>1</sup> BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005: LAW AND EXPLANATION 3 (Sheila M. Williams et al. eds., 2005) [hereinafter Williams, BANKRUPTCY ABUSE PREVENTION].

<sup>2</sup> H.R. REP. No. 109-31(I), at 1 (2005) *reprinted in* 2005 U.S.C.C.A.N. 88, 89.

<sup>3</sup> Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 11 U.S.C. §1501 (2006); ALAN N. RESNICK & HENRY J. SOMMER, THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005: A SECTION-BY-SECTION ANALYSIS 29 (2005). Section 304, enacted in 1978, also related to bankruptcy cases which were ancillary to foreign proceedings, however, Chapter 15 expanded upon and made significant departures from the previous procedures of the Bankruptcy Code, *see discussion infra* Section I.B.

<sup>4</sup> U.S. NAT’L BANKR. REVIEW COMM’N, BANKRUPTCY: THE NEXT TWENTY YEARS 361 (1997), *available at* <http://govinfo.library.unt.edu/nbrcreporttitlepg.html>.

<sup>5</sup> G.A. Res. 52/158, U.N. Doc. A/RES/52/158 (Jan. 30, 1998); U.N. Comm’n on Int’l

effective date of October 17, 2005, only about 300 cases have been commenced in the U.S. Bankruptcy Courts under the chapter, a negligible proportion of the more than 4.35 million bankruptcy cases commenced under all chapters of the Code during that time.<sup>6</sup> A total of 140 Chapter 15 cases were filed in 2009, up from 48 in 2008.<sup>7</sup> Of these, the most active Chapter 15 courts were the Southern District of New York (thirty-six cases filed) and the District of Delaware (twenty-five cases filed).<sup>8</sup>

Despite the small number of cases filed under Chapter 15, no other section of the current Bankruptcy Code has broader implications for international business transactions and global foreign business relations than the provisions of Chapter 15. Moreover, since the United States has long been an innovator at the forefront of international insolvency law, particularly since its 1978 adoption of Chapter 15 predecessor Section 304 of the Code,<sup>9</sup> interpretation of key provisions of the Chapter and related UNCITRAL Model Law complements by U.S. courts could provide meaningful guidance for foreign policymakers and courts as well as foreign and domestic businesses operating globally.

This Comment will examine some of the key emerging legal issues in U.S. Bankruptcy Courts surrounding cross-border insolvency proceedings since the adoption of Chapter 15, and it will analyze those issues within the framework of the stated goals of the Chapter as defined in the Code and based on the Model Law. Part I will provide a brief history of international insolvency law, focusing on the development of the UNCITRAL Model Law and the eventual adoption of Chapter 15, and highlight substantive

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Trade Law, *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, U.N. Doc. A/CN.9/442 (1997) available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/1997Model.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html) (hereinafter UNCITRAL); Williams, BANKRUPTCY ABUSE PREVENTION, *supra* note 1, at 155.

<sup>6</sup> ADMIN. OFFICE OF THE U.S. CTS., ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS, at tbls. F-2 (2006)–(2009), available at <http://www.uscourts.gov/Statistics/JudicialBusiness.aspx>. Note that more than 300 potential cases may have been filed for recognition under Chapter 15 but some have been rejected for recognition. Total bankruptcy filings up to Sept. 2009 were: 1,402,816 in 2009; 1,042,993 in 2008; 801,269 in 2007; and 1,112,542 in 2006. *Id.*

<sup>7</sup> ADMIN. OFFICE OF THE U.S. CTS., ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS, at 24 (2009), available at <http://www.uscourts.gov/Statistics/JudicialBusiness.aspx> [hereinafter ADMIN. OFFICE OF THE U.S. CTS.] (figures cited in 2009 are for the period ending Sept. 30, 2009). There were forty-nine Chapter 15 cases filed in 2007 and sixty-nine filed in 2006, ADMIN. OFFICE OF THE U.S. CTS., ANNUAL REPORTS OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS, at tbls. F-2 (2006)–(2007), available at <http://www.uscourts.gov/Statistics/JudicialBusiness.aspx>. The reason for the significant increase in filings in 2009 is not entirely clear, although the worldwide financial crisis of late 2008 may have contributed to the jump in filings during 2009.

<sup>8</sup> ADMIN. OFFICE OF THE U.S. CTS., *supra* note 7.

<sup>9</sup> See U.S. NAT'L BANKR. REVIEW COMM'N, *supra* note 4, at 354 (highlighting U.S. leadership in the field of international insolvencies and restructuring and encouraging the adoption of the UNCITRAL Model Law on Cross-Border Insolvency).

legal changes to the Bankruptcy Code brought about by the Chapter's adoption. Part II will examine two major emerging legal issues facing U.S. courts since the Chapter's adoption, namely, the development of the "Center of Main Interests" analysis and the "Public Policy Exception," analyze the potential direction of law going forward, and offer suggestions for adaptations and change. Finally, Part III will offer some broader recommendations and concluding thoughts surrounding cross-border insolvencies pursuant to Chapter 15.

## I. INTERNATIONAL INSOLVENCIES, THE UNCITRAL MODEL LAW, AND CHAPTER 15

The significant differences in insolvency regulation and procedure among nations and increased globalization of business activities over the last several decades led to a need for a clearer understanding of applicable law between countries and some level of parity of the legal parameters of cross-border insolvency. This Part details the development and eventual adoption by the United States and other nations of the most widely accepted international insolvency guidelines developed through the United Nations' Model Law on Cross-Border Insolvencies, the changes to U.S. bankruptcy law through the adoption of the Model Law into Chapter 15, and the main goals and purposes of the revised Code as it pertains to international insolvencies.

### A. Development and Adoption of the UNCITRAL Model Law on Cross-Border Insolvencies

In response to the rapid expansion of global economic activities in the latter part of the 20th Century, a number of international and regional organizations undertook the task of harmonizing the bankruptcy process across national borders but encountered significant difficulties in creating unified solutions and gaining wide acceptance of standards.<sup>10</sup> Despite these difficulties, in 1992 the United Nations Commission on International Trade Law (UNCITRAL) began to work in earnest to create such a model.<sup>11</sup>

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<sup>10</sup> U.N. Secretariat, *Possible Future Work: Cross-Border Insolvency: Note by the Secretariat*, U.N. Doc. A/CN.9/378/Add.4 (June 23, 1993), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V93/865/52/IMG/V9386552.pdf?OpenElement> (detailing various regional initiatives to harmonize insolvency law in areas including Latin America and Europe, and through groups like the International Bar Association, but noting a significant lack of harmony between the initiatives overall); see also *Insolvency Restructuring and Creditors' Rights Library*, INT'L BAR ASS'N, [http://www.ibanet.org/LPD/SIRC/Inslvncy\\_Rstrcrng\\_Crdtrs\\_Rights/SIRC\\_Library.aspx](http://www.ibanet.org/LPD/SIRC/Inslvncy_Rstrcrng_Crdtrs_Rights/SIRC_Library.aspx) (last visited June 13, 2012) (general documents on international insolvency efforts).

<sup>11</sup> Jenny Clift, *The UNCITRAL Model Law on Cross-Border Insolvency—A Legislative Framework to Facilitate Coordination and Cooperation in Cross-Border Insolvency*, 12 TUL. J. INT'L & COMP. L. 307, 307–08 (2004).

From 1993 to 1995, UNCITRAL, along with INSOL International,<sup>12</sup> held a number of judicial conferences and other joint international meetings, as well as conducted a number of studies, to assess the feasibility and process for creating a workable, unified cross-border insolvency model.<sup>13</sup> These efforts noted a number of barriers to the development of a unified model process, including the inadequacy of current local insolvency laws, unpredictability of implementation of laws, and the potential costs and delays of cross-border insolvency proceedings.<sup>14</sup>

Given these concerns, the UNCITRAL Congress agreed to address a number of key cross-border insolvency issues it felt were manageable and had potential for resolution. These included focusing on cooperation among the courts of the States where debtors' assets are located, allowing foreign representatives to have access to local court proceedings and creditors, and encouraging comity of certain orders of foreign courts in insolvency matters.<sup>15</sup> A working group of States, inter-governmental organizations, and nongovernmental groups including the Hague Conference on Private International Law, the European Insolvency Practitioners Association, the International Bar Association, and the International Chamber of Commerce worked to create the Model Law in Cross-Border Insolvency,<sup>16</sup> adopted by UNCITRAL in May 1997.<sup>17</sup>

Though the United States did not formally adopt the UNCITRAL Model Law until a number of years later, the U.S. National Bankruptcy Review Commission (NBRC) recommended the Model Law for adoption under the Bankruptcy Code as early as October 1997.<sup>18</sup> In its report to President Clinton, Chief Justice Rehnquist, and Congress, the NBRC noted that UNCITRAL's work represented a "groundbreaking development of an international model law on insolvency and reorganization" and recommended changes to the Bankruptcy Code in order to conform to the

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<sup>12</sup> *Insol International*, INT'L ASS'N OF RESTRUCTURING, INSOLVENCY, & BANKR. PROF'LS, <http://www.insol.org/> (last visited June 13, 2012).

<sup>13</sup> Clift, *supra* note 11, at 309.

<sup>14</sup> *Id.* at 309–10; U.N. Secretariat, *Cross-Border Insolvency: Report on UNCITRAL—INSOL Colloquium on Cross-Border Insolvency, Note by the Secretariat*, U.N. Comm'n on Int'l Trade Law, 4 U.N. Doc. A/CN.9/398 (May 19, 1994).

<sup>15</sup> U.N. Comm'n on Int'l Trade, Report of the Working Group on Insolvency Law on the Work of its Twentieth Session, Oct. 7–18, 1996, 3 U.N. Doc. A/CN.9/433 (Oct. 7, 1996).

<sup>16</sup> See U.N. Comm'n on Int'l Trade, Report of the Working Group on Insolvency Law on the Work of its Twenty-First Session, Jan. 20–31, 1997, U.N. Doc. A/CN.9/435 (Jan. 20, 1997) (detailing the numerous organizations of the working group).

<sup>17</sup> G.A. Res. 52/158, U.N. GAOR, 30th Sess., 72nd plen. mtg., U.N. Doc. A/52/17(1997); Look Chan Ho, *Overview*, in *CROSS-BORDER INSOLVENCY: A COMMENTARY ON THE UNCITRAL MODEL LAW 7* (Look Chan Ho ed., 2d ed. 2009).

<sup>18</sup> The National Bankruptcy Review Commission is an independent commission established pursuant to the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106.

Model Law.<sup>19</sup>

The 1997 NRBC Report noted that “although . . . changes will be beneficial, the principal benefit to the United States from adopting the Model Law will lie in the effect of its adoption on other jurisdictions” since “[e]arly adoption by the United States is likely to influence other countries to adopt [the] law and to spur international organizations to encourage countries to do so.”<sup>20</sup> However, the delay of U.S. adoption of the code until 2005 did not seem to deter other nations from recognizing the importance and usefulness of the Model Law in their own insolvency provisions.<sup>21</sup> Between the time of the NRBC’s initial report and the official adoption of the U.S. BAPCPA reforms including Chapter 15, a number of countries enacted all or parts of the UNCITRAL Model Law. Eritrea, Mexico, South Africa, Japan, Montenegro, Northern Ireland and the British Virgin Islands, Poland, Romania, and Serbia all adopted the Model Law before 2005.<sup>22</sup>

#### B. U.S. Adoption of Chapter 15 and Changes to the Bankruptcy Code

In its 1997 Report, the National Bankruptcy Review Commission stated that “because the United States is already a world leader” in the field of international insolvency law, “adoption of the [UNCITRAL] Model Law will result in relatively minor substantive changes to U.S. Bankruptcy

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<sup>19</sup> U.S. NAT’L BANKR. REVIEW COMM’N, *supra* note 4, at 353.

<sup>20</sup> *Id.* at 361.

<sup>21</sup> Note that adoption does not necessarily mean a nation will use the Model Law in full or even in partial force. Currently, South Africa’s version of the Model Law only applies to official, designated countries, of which there are currently none, leaving that nation’s Act to implement the law practically inapplicable. Ian R. De Witt, Presentation at the 16th Commonwealth Law Conference in Hong Kong: Challenges of Cross-Border Insolvencies: The UNCITRAL Model Law on Cross-Border Insolvency, Hong Kong and the Commonwealth (Apr. 2009), *summary available at* <http://www.tannerdewitt.com/media/publications/challenges-of-cross-border-insolvencies.php>. In addition, Argentina, Mexico and Romania all require reciprocity before the Model Law provisions are applied to a foreign proceeding. Scott C. Mund, *11 U.S.C. 1506: U.S. Courts Keep a Tight Rein on the Public Policy Exception, but the Potential to Undermine International Cooperation in Insolvency Proceedings Remains*, 28 WIS. INT’L L.J. 325, 336 (2010).

<sup>22</sup> As of February 2010, Eritrea (1998), Mexico (2000), South Africa (2000), Japan (2000), Montenegro (2002), Northern Ireland and the British Virgin Islands (2003), Poland (2003), Romania (2003), Serbia (2004) had all adopted the Model Law. Omer Shahid, Note, *The Public Policy Exception: Has § 1506 Been a Significant Obstacle in Aiding Foreign Bankruptcy Proceedings?*, 9 J. INT’L BUS. & L. 175, 178 (2010). Canada also began drafting provisions to their Companies’ Creditors Arrangement Act (CCAA) modeled somewhat after the UNCITRAL Model Law in the early 2000’s. The revised CCAA provisions came into force on September 18, 2009, including official adoption of the UNCITRAL Model Law. Canadian Bankruptcy and Insolvency Act (BIA), R.S.C. 1985, c. B-3, §§ 267–84 and the Companies’ Creditors Arrangement Act (CCAA), R.S.C. 1985, c. C-36, §§ 44–61 (Can.); *see generally* Steven Golick & Marc Wasserman, *Canada, in* CROSS-BORDER INSOLVENCY: A COMMENTARY ON THE UNCITRAL MODEL LAW 59, 59–85 (Look Chan Ho ed., 2d ed. 2009) (discussing the Canadian adoption process of Model Law provisions).

Law.”<sup>23</sup> While perhaps true in the abstract, adoption of the Model Law did in fact create significant codified changes to the process and procedure of international insolvencies in the context of the U.S. Bankruptcy system, and, as explored below in this Comment, may have served to create significant secondary legal and practical conundrums as well for a number of reasons.<sup>24</sup>

In general, Chapter 15 maintained the spirit of its predecessor Section 304 (Cases Ancillary to Foreign Proceedings).<sup>25</sup> Both favor “universalism”—a centralized administration of a debtor’s assets in one primary proceeding, with proceedings in other courts being ancillary—rather than a territorialist approach in which multiple courts seek to assert jurisdiction and claims for assets among creditors.<sup>26</sup> Chapter 15 and Section 304 also both aimed to maintain the majority of foreign insolvency proceedings as U.S. ancillary proceedings.<sup>27</sup> Taken together, these preferences suggest that courts, when given discretion, will often favor a foreign debtor’s “home country” as the location for the main bankruptcy action, with any U.S. proceedings being ancillary to the foreign proceeding.<sup>28</sup> Another significant change is that Chapter 15 is more prescriptive in its desire to establish interstate cooperation, dictating that the U.S. courts cooperate with a foreign court or representative “to the maximum extent possible.”<sup>29</sup>

As a departure from Section 304, however, Chapter 15 expanded the cross-border insolvency purview to include laws that apply not only to

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<sup>23</sup> U.S. NAT’L BANKR. REVIEW COMM’N, *supra* note 4, at 361.

<sup>24</sup> See 11 U.S.C. §§ 1501–32 (2006); 11 U.S.C. § 304 (repealed 2005). Though not any sort of scientific measure, it is worth noting that 11 U.S.C. 304 contained about 250 words in total, while Chapter 15 contains thirty-two sections and over 4,500 words in its text. Even without delving into the details of the new Chapter, it is likely that impactful changes will arise from the adoption of a much more standardized and “strict” process of cross-border insolvencies in the United States.

<sup>25</sup> 11 U.S.C. § 304 (repealed 2005).

<sup>26</sup> Brendan Mockler, *Chapter 15 Choice of Avoidance Law in U.S. Bankruptcy Court: Is it Really a Choice?*, 2009 NORTON ANN. SURV. OF BANKR. L. PT. I § 11 (2009).

<sup>27</sup> *Id.*

<sup>28</sup> See H.R. REP. NO. 109-31(I), Pt. 1 § 1504 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88 (highlighting that the preference for ancillary status is still in force. “The title ‘ancillary’ in the title of this section and in the title of this chapter emphasizes the United States policy in favor of a general rule that countries other than the home country of the debtor, where a main proceeding would be brought, should usually act through ancillary proceedings in aid of the main proceedings, in preference to a system of full bankruptcies (often called ‘secondary’ proceedings) in each state where assets are found. Under the Model Law, notwithstanding the recognition of a foreign main proceeding, full bankruptcy cases are permitted in each country (see sections 1528 and 1529).”).

<sup>29</sup> 11 U.S.C. § 1525(a); *see also* 11 U.S.C. § 1527. *Accord In re Artimm, S.r.L.*, 335 B.R. 149, 159 (Bankr. C.D. Cal. 2005) (aligning with the directive of Chapter 15 to cooperate with foreign courts and detailing the actual and potential consequences of such cooperation).

those U.S. cases deemed ancillary to foreign proceedings but also to other sorts of cross-border cases. These included cases started in the United States which could impact non-U.S. creditors or involve non-U.S. assets as well as cases pending concurrently in U.S. and non-U.S. courts.<sup>30</sup>

While this change expanded the types of cases the courts might recognize and hear in U.S. bankruptcy proceedings, perhaps a more significant change brought on by Chapter 15 served to effectively remove considerable discretionary power from U.S. courts. Under § 304, cooperation with foreign jurisdictions in the context of U.S. ancillary bankruptcy proceedings was wholly discretionary.<sup>31</sup> However, pursuant to Chapter 15, cooperation with the foreign country and preference for its proceeding to progress as a “foreign main” proceeding is mandated if the foreign proceeding is recognized as being filed in the debtor’s “home country,” triggering other provisions of the Code.<sup>32</sup> This change, which aligns with the Model Law, increases the United States’ default preference favoring universalism.<sup>33</sup> However, as discussed below, defining the debtor’s “home” through the provisions of determining if the case is a “foreign main” or “foreign nonmain” proceeding has sometimes proven difficult.<sup>34</sup>

Section 1501(c) of the U.S. Bankruptcy Code identifies the entities that are excluded from the section by referencing section 109 of the Code (“Who may be a debtor”).<sup>35</sup> It also sets a framework in which corporations and other business entities may obtain relief in U.S. Bankruptcy Courts.<sup>36</sup> This section was created to closely mirror Section 304. Under Chapter 15, while foreign insurance companies can commence or join a proceeding,

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<sup>30</sup> Selina A. Melnik, *United States, in* CROSS-BORDER INSOLVENCY: A COMMENTARY ON THE UNCITRAL MODEL LAW 265, 272 (Look Chan Ho ed., 2d ed. 2009); *see also* 11 U.S.C. § 1501(b) (highlighting that the chapter applies to cases where assistance is sought either by the United States or by a foreign court or representative in connection with a bankruptcy proceeding in the alternate forum, where domestic and foreign bankruptcy cases are pending concurrently, or where foreign entities, including creditors, have an interest in beginning or participating in a domestic proceeding).

<sup>31</sup> Hon. Allan L. Gropper, *Current Developments in International Insolvency Law: A United States Perspective*, PRACTISING L. INST. COM. L. & PRAC. COURSE HANDBOOK SERIES, PLI Order No. 14441, 906 PLI/Comm 685, 702 (2008).

<sup>32</sup> *See* Andrew B. Dawson, *Offshore Bankruptcies*, 88 NEB. L. REV. 317, 327–28 (2009) (examining the mandatory requirement of cooperation under Chapter 15. Note that “cooperation remains discretionary if the foreign proceeding is not in the debtor’s [Center of Main Interests], but rather in a jurisdiction where the debtor has an “establishment”—defined as a place where the debtor carries on nontransitory economic activity.”).

<sup>33</sup> *See* discussion of determining one’s “home country” through the COMI analysis, *infra* p. 402; *see also* John J. Chung, *The Retrogressive Flaw of Chapter 15 of the Bankruptcy Code: A Lesson from Maritime Law*, 17 DUKE J. COMP. & INT’L L. 253, 253–54 (2007) (criticizing the reliance on universalism in the Chapter 15 context).

<sup>34</sup> For discussion of the foreign main/foreign nonmain distinction, *see infra* Part II.A.1.

<sup>35</sup> 11 U.S.C. § 1501(c) (2006).

<sup>36</sup> *Id.*

foreign banks, foreign railroads, domestic insurance companies, and domestic banks are not permitted to pursue action.<sup>37</sup> Moreover, the individual filing requirements under 11 U.S.C.A. § 1501(c)(2) suggest that very few individual consumers will be able to pursue relief under the chapter, as it does not apply to individual debtors who are citizens or permanent resident aliens of the United States and creates other restrictions that limit the number of non-citizen and non-resident individuals who would likely qualify under the chapter.<sup>38</sup> This varies from the Model Law, which does not make a distinction between consumer and business debtors.<sup>39</sup>

Last, because it created certain mandatory court actions, Chapter 15 also contains a public policy exception which can limit otherwise mandatory actions, including the recognition or primacy of foreign proceedings. The language of Chapter 15 states that “[n]othing in [Chapter 15] prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States.”<sup>40</sup>

### C. Purposes & Goals of Chapter 15 and Recent Foreign Model Law Adoption

In addition to creating the changes and exclusions described above, the

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<sup>37</sup> *Id.* Note that foreign insurance companies can qualify as a “debtor” under Chapter 15. *Id.*

<sup>38</sup> See 11 U.S.C. § 1501(c)(2) (dictating that individuals or a marital couple are not eligible to proceed under Chapter 15 if their debts are within the limits specified in section 109(e) of the Code and who are “citizens of the United States or aliens lawfully admitted for permanent residence in the United States.” Effective April 1, 2010, “an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than \$360,475 and noncontingent, liquidated, secured debts of less than \$1,081,400, or an individual with regular income and such individual’s spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than \$360,475 and noncontingent, liquidated, secured debts of less than \$1,081,400” are eligible to file under Chapter 13 of the Code and therefore ineligible to proceed under Chapter 15. 11 U.S.C. § 109(e). In 2009, the average Chapter 7 bankruptcy individual filer with complete schedules of assets and liabilities (943,995 total) had \$112,561 more in liabilities than in assets, and the average Chapter 13 filer with complete schedules (356,807 total) had \$51,725 more in liabilities than in assets. ADMIN. OFF. OF THE U.S. CTS., 2009 REPORT OF STATISTICS REQUIRED BY THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005, at Tables 1A & 1D (2010), available at <http://www.uscourts.gov/Statistics/BankruptcyStatistics.aspx>. This suggests that most individual petitioners would not be eligible to pursue a bankruptcy case under Chapter 15. For the twelve-month period ending Sept. 30, 2009, approximately 1.34 million of the total 1.4 million bankruptcy petitions filed were individual filings. ADMIN. OFFICE OF THE U.S. CTS., ANNUAL REPORTS OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS, at 291 (2009), available at <http://www.uscourts.gov/Statistics/JudicialBusiness.aspx>.

<sup>39</sup> Williams, BANKRUPTCY ABUSE PREVENTION, *supra* note 1, at 157.

<sup>40</sup> 11 U.S.C. § 1506 (2006).

first section of Chapter 15 also outlined the primary purposes of the Chapter. These purposes closely mirror the goals and purposes of the UNCITRAL Model Law itself, and the section is quite unique when compared to other chapters of the U.S. Bankruptcy Code, which do not include any statement of purpose or goals.<sup>41</sup> The goals are outlined as follows:

The purpose of this chapter is to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency with the objectives of—

- (1) cooperation between—
  - (A) courts of the United States, United States trustees, trustees, examiners, debtors, and debtors in possession; and
  - (B) the courts and other competent authorities of foreign countries involved in cross-border insolvency cases;
- (2) greater legal certainty for trade and investment;
- (3) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor;
- (4) protection and maximization of the value of the debtor's assets; and
- (5) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.<sup>42</sup>

Additionally, § 1508 dictates that “in interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions.”<sup>43</sup> Finally, any determination for assistance under Chapter 15 must be “consistent with the principles of comity.”<sup>44</sup> This requirement aligns with the primary considerations under

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<sup>41</sup> This is not to say, however, that other sections of the Code do not have specific purposes or goals within them (protecting the interests of creditors, ensuring the speedy resolution of proceedings, etc.), but rather that the goals of Chapter 15 are clearly set forth and designed as a lead in to the entire Chapter. 11 U.S.C. § 1501.

<sup>42</sup> 11 U.S.C. § 1501(a).

<sup>43</sup> 11 U.S.C. § 1508.

<sup>44</sup> 11 U.S.C. § 1507; *see* *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895) (defining comity generally as “the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and

the repealed Section 304.<sup>45</sup>

After U.S. adoption in 2005, nine nations have adopted all or significant parts of the UNCITRAL Model Law on Cross-Border Insolvency. Most notably, Great Britain adopted the Model Law in 2006 and Australia followed suit in 2008.<sup>46</sup> In addition, while the Cayman Islands has not adopted the UNCITRAL Model Law *per se*, the nation's "Grand Court applies Model Law principals in all but name."<sup>47</sup>

## II. KEY EMERGING LEGAL ISSUES

Scholars examining Chapter 15 and its predecessor Section 304 have sometimes focused on the broader debate of the values of universalism contained in the Bankruptcy Code and the values of a more territorial approach to international insolvencies.<sup>48</sup> However, two significant lines of legal inquiry have emerged that highlight the narrower, practical issues facing U.S. courts in the cross-border bankruptcy context: the Center of Main Interest (COMI) Analysis and the Public Policy Exception. Here, this Comment will explore these issues by considering the language of Code, examining domestic and foreign case law, and analyzing potential for revision and change.

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convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws"); U.S. v. J.A. Jones Const. Group, LLC, 333 B.R. 637, 638 (E.D.N.Y. 2005) (discussing the primacy and importance of comity as a concept to adhere to in the context of Chapter 15 proceedings).

<sup>45</sup> See *In re Ran*, 390 B.R. 257, 291 (Bankr. S. D. Tex. 2008) (noting that "all relief under section 304 was discretionary and based on subjective, comity-influenced factors"); see also H.R.REP. NO. 95-595, at 324-25, reprinted in 1978 U.S.C.C.A.N. 5963, 6280-81; S.REP. NO. 95-989, at 35, reprinted in 1978 U.S.C.C.A.N. 5787, 5821 (legislative history of § 304 stating that "these guidelines are designed to give the court the maximum flexibility in handling ancillary cases. Principles of international comity and respect for the judgments and laws of other nations suggest 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>46</sup> Shahid, *supra* note 22, at 178; See also, *Status, 1997—Model Law on Cross-border Insolvency*, 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 June 13, 2012) (showing that the nations which have adopted the Model Law are Great Britain (2006), New Zealand (2006), Columbia (2006), South Korea (2006), Slovenia (2007), Australia (2008), Mauritius (2009), Canada (2009), and Greece (2010)).

<sup>47</sup> Tony Heaver-Wren & Jeremy Walton, *Cayman Islands, in CROSS-BORDER INSOLVENCY: A COMMENTARY ON THE UNCITRAL MODEL LAW 87* (Look Chan Ho ed., 2d ed. 2009) (noting that major amendments to the Cayman Islands' Companies Law through the Companies (Amendment) Law 2007 "codifies the Grand Court's powers to make orders in aid of foreign insolvency proceedings." *Id.* at 88).

<sup>48</sup> See, e.g., Chung, *supra* note 33, at 253-54 (criticizing the reliance on universalism in the Chapter 15 context); Edward S. Adams & Jason Fincke, *Coordinating Cross-Border Bankruptcy: How Territorialism Saves Universalism*, 15 COLUM. J. EUR. L. 43 (2008) (comparing the values of universalism and territorialism in cross-border insolvencies).

A. The Center of Main Interests (COMI) Analysis

1. *Recognition of a Foreign Proceeding and COMI in the Language of Chapter 15*

One of the most significant changes to the United States Courts' treatment of international insolvencies is that which changed the discretion of the Court and practically mandated foreign cooperation in some cases.

If a foreign entity can be classified as a "debtor" by overcoming the hurdles of Section 1501(c),<sup>49</sup> it might logically follow that they would be able to qualify for relief under Chapter 15. As one commentator notes, "from the plain language of Chapter 15, it appears that a foreign corporation that is not a railroad or a banking institution, and that has residence, domicile, place of business, or property in the United States can obtain relief under Chapter 15."<sup>50</sup> However, as discussed below, the process of obtaining relief has proven much more cumbersome in some cases.

A Chapter 15 case is commenced by filing a petition for recognition of a foreign proceeding pursuant to Section 1515 by a foreign representative.<sup>51</sup> Recognition under Chapter 15 is crucial: if a court refuses to recognize a proceeding, foreign proceedings or debtors may be jurisdictionally estopped from seeking relief or cooperation from U.S. state or federal courts.<sup>52</sup>

In order to gain recognition under Chapter 15, a non-U.S. proceeding must be designated as a "foreign proceeding." Under the Code, a foreign proceeding is:

[A] collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign

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<sup>49</sup> See discussion *supra* Section I.B. of "who may be a debtor."

<sup>50</sup> Judith Elkin et al., *Sauce for the Goose? Dual Standard Emerging in Cross Border Insolvencies: Domicile Not Enough to Recognize Foreign Proceeding, Bankruptcy & Reorganizations: Current Developments 2010*, PRACTISING L. INST. COM. L. & PRAC. COURSE HANDBOOK SERIES, PLI Order No. 22594, 927 PLI/Comm 947, 952 (2010).

<sup>51</sup> 11 U.S.C. § 1504 (2006); see 11 U.S.C. § 101(24) (defining a "foreign representative" as a person or body, including an interim representative, "authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding"); see also 11 U.S.C. § 1515 (dictating that a foreign representative must file a petition for recognition including English language translations of any court decisions certifying a foreign proceeding, a certificate from the foreign court affirming the existence of foreign proceedings and/or the appointment of a foreign representative, etc.).

<sup>52</sup> See 11 U.S.C. § 1509(d). Note that Chapter 15 recognition is affirmatively not a prerequisite for U.S. court cooperation in the case where the foreign representative is seeking assistance from the U.S. solely to "collect or recover a claim which is the property of the debtor." 11 U.S.C. § 1509(f).

court, for the purpose of reorganization or liquidation.<sup>53</sup>

However, under Chapter 15, the foreign proceeding must be classified specifically as a “foreign main” or “foreign nonmain” proceeding in order to gain recognition.<sup>54</sup> These concepts are adopted virtually word-for-word from the UNCITRAL Model Law.<sup>55</sup> In addition, courts have held that the main/nonmain distinction must be considered primary to and apart from any consideration of comity.<sup>56</sup>

Chapter 15 defines “foreign main proceeding” to mean “a foreign proceeding pending in the country where the debtor has the center of its main interests” and a “foreign nonmain proceeding” to mean “a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment.”<sup>57</sup> While Chapter 15 contains a number of definitions solely applicable to that chapter, and is in fact the only chapter of the U.S. Bankruptcy Code to do so, many of the terms surrounding the “foreign main” and “foreign nonmain” designations are wholly undefined. While “establishment” is defined as “any place of operations where the debtor carries out a nontransitory economic activity,”<sup>58</sup> neither “operations” nor “nontransitory economic activity” are defined in the Code, and no definition exists which clearly delineates what qualifies as a debtor’s “center of main interests” (COMI).<sup>59</sup> Since recognition is the gateway through which virtually any relief may be obtained in the U.S. courts under Chapter 15, the lack of clarity surrounding these terms has driven controversy in the courts.

Moreover, just as recognition of any type is paramount in establishing a right to relief in the U.S. courts, determining recognition of a foreign proceeding as main or nonmain is key in assessing what types of relief a foreign entity may seek within the system. The relief available to a foreign main representative under Chapter 15 includes the automatic stay of all of a

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<sup>53</sup> 11 U.S.C. § 101(23). Note that while Chapter 15 contains definitions solely applicable to that Chapter, the definitions contained in Section 101 of the Bankruptcy Code also apply per 11 U.S.C. § 103(a); see *U.S. v. J.A. Jones Const. Group, LLC*, 333 B.R. 637, 638 n.2 (E.D.N.Y. 2005) (citing 11 U.S.C. § 101(23)–(24) for reference); see also Melnik, *supra* note 30, at 284 n.72 (detailing that eighty-six definitions contained in Section 101 apply to Chapter 15).

<sup>54</sup> 11 U.S.C. § 1517.

<sup>55</sup> See UNCITRAL, *supra* note 5, ¶¶ 20, 28–31.

<sup>56</sup> *In re Ran*, 390 B.R. 257, 292 (Bankr. S. D. Tex. 2008) (“In accordance with *In re Bear Stearns High-Grade Structured Credit*, comity is not an element of recognition; it is rather, a consideration once recognition is granted”).

<sup>57</sup> 11 U.S.C. § 1502(4)–(5) (2006).

<sup>58</sup> 11 U.S.C. § 1502(2).

<sup>59</sup> See Melnik, *supra* note 30, at 275; *Lavie v. Ran*, 384 B.R. 469 (S.D. Tex. 2008). 11 U.S.C. § 1516 does establish that “[i]n the absence of evidence to the contrary, the 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,” but this has proven to be far from clear for courts confronting COMI analysis.

debtor's property within U.S. jurisdictional boundaries<sup>60</sup> and allowance to voluntarily file a Chapter 11 case, while a foreign nonmain representative is limited to filing only an involuntary Chapter 11 case.<sup>61</sup> The practical effect of this distinction stems from the fact that because a proceeding classified as "foreign nonmain" will be barred from any voluntary Chapter 11 petition, creditors could be given greater control in seeking judicial insolvency remedies.<sup>62</sup>

Section 1516(c) aims to shed some light in defining the debtor's "center of main interests." It details that "[i]n the absence of evidence to the contrary, the 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."<sup>63</sup> Courts have held that this is a rebuttable presumption.<sup>64</sup>

## 2. COMI Analysis in U.S. Courts

A few early U.S. court cases confronting the Section 1516(c) presumption applied a straightforward and uninquiring analysis of the debtor's COMI. Consider *In re Artimm*.<sup>65</sup> Though ultimately decided under the old Section 304 standards due to the timing of filing, the court there explored the standards of the new Chapter 15 procedure.<sup>66</sup> It concluded that because the Italian debtor corporation Artimm had a registered office in Rome, it would assume that the company's center of main interests was in Rome.<sup>67</sup> Another early Chapter 15 case, *In re Tri-Continental Exchange Ltd.*, also applied a simplified COMI analysis.<sup>68</sup> The court stated that the debtor's main office or place of incorporation could be accepted as a proxy for COMI generally, but highlighted that different

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<sup>60</sup> See *In re Artimm*, S.r.L., 335 B.R. 149, 159 (Bankr. C. D. Cal. 2005) ("The consequences of an order recognizing a foreign main proceeding are substantial. Most dramatically, the U.S. automatic stay, in all its details, applies immediately with respect to the debtor and property of the debtor that is located within the territorial jurisdiction of the United States. See § 1520(a)(1). This is a major change from the law under § 304, which required a court order for the imposition of a stay on domestic creditor collection action.")

<sup>61</sup> Elkin, *supra* note 50, at 960; see also Gropper, *supra* note 31, at 704–07, 724–25 (detailing the list of forms of relief available to main and nonmain proceeding parties).

<sup>62</sup> See 11 U.S.C. §§ 301, 303 (a voluntary bankruptcy petition is filed by the debtor, while an involuntary petition is filed by creditors that meet certain requirements).

<sup>63</sup> See generally *In re Artimm*, 335 B.R. at 159; *In re Tri-Continental Exchange, Ltd.*, 349 B.R. 627, 635 (Bankr. E.D. Cal. 2006) (examining main offices as potential COMI locations).

<sup>64</sup> See *In re SPhinX, Ltd.*, 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006), *aff'd* 371 B.R. 10 (S.D.N.Y. 2007) ("Pursuant to the introductory clause to [Section] 1516(c), however, that presumption may be rebutted.")

<sup>65</sup> 335 B.R. at 149–66.

<sup>66</sup> *Id.* at 159.

<sup>67</sup> *Id.*

<sup>68</sup> *In re Tri-Continental Exch., Ltd.*, 349 B.R. at 631.

situations could present various levels of COMI acceptance, as described in the chart below:<sup>69</sup>

<u>Location of Foreign Proceeding</u>	<u>COMI Analysis</u>
Country of debtor's registered office (or place of incorporation)	Country is presumed as the proxy for COMI absent evidence that the debtor's COMI is elsewhere, in which case the foreign representative bears the burden of proof on COMI
Country other than the country of debtor's registered office (or place of incorporation)	Foreign representative bears the burden of proof on COMI

In that case, the debtors were a number of insurance companies operating under the laws of the Caribbean islands making up St. Vincent and the Grenadines (SVG). The Eastern Caribbean Supreme Court appointed liquidators during the companies' winding-up proceedings.<sup>70</sup> A creditor argued that the case should not be deemed a foreign main proceeding since most of the alleged defrauded creditors were located in the United States.<sup>71</sup> However, the court held that because the debtors "conducted regular business operations at their registered offices" in SVG, the nation would qualify as the companies' COMI "even though the enterprise perpetrated an insurance scam primarily in the United States and Canada."<sup>72</sup>

During the same month of the *In re Tri-Continental Exchange Ltd.* decision, the court of the Southern District of New York issued the first of three decisions directly addressing the standard for rebutting the presumption of COMI under Section 1516(c).

First, *In re SPhinX* involved a debtor that had incorporated and registered in the Cayman Islands, kept some business records in the country, and received some mail there.<sup>73</sup> In accordance with local regulations, the company was not authorized to and did not conduct any business in the Cayman Islands, had no employees there, and maintained no assets in the country.<sup>74</sup> The court ruled that these factors, along with the facts that the debtor had \$500 million in assets in the United States and all of the debtor's corporate processes were handled in the United States, were enough to rebut the presumption of the COMI being located in the

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<sup>69</sup> *Id.* at 635.

<sup>70</sup> *Id.* at 629–30.

<sup>71</sup> *Id.* at 633.

<sup>72</sup> *Id.* at 629.

<sup>73</sup> 351 B.R. at 119.

<sup>74</sup> *Id.* at 107–08.

Caymans.<sup>75</sup> The court instead recognized the proceeding as a “foreign nonmain” proceeding where there was no objection to the recognition and “no negative consequences would appear to result from recognizing the Cayman Islands proceedings as nonmain proceedings.”<sup>76</sup> Writing more generally, the *SPhinX* court noted that while the Bankruptcy Code did not state the type of evidence required to rebut the COMI presumption, various factors could be relevant to the COMI determination, including:

[T]he location of the debtor’s headquarters; the location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company); the location of the debtor’s primary assets; the location of the majority of the debtor’s creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes.<sup>77</sup>

Under this reasoning, the debtors’ proceeding in *In re Tri-Continental Exchange Ltd.* would likely also fail to be recognized as a foreign main proceeding since the “majority of the creditors who would be affected by the case” did reside in the United States rather than in St. Vincent and the Grenadines.<sup>78</sup>

Two other cases in the Southern District of New York, *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd. (Bear Stearns)*<sup>79</sup> and *In re Basis Yield Alpha Fund (Master) (Basis Yield)*,<sup>80</sup> also examined the recognition status of entities incorporated in the Cayman Islands and also concluded that the COMI was not the Caymans and thus the proceedings could not be recognized as foreign main proceedings. However, unlike the court in *In re SPhinX*, both the *Bear Stearns* and *Basis Yield* courts refused to recognize the foreign proceeding as a foreign nonmain proceeding.

The debtor party in *Bear Stearns*, two investment funds registered as limited liability companies in the Cayman Islands but administered and managed by a U.S. company and with assets in the United States, looked substantially similar to the debtor in *SPhinX*.<sup>81</sup> The *Bear Stearns* court, however, squarely rejected the dicta of the *SPhinX* decision which indicated that the lack of an objection by a party in interest was enough to green-light the approval of a foreign main or nonmain proceeding.<sup>82</sup> The court asserted

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 122.

<sup>77</sup> *Id.* at 117.

<sup>78</sup> See also *In re SPhinX, Ltd.*, 371 B.R. 10 (S.D.N.Y. 2007) (upholding the 2006 *SPhinX* decision on appeal).

<sup>79</sup> 374 B.R. 122 (Bankr. S.D.N.Y. 2007).

<sup>80</sup> 381 B.R. 37 (Bankr. S.D.N.Y. 2008).

<sup>81</sup> *In re Bear Stearns*, 374 B.R. at 124.

<sup>82</sup> *Id.* at 126; see also Daniel M. Glosband et al., *SPhinX Chapter 15 Opinion Misses the Mark*, 26-10 AM. BANKR. INST. J. (2007), available at [www.abiworld.org](http://www.abiworld.org).

that “recognition under section 1517 is not to be rubber stamped by the courts. This Court must make an independent determination as to whether the foreign proceeding meets the definitional requirements of sections 1502 and 1517 of the Bankruptcy Code.”<sup>83</sup> The court first reached its decision that the company was not entitled to foreign main proceeding recognition. It looked to both the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency<sup>84</sup> and a recent landmark COMI decision from the European Court of Justice, known as the *Eurofood* case<sup>85</sup> to determine that the COMI presumption could be easily rebutted in the case of a “letterbox” company.

Further, the court found that the proceeding could not be recognized as a foreign nonmain proceeding because there was no “establishment” as required under 11 U.S.C.A. § 1517 and defined under § 1502.<sup>86</sup> According to the court, in order to meet the requirements of § 1517, “there must be an ‘establishment’ in the Cayman Islands for the conduct of *nontransitory* economic activity, i.e., a local place of business.”<sup>87</sup> In this case, the funds in question were exempted entities that were prohibited from and did not engage in business in the Caymans “except in furtherance of their business otherwise carried on *outside* of the Cayman Islands”<sup>88</sup> as required by Cayman Islands law,<sup>89</sup> and the entities could not meet the establishment requirement of § 1517. Interestingly, the decision was upheld on appeal by the same judge who also upheld the *SPhinX* decision a little more than a year before.<sup>90</sup> In addressing the reasoning within these seemingly

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<sup>83</sup> *In re Bear Stearns*, 374 B.R. at 126. Note that the Judge in this case, J. Burton R. Lifland, participated in the drafting of the UNCITRAL Model Law and continued to participate in UNCITRAL Insolvency matters after the development of the law. Multinational Judicial Colloquium, UNCITRAL-INSOL International, Mar. 22–23, 1995, available at <http://www.uncitral.org/pdf/english/news/FirstJC.pdf>; Multinational Judicial Colloquium, UNCITRAL-INSOL International, Oct. 13–14, 1999, available at <http://www.uncitral.org/pdf/english/news/ThirdJC.pdf>.

<sup>84</sup> *In re Bear Stearns*, 374 B.R. at 129; G.A. Res. 52/158, U.N. Doc. A/RES/52/158 (Jan. 30, 1998); UNCITRAL, *supra* note 5; see also H.R. REP. No. 109-31(I), reprinted in 2005 U.S.C.C.A.N. 88, 169 n. 101.

<sup>85</sup> See Case C-341/04 *Eurofood IFSC Ltd.* 2006 E.C.R. I-03813, at ¶ 35, available at <http://curia.europa.eu/en/content/juris/index.htm>. As noted by the European Court of Justice, the COMI presumption may be overcome “particular[ly] in the case of a ‘letterbox’ company not carrying out any business in the territory of the Member State in which its registered office is situated.” See also *In re SPhinX, Ltd.*, 371 B.R. 10 (citing to *Eurofood* and the “letterbox” exception). See generally UNCITRAL, *supra* note 5, ¶ 122 (explaining that the presumption does “not prevent, in accordance with applicable procedural law, calling for or assessing other evidence if the conclusion suggested by the presumption is called into question by the court or an interested party”).

<sup>86</sup> 11 U.S.C. § 1502(2), (5) (2006).

<sup>87</sup> *In re Bear Stearns*, 374 B.R. at 131.

<sup>88</sup> *Id.*

<sup>89</sup> Companies Law (2004 Revision) of the Cayman Islands § 193.

<sup>90</sup> See *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 389

inconsistent opinions, Judge Sweet stated that “any language in [the *SPhinX* opinion on appeal] bearing on the bankruptcy court’s nonmain determination must be viewed as dicta” and “it must also be noted that there is no presumption applicable to the recognition determination with respect to a nonmain proceeding,” suggesting a broader basis of flexibility in making a nonmain determination.<sup>91</sup>

Less than six months after the initial ruling in *Bear Stearns*, the *Basis Yield* court arrived at a similar conclusion to the *Bear Stearns* court.<sup>92</sup> In that case, joint provisional liquidators (JPLs) of a foreign debtor fund registered in the Cayman Islands filed a petition for recognition of a foreign main proceeding in the Caymans.<sup>93</sup> There were no objections to the recognition by any party in interest, and the JPLs argued they were entitled to the presumption of the COMI in the Cayman Islands under Section 1516.<sup>94</sup> The court rejected this argument, however, holding that while the COMI presumption existed to ensure speed, convenience, and cost-savings for the parties, it did not limit the ability of the court to examine the presumed COMI more closely if it deems “the issues to be sufficiently material to warrant further inquiry” and possibly rebut the presumption.<sup>95</sup> Like in *Bear Stearns*, the *Basis Yield* court determined that the proceeding could not properly be recognized either as a foreign main or nonmain proceeding under Chapter 15.

### 3. COMI Analysis in Foreign Courts: The Eurofood Decision

While the development of COMI analysis in the context of insolvency law is still relatively young both in the United States and abroad, it is not all that surprising that U.S. courts have found themselves struggling with the same difficulties facing other UNCITRAL Model Law nations in determining which COMI analysis best meets the needs and interests of creditors, debtors, and the standard of comity among States. Nevertheless, foreign models interpreting COMI have been and will likely continue to be useful and influential sources for U.S. judges examining the issue.

First, it is important to note that examination of certain foreign models and caselaw in the COMI context is not simply a useful tool based on the similarities of the Model Law implementation, but in fact urged by the Model Law and Chapter 15 itself,<sup>96</sup> and a number of decisions have looked

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B.R. 325, 327 (S.D.N.Y. 2008).

<sup>91</sup> *Id.* at 334.

<sup>92</sup> *See In re Basis Yield Alpha Fund (Master)*, 381 B.R. 37 (Bankr. S.D.N.Y. 2008).

<sup>93</sup> *Id.*

<sup>94</sup> *In re Basis Yield Alpha Fund*, 381 B.R. at 43; *see* 11 U.S.C. § 1516 (stating that “in the absence of evidence to the contrary, the 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”).

<sup>95</sup> *Id.* at 52.

<sup>96</sup> 11 U.S.C. § 1508 (“In interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the

to the UNCITRAL Guide to the Model Law and foreign case decisions when assessing U.S. petitions.<sup>97</sup>

One of the most substantive and influential non-U.S. decisions examining COMI was *Eurofood*, ultimately adjudicated by the European Court of Justice (EJC) in 2006.<sup>98</sup> In that case, the company at issue, Eurofood, was a wholly owned subsidiary of Parmalat, a company incorporated in Italy and operating through subsidiary companies in more than two dozen countries.<sup>99</sup> Eurofood's registered office was in Dublin, Ireland, and its principal objective was providing financing for other subsidiaries of Parmalat.<sup>100</sup> Following the collapse of the Parmalat Group into a financial crisis in late 2003, both Ireland and Italy issued rulings that held their own States as Eurofood's COMI and accordingly determined their own States were the nation of the main insolvency proceeding.<sup>101</sup> The jurisdictional dispute was referred to the EJC, which ruled in favor of the Irish courts. According to its ruling, when a debtor subsidiary entity goes beyond merely keeping a "letterbox" or post-office address in a nation and instead actually carries out its business where its registered office is located, the fact that the parent company can control the subsidiary from another state is not enough to rebut the presumption of COMI.<sup>102</sup> Instead, rebuttal can only take place "if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which location at that registered office is deemed to reflect."<sup>103</sup> Moreover, this focus on third parties—namely, creditors—is important to "ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings."<sup>104</sup>

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application of similar statutes adopted by foreign jurisdictions.").

<sup>97</sup> See, e.g., *In re Ran*, 390 B.R. 257 (Bankr. S. D. Tex. 2008); *SPhinX, Ltd.*, 371 B.R. 10; *Bear Stearns*, 374 B.R. at 129.

<sup>98</sup> Case C-341/04 Eurofood IFSC Ltd., 2006 E.C.R. I-03813, available at <http://curia.europa.eu/en/content/juris/index.htm>; see also Samuel J. Bufford, *Center of Main Interests, International Insolvency Case Venue, and Equality of Arms: The Eurofood Decision of the European Court of Justice*, 27 NW. J. INT'L L. & BUS. 351 (2007) (discussion and in-depth analysis of the *Eurofood* case).

<sup>99</sup> *Id.*

<sup>100</sup> Bufford, *supra* note 98, at 364–65. Note that the office was located at the Custom House Dock in Dublin, a center dedicated to businesses that operate in internationally traded financial services to non-residents of Ireland and provide a number of tax haven benefits to those businesses. Samuel J. Bufford, *International Insolvency Case Venue in the European Union: The Parmalat and Daisytek Controversies*, 12 COLUM. J. EUR. L. 429, 440 (2006).

<sup>101</sup> Case C-341/04 Eurofood IFSC Ltd., 2006 E.C.R. I-03813, available at <http://curia.europa.eu/en/content/juris/index.htm>.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at I-3868.

<sup>104</sup> *Id.*

#### 4. Analysis

The *Eurofood* emphasis on predictability and special attention to creditor interests is something that should be kept top-of-mind by U.S. courts examining COMI analysis issues. While the COMI test on its face seems to focus solely on the debtor, the *SPhinX* court's list of both debtor and creditor-based factors when determining COMI is likely more just,<sup>105</sup> especially when confronted with debtor entities aiming to avoid U.S. tax and insolvency law by incorporating and registering in "tax-haven" countries. While the goals of Chapter 15 dictate that the aims are to "protects the interests of all creditors, and other interested entities, including the debtor" and to ensure the "protection and maximization of the value of the debtor's assets,"<sup>106</sup> shifting the balance of factors in favor of creditors may meet another prime goal of Chapter 15: to create "greater legal certainty for trade and investment."<sup>107</sup> Moreover, giving more weight to creditor predictability could serve to discourage forum shopping by would-be debtors and fall squarely in line with the interests indicated in other chapters of the Bankruptcy Code.<sup>108</sup>

An emphasis on creditor-based factors in the COMI analysis, however, should not be limited to where the majority of affected creditors are located, however, but also look to the potential outcome for both creditors and debtors in the longer-term insolvency proceeding. For example, one significant criticism of the *Eurofood* decision was that by focusing solely on the COMI of the subsidiary entity Eurofood rather than the parent company Parmalat, the EJC set in motion a precedent which would ultimately complicate the insolvency proceedings of corporate groups and multinational holding companies since each subsidiary could presumably have a different COMI than its parent.<sup>109</sup> In the long-term, these complications could incur significant damage to all interested creditors by creating delay and expense in proceedings across nations. Taken together, the long-term best interests of the creditors—and debtors for that matter—might have best been served with a single case proceeding of all the Parmalat subsidiaries in one country.

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<sup>105</sup> "[T]he location of the debtor's headquarters; the location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company); the location of the debtor's primary assets; the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes." *SPhinX*, 351 B.R. at 117.

<sup>106</sup> 11 U.S.C. § 1501(a)(3)–(4) (2006).

<sup>107</sup> 11 U.S.C. § 1501(a)(2).

<sup>108</sup> See, e.g., the so-called "best interest of creditors" tests indicated in Chapter 11 (11 U.S.C. § 1129(a)(7)), Chapter 13 (11 U.S.C. § 1324(a)(4)), and Chapter 9 (11 U.S.C. § 943(b)(7)).

<sup>109</sup> Bufford, *supra* note 98, at 381. See generally Aaron M. Kaufman, *The European Union Goes Comi-tose: Hazards of Harmonizing Corporate Insolvency Laws in the Global Economy*, 29 HOUS. J. INT'L L. 625 (2007).

Beyond the COMI analysis itself, the question still remains if cases like *Bear Stearns* and *Basis Yield*, which rejected both foreign main and foreign nonmain recognition, truly serve the interests and goals of Chapter 15 and the aims of the UNCITRAL Model Law. As noted by one commentator, recognition is “effectively . . . an ‘entry visa’ jurisdictional prerequisite to seeking relief from any court within the United States.”<sup>110</sup> If a proceeding is not properly recognized as foreign main or foreign nonmain, does that then mean there is no legal recourse for a petitioner’s relief within the U.S. courts? The court in *In re Bear Stearns* answered this question in the negative, asserting that Section 303(b)(4) of the Bankruptcy Code “specifically provides that an involuntary case may be commenced under chapter 7 or 11 of the Bankruptcy Code by a foreign representative of the estate in a foreign proceeding so that a foreign representative is not left remediless upon nonrecognition.”<sup>111</sup> An earlier decision in the neighboring Eastern District of New York, however, highlighted that “in the absence of recognition under chapter 15” the federal court “has no authority to consider [a] request for a stay” against a foreign debtor.<sup>112</sup> Chapter 15 itself seems to provide that in some cases a petitioner might indeed be left without recourse for relief. While 11 U.S.C.A. § 1509(f) indicates that relief can be sought under other measures in the U.S. courts (including § 303), that right to relief is subject to other provisions of the section, including § 1509(d) which states that “if the court denies recognition under this chapter, the court may issue any appropriate order necessary to prevent the foreign representative from obtaining comity or cooperation from courts in the United States.”<sup>113</sup> Thus, in some cases, an unrecognized petitioner might be effectively “banned” from seeking cooperation or relief through Section 303 or otherwise. While there may be extreme cases in which action under Section 1509(d) is necessary, courts should weigh these actions against the interests of debtors and creditors who may well be entitled to relief in some measure within the U.S. court system.<sup>114</sup>

## B. The Public Policy Exception

### 1. *The Public Policy Exception and the Principle of Comity*

Under the former international insolvency provision of 11 U.S.C. §

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<sup>110</sup> See Melnik, *supra* note 30, at 273–74 (noting there are limited exceptions within § 1509 but that these “exceptions” are not without their own complications).

<sup>111</sup> *Bear Stearns*, 374 B.R. at 132. Section 303(b)(4) reads that “An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title . . . by a foreign representative of the estate in a foreign proceeding concerning such person.” 11 U.S.C. § 303(b)(4).

<sup>112</sup> *United States v. J.A. Jones Constr. Grp., LLC*, 333 B.R. 637, 639 (E.D.N.Y. 2005).

<sup>113</sup> 11 U.S.C. § 1509(d) & (f) (2006).

<sup>114</sup> As of November 2010, only five published cases had addressed § 1509(d) at all, and none of them addressed it in depth.

304, bankruptcy courts were given broad discretion to recognize cases ancillary to foreign insolvency proceedings consistent with, among other things, the just treatment of creditors and the principles of comity.<sup>115</sup> In general and within the bankruptcy context, comity can be viewed as appropriate where foreign “proceedings do not violate the laws or public policy of the United States, and if the foreign court abides by fundamental standards of procedural fairness.”<sup>116</sup> Thus, under the standard of Section 304, the court’s discretion to accord relief included the discretion to reject the right relief based on the principle of comity.

In adopting the UNCITRAL’s more “cooperative” international standards including the mandatory recognition of foreign main proceedings, Chapter 15 also enacted Article 6 of the Model Law verbatim. Section 1506 states: “[n]othing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States.”<sup>117</sup> In its adoption, Congress noted that the provision of Article 6 “has been narrowly interpreted on a consistent basis in courts around the world” and such a narrow interpretation would also be expected in U.S. courts.<sup>118</sup> Moreover, Congress dictated that “the word ‘manifestly’ in international usage restricts the public policy exception to the most fundamental policies of the United States.”<sup>119</sup> This interpretation coincides with the intent of the drafters of the Model Law,<sup>120</sup> and has been noted by some U.S. courts.<sup>121</sup>

## 2. Applying the Public Policy Exception in U.S. Courts

In the few cases to date that have claimed public policy violations and aimed to invoke Section 1506, courts seemed to follow Congressional intent and almost entirely rejected the claims, indeed treating the provision, as it was described by one court, as a “safety valve” to the requirements of Chapter 15 recognition.<sup>122</sup> Since few decisions to date have found that the fundamental policies of the United States were at risk and invoked the public policy exception,<sup>123</sup> case law is still far from comprehensive as to

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<sup>115</sup> 11 U.S.C. § 304(c) (repealed 2005).

<sup>116</sup> *Finanz AG Zurich v. Banco Economico S.A.*, 192 F.3d 240, 246 (2d Cir.1999).

<sup>117</sup> 11 U.S.C. § 1506.

<sup>118</sup> H.R. REP. NO. 109-31(I), *reprinted in* 2005 U.S.C.C.A.N. 88, 172.

<sup>119</sup> *Id.*

<sup>120</sup> UNCITRAL, *supra* note 5, ¶¶ 88–89 (1997) (stating that “article 6 is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State”).

<sup>121</sup> *See, e.g., In re Tri-Cont’l Exch., Ltd.*, 349 B.R. 627, 638 (Bankr. E.D. Cal. 2006) (“Congress has indicated, with its use of the phrase ‘manifestly contrary,’ that this exception is to be narrowly construed, which view is consistent with the explication in the [UNCITRAL Model Law] Guide.”).

<sup>122</sup> *Basis Yield*, 381 B.R. at 45 n. 27.

<sup>123</sup> *In re Toft*, 453 B.R. 186 (Bankr. S.D.N.Y. 2011); *In re Gold & Honey, Ltd.*, 410 B.R.

what circumstances can constitute a risk great enough to overcome considerations of comity and international cooperation in insolvency proceedings. Nevertheless, key decisions are beginning to form a cohesive standard indicating the use of the doctrine in only very narrow circumstances.

Most recently, the district court of the Eastern District of Virginia endeavored to reconcile what it viewed as the most in-depth published decisions examining § 1506 and to develop principles for evaluating claims pursuant to it in *In re Qimonda AG Bankruptcy Litigation (Qimonda)*.<sup>124</sup> The court began by noting that the key decisions in this area agreed that “the fact that application of foreign law leads to a different result than application of U.S. law is, without more, insufficient to support § 1506 protection,” though such a conflict of laws is a necessary prerequisite to any viable § 1506 claim.<sup>125</sup> In addition to this principle, the court held that at least two other principles should guide courts analyzing whether an action within a Chapter 15 proceeding is “manifestly contrary to the public policy of the United States.”<sup>126</sup> First, the court stated that a foreign proceeding should not be given deference where that court’s procedural fairness was in question or could not be resolved by additional legal protections.<sup>127</sup> In addition, the court stated that court action in Chapter 15 cases should be avoided where it might frustrate a U.S. court’s ability to administer the Chapter 15 proceeding and/or would impinge severely a U.S. constitutional or statutory right, particularly if a party continues to enjoy the benefits of the Chapter 15 proceeding.<sup>128</sup> Notably, the *Qimonda* court cited these considerations as just some of the guiding principles that courts could use in making a § 1506 determination.<sup>129</sup>

Aligning with this reasoning, courts have held that none of the following are enough to properly invoke the public policy exception: the potential for U.S. creditors to get less money as a result of a foreign proceeding,<sup>130</sup> the inability to conduct a jury trial in the foreign proceeding,<sup>131</sup> or the enforcement of a non-debtor, third party release and injunction valid under foreign law but which might not be valid under U.S.

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357 (Bankr. E.D.N.Y. 2009).

<sup>124</sup> 433 B.R. 547 (E.D. Va. 2010) (the *Qimonda* court focused its attention on four decisions, *In re Metcalfe & Mansfield Alternative Invs.*, 421 B.R. 685 (Bankr. S.D.N.Y. 2010), *In re Ernst & Young, Inc.*, 383 B.R. 773 (Bankr. D. Colo. 2008), *In re Ephedra Prods. Liab. Litig.*, 349 B.R. 333 (S.D.N.Y. 2006), and *Gold & Honey, Ltd.*, 410 B.R. 357).

<sup>125</sup> *In re Qimonda AG Bankr. Litig.*, 433 B.R. at 568.

<sup>126</sup> 11 U.S.C. § 1506 (2006).

<sup>127</sup> *In re Qimonda AG Bankr. Litig.*, 433 B.R. at 570.

<sup>128</sup> *Id.* at 570.

<sup>129</sup> *Id.*

<sup>130</sup> *Ernst & Young, Inc.* 383 BR 773.

<sup>131</sup> *Ephedra Prods.*, 349 B.R. at 336–37.

bankruptcy law standards.<sup>132</sup>

One significant case which held § 1506 to apply in an action of a Chapter 15 proceeding was *In re Gold & Honey, Ltd.*<sup>133</sup> There, the debtors were Gold & Honey, Ltd. (G&H Ltd.), a corporation formed and organized in Israel, and Gold & Honey LP (G&H LP), a United States' limited partnership whose general partnership included a large equity stake owned by G&H Ltd.<sup>134</sup> In July 2008, an Israeli banking corporation and prepetition lender to G&H LP forced the seizure of both of G&H entities' assets and began an Israeli receivership proceeding.<sup>135</sup> Shortly thereafter, the debtors filed a Chapter 11 petition, invoking the automatic stay of 11 U.S.C. § 362. Despite the bankruptcy court's instruction to discontinue its proceedings in light of the automatic stay, the Israeli court continued to prosecute its receivership proceeding.<sup>136</sup> In January 2009, the lender filed motions to lift the automatic stay and filed for petition of recognition of the Israeli proceeding under Chapter 15.<sup>137</sup>

The court refused to recognize the Israeli proceeding as either foreign main or foreign nonmain because, *inter alia*, the appointment of the Israeli receivers was a violation of the automatic stay and recognition of the foreign proceeding would "have an adverse effect on public policy" under Section 1506.<sup>138</sup> The court asserted that the lenders proceeded with the receivership proceeding in Israel "in spite of and in the face of [the U.S.] Court's Stay Order" and that recognizing the Chapter 15 petition and the receivers "appointed as the result of a knowing a willful violation of the stay" order would "fly in the face of the Bankruptcy Code."<sup>139</sup> Moreover, recognizing the violation as valid by allowing the Israeli receivers to proceed in collection of the debtor's assets would prevent U.S. bankruptcy courts from carrying out important fundamental policies and purposes of the automatic stay.<sup>140</sup> Specifically, "preventing one creditor from obtaining an advantage over other creditors, and providing for the efficient and orderly distribution of a debtor's assets to all creditors in accordance with their relative priorities."<sup>141</sup>

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<sup>132</sup> *In re Metcalfe & Mansfield Alternative Inves.*, 421 B.R. 685 (Bankr. S.D.N.Y. 2010).

<sup>133</sup> *Gold & Honey*, 410 B.R. 357 (this case was one examined by the *Qimonda* court in developing its principles); *see also Toft*, 453 B.R. 186 (recently holding violation of Section 1506 where a German Mail Interception Order would "directly contravene U.S. laws and public policies" including electronic privacy rights, the powers of estate representatives, and the rights of parties affected by court orders to notice).

<sup>134</sup> *Gold & Honey*, 410 B.R. at 362.

<sup>135</sup> *Id.* at 362–63.

<sup>136</sup> *Id.* at 363.

<sup>137</sup> *Id.* at 365.

<sup>138</sup> *Id.* at 368.

<sup>139</sup> *Id.*

<sup>140</sup> *Gold & Honey*, 410 B.R. at 372.

<sup>141</sup> *Id.*

### 3. Analysis

While it appears from the decisions addressing § 1506 thus far that courts have very narrowly construed the provision, there is potential for the public policy exception to be used in some cases that would go against the § 1501 goals of international cooperation, comity, and fair and efficient administration of cross-border insolvencies. In order to maintain the narrowness of the use of the public policy exception while still ensuring the spirit of international cooperation and fairness to debtors and creditors, courts can keep a few things in mind. First, the principles detailed in the recent *Qimonda* decision provide a good starting point for evaluating potential § 1506 claims, but courts should also take care to examine any U.S. constitutional or statutory rights within the context of the Bankruptcy Code and against the broader, global understanding of fair and just treatment in insolvency proceedings. This narrow examination has, in the past, led courts to discard a challenge of potential removal of a jury right, since the right to a jury in the bankruptcy context is quite rare and many non-jury foreign proceedings can still result in a “fair and impartial proceeding.”<sup>142</sup>

Unlike the COMI issue where creditor rights should arguably play a larger role in a COMI analysis and recognition determination, creditor and debtor rights are and should continue to be secondary or even tertiary considerations in the public policy exception.<sup>143</sup> If recognition could significantly harm the fundamental interests of the United States, § 1506 will be properly invoked and recognition denied, even if recognition could serve to significantly benefit U.S. creditor interests. One commentator has noted that alternative measures might be taken by the court to ensure fairness and opportunity to potentially gain relief without invoking the public policy exception, namely, challenging the debtor’s COMI and citing § 1521(b) to ensure that “the court is satisfied that the interests of creditors in the United States are sufficiently protected.”<sup>144</sup> While these measures seem useful, they can only be properly invoked if due care is given to U.S. creditor interests, as suggested above, particularly with regard to the COMI analysis. Further, courts facing significant violations of comity and fundamental policies breached upon the United States by other nations, as appeared to be the case in *In re Gold & Honey*, should not shy away from utilizing the § 1506 public policy exception, lest they encourage greater forum shopping and continued blatant violations of the comity principle by foreign nations.

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<sup>142</sup> *Ephedra Prods.*, 349 B.R. at 336–37.

<sup>143</sup> See *Ernst & Young*, 383 BR 773.

<sup>144</sup> *Mund*, *supra* note 21, at 354; 11 U.S.C. § 1521(b) (2006).

### III. CONCLUSIONS

As discussed in this Comment, case law development pursuant to Chapter 15 matters should continue the tradition, already at work in some U.S. courts, to examine foreign cases and models as well as the UNCITRAL Guide to the Model Law for instructive guidance in decision-making, especially surrounding the COMI analysis. In addition, a shifting of the balance of factors in the COMI analysis towards broad creditor interests could likely better meet the Chapter 15 goal of ensuring “greater legal certainty for trade and investment”<sup>145</sup> while protecting U.S. creditor rights and interests. Finally, courts will likely continue to narrowly construe the public policy exception of § 1506, aligning with the principle of comity and meeting the UNCITRAL objective of greater international cooperation in insolvency proceedings.

With regard to the COMI analysis, the public policy exception, and other emerging and potentially developing legal issues surrounding Chapter 15 matters, there is a broader step U.S. courts can take to meet all of the goals of § 1501 and the objectives of the UNCITRAL Model Law overall while providing caselaw guidance for other nations examining insolvency issues: publishing opinions. Though about 300 cases have been commenced under Chapter 15 since its enactment, and likely more petitions rejected,<sup>146</sup> only about forty-five opinions have been published examining the petitions, proceedings, or related adversary proceedings.<sup>147</sup> A practice of publishing opinions surrounding Chapter 15 issues more frequently will not only provide greater guidance for U.S. courts investigating these issues but also continue the longstanding tradition of U.S. leadership and innovation in the field of international insolvency law by providing concrete models for foreign courts to examine.<sup>148</sup>

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<sup>145</sup> 11 U.S.C. § 1501(a)(2).

<sup>146</sup> See sources cited, *supra* note 6.

<sup>147</sup> Author Selina A. Melnik documented that in mid-February 2009, only 16 published opinions existed. Melnik, *supra* note 30, at 267–68. A search of Westlaw on November 18, 2010, returned sixteen more decisions, some concerning the same case or issue (*In re Condor Ins. Ltd.*, 601 F.3d 319 (5th Cir. 2010); *In re Ran*, 607 F.3d 1017 (5th Cir. 2010); *In re Loy*, 432 B.R. 551 (E.D. Va. 2010); *In re Qimonda AG Bankr. Litig.*, 433 B.R. 547 (E.D. Va. 2010); *Lavie v. Ran*, 406 B.R. 277 (S.D. Tex. 2009); *In re Bozel S.A.*, 434 B.R. 86 (Bankr. S.D.N.Y. 2010); *In re British Am. Ins. Co. Ltd.*, 425 B.R. 884 (Bankr. S.D. Fla. 2010); *In re Chiang*, 437 B.R. 397 (Bankr. C. D. Cal. 2010); *In re JSC BTA Bank*, 434 B.R. 334 (Bankr. S.D.N.Y. 2010); *In re Japan Airlines Corp.*, 425 B.R. 732 (Bankr. S.D.N.Y. 2010); *In re Metcalfe & Mansfield Alternative Invs.*, 421 B.R. 685 (Bankr. S.D.N.Y. 2010); *In re RHTC Liquidating Co.*, 424 B.R. 714 (Bankr. W.D. Pa. 2010); *In re Atlas Shipping, A/S* 404 B.R. 726 (Bankr. S.D.N.Y. 2009); *In re Gold & Honey, Ltd.*, 410 B.R. 357 (Bankr. E.D.N.Y. 2009); *In re Spansion, Inc.*, 418 B.R. 84 (Bankr. Del. 2009); *In re Steadman* 410 B.R. 397, (Bankr. N.J. 2009)).

<sup>148</sup> Note that in addition to court opinions, further action by Congress may be relevant and useful in legal developments in this area. While for many years after its adoption no readily apparent Congressional action had addressed Chapter 15, the recent Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111-203, 124 Stat. 1376 (2010))

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required that a study and report to Congress be completed examining the mechanisms and extent of “international coordination relating to bankruptcy process for financial companies.” Though narrow in scope, this report could also help contribute to the development of Chapter 15 jurisprudence or lead to further Congressional examination of the Chapter more broadly.