BEST LET SLEEPING PRESUMPTIONS LIE: INTERPRETATION OF "CENTER OF MAIN INTEREST" UNDER CHAPTER 15 OF THE BANKRUPTCY CODE AND AN APPEAL FOR ADDITIONAL JUDICIAL COMPLACENCY

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After the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) changes to the Bankruptcy Code, debtors undergoing foreign bankruptcy proceedings must show that their bankruptcy is taking place in their "center of main interest" (COMI) in order to receive the fullest cooperation from courts in the United States. This provision was intended to prevent forum shopping and abuse of bankruptcy havens. The Code does not, however, define COMI and so U.S. courts have been forced to develop a common law definition, drawing from international and European antecedents that also use the term.

This Note briefly summarizes the statutory provisions enacted as part of BAPCPA and provides background to the challenges of interpreting COMI. Then it discusses the few U.S. cases that have squarely addressed the COMI issue. Finding that courts have adopted a broad view of their own powers to investigate and challenge debtors on the location of their COMI, this Note concludes by arguing that courts should generally not use their powers and instead should defer to a bankruptcy venue that both debtor and creditors can agree on.

I. INTRODUCTION

In 2003, Daisytek, a relatively obscure distributor of professional tape products and computer parts based in Allen, Texas, found itself in financial trouble.[1] Somewhat surprisingly, this Texas tape distributor's economic straits led to litigation in Leeds, England; Pontoise and Ver-

* J.D. 2010, University of Illinois College of Law. I thank Professor Charles Tabb for providing me with the idea for this Note and providing advice along the way. I would also like to thank my Notes Editors, Emily Kerkhof and James Desir. Teresa Cannistraro Christenson made all the days I spent writing this a delight, and continues to do so. This article also owes something to Gary Christenson. As my father and first writing mentor, he managed to be both a proximate and ultimate cause of this piece.

1. Daisytek Int'l Corp., Quarterly Report (Form 10-Q), at 7 (Feb. 14, 2003) [hereinafter Daisytek Quarterly Report]; Samuel L. Bufford, *International Insolvency Case Venue in the European Union: The Parmalat and Daisytek Controversies*, 12 COLUM. J. EUR. L. 429, 453 (2006).

sailles, France; and Düsseldorf, Germany, in addition to Dallas, Texas.[2] The case led to jurisdictional wrangling between courts in England, on the one hand, and courts in France and Germany on the other.[3] It also caused comment and debate among scholars in both the United States and Europe.[4] Of course, Daisytek owed creditors over $100 million at the time and those creditors were likely to vigorously seek repayment, but the major complications of the case occurred because Daisytek was a global company with subsidiaries spread across North America and Europe.[5]

In international insolvency cases, like that of Daisytek, there will be disputes over jurisdiction. Those disputes have real import because different jurisdictions may have significant procedural and substantive differences in their laws.[6] For example, Daisytek had a French subsidiary that filed its bankruptcy case in England.[7] If the case had been filed in France instead, the subsidiary would have been required to meet with representatives of its workers and include them in the proceedings.[8] Certainly the 145 French employees of Daisytek would have preferred a filing in France, where they might have had a stronger voice in the eventual fate of their employer.[9] American cases also show the strong effects of bankruptcy jurisdiction; in one example a creditor claimed a debt of $312 million from a hedge fund and was likely to get it if U.S. law was used in a bankruptcy case but would probably have to share priority with the hedge fund's investors if Cayman Island law was chosen.[10]

A parochial response to these difficult issues of jurisdiction might be for courts in each nation to take whatever resources of the debtor were located within the country and distribute those to local creditors. Schemes for handling international bankruptcy cases that generally proceed like this are termed territorial.[11] A more pejorative term might be

2. Bufford, *supra* note 1, at 454, 459–60, 463.

3. *Id.* at 453.

4. *See, e.g.*, *id.* at 453–64; Lynn M. LoPucki, *Universalism Unravels*, 79 AM. BANKR. L.J. 143, 150–52 (2005); Gabriel Moss, *Group Insolvency—Choice of Forum and Law: The European Experience Under the Influence of English Pragmatism*, 32 BROOK. J. INT'L L. 1005, 1010–12 (2007); John A. E. Pottow, *The Myth (and Realities) of Forum Shopping in Transnational Insolvency*, 32 BROOK. J. INT'L L. 785, 794 n.42 (2007).

5. Daisytek Quarterly Report, *supra* note 1, at 2; Bufford, *supra* note 1, at 453–54.

6. *See* Patrick Wautelet, *Some Considerations on the Center of the Main Interests as Jurisdictional Test Under the European Insolvency Regulation*, *in* CROSS-BORDER INSOLVENCY AND CONFLICT OF JURISDICTIONS: A US-EU EXPERIENCE 73, 73–74 (Georges Affaki ed., 2007) [hereinafter CROSS-BORDER INSOLVENCY].

7. Moss, *supra* note 4, at 1010–12.

8. Bufford, *supra* note 1, at 462 & n.267.

9. *Id.* at 455.

10. *In re* SPhinX, Ltd., 351 B.R. 103, 108–09 (Bankr. S.D.N.Y. 2006).

11. John A. E. Pottow, *Greed and Pride in International Bankruptcy: The Problems of and Proposed Solutions to "Local Interests,"* 104 MICH. L. REV. 1899, 1907–08 (2006); Liza Perkins, Note, *A Defense of Pure Universalism in Cross-Border Corporate Insolvencies*, 32 N.Y.U. J. INT'L L. & POL. 787, 789–90 (2000).

"grab rule."[12] The opposite method is universalism, having a single court take responsibility for all the assets of the debtor worldwide and distribute them to creditors.[13] Whatever the merits of territorialism, the United States decided in 2005 to go the other way, embracing universalism and the notion that there is one proper forum for every company's bankruptcy case.[14] The trick now will be to understand how to locate that correct forum.

The U.S. approach to international bankruptcy is contained in chapter 15 of the Bankruptcy Code.[15] This chapter introduces new concepts to U.S. bankruptcy law that are important for understanding how the courts now determine bankruptcy jurisdiction such as main proceeding, nonmain proceeding, establishment, and center of main interest (COMI).[16] COMI in particular is an essential concept. International bankruptcy proceedings are supposed to take place in the debtor's home country, and COMI is the concept used to establish which country is a debtor's home.[17] Yet despite being a concept of great importance, COMI is never defined in chapter 15.[18] The comments of the 598-page report of the House Judiciary Committee on the bill that enacted chapter 15 mention the term only once in passing.[19] Courts have thus been left to invent meaning for themselves with reference to similar international laws, scholarship on the subject, and their own intuition.[20]

This Note examines the sources of chapter 15 and the first few U.S. court opinions on the topic in order to understand what COMI means. Examination of the U.S. cases shows that the courts are adopting an expansive view of their own power to investigate COMI and the facts that can be considered as part of that inquiry. Following that, a consideration of the policy concerns surrounding bankruptcy venue, primarily predictability and having procedurally and substantively adequate law, suggests that the bankruptcy courts should refrain from exercising their powers and independently challenging the location of COMI when the debtor and creditors agree on its location.

Part II of this Note explains the origins of chapter 15 in international and European law. It then provides a short overview of procedure un-

12. Andrew T. Guzman, *International Bankruptcy: In Defense of Universalism*, 98 MICH. L. REV. 2177, 2179 (2000).

13. Pottow, *supra* note 11, at 1908.

14. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, §§ 801–802, 119 Stat. 23, 134–47 (codified as amended at 11 U.S.C. §§ 1501–1532 and other scattered sections of 11 U.S.C. and 28 U.S.C.); LoPucki, *supra* note 4, at 143.

15. Alesia Ranney-Marinelli, *Overview of Chapter 15 Ancillary and Other Cross-Border Cases*, 82 AM. BANKR. L.J. 269, 269–70 (2008).

16. Bufford, *supra* note 1, at 433.

17. *In re* SPhinX, Ltd., 351 B.R. 103, 117–18 (Bankr. S.D.N.Y. 2006); LoPucki, *supra* note 4, at 143.

18. Ranney-Marinelli, *supra* note 15, at 285.

19. H.R. REP. NO. 109-31, pt. 1 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88.

20. *E.g.*, *In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 374 B.R. 122, 127–29 (Bankr. S.D.N.Y. 2007).

der chapter 15 before discussing the potential danger of forum shopping as it applies to domestic and international bankruptcy cases. Part III provides examples of courts in Europe and the United States attempting to define and operationalize COMI and synthesizes current U.S. case law on the subject. Part IV examines the two priorities that any rule about COMI should try to fulfill and then suggests that current procedure is not serving these priorities as well as it might. The proposed solution is that the courts should be more willing to accept apparent agreement among interested parties about the location of COMI.

II. BACKGROUND

This Part first briefly introduces chapter 15 and discusses its international law antecedents. It then discusses the procedure for obtaining recognition under chapter 15, including the definition of recognition and a discussion of why recognition is important. Finally, this Part considers the problems of forum shopping in insolvency law and whether those problems have manifested at the international level.

A. Introduction to Chapter 15

Congress added chapter 15 to the Bankruptcy Code as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).[21] The law repealed § 304 of the Bankruptcy Code,[22] which had been the previous method by which U.S. courts could assist a foreign bankruptcy proceeding.[23] The new statute largely incorporates the Model Law on Cross-Border Insolvency[24] promulgated by the United Nations Commission on International Trade Law (UNCITRAL) into U.S. law.[25]

The Model Law was created in 1997 as a tool to facilitate cooperation between the bankruptcy systems of countries, to allow foreign bankruptcy administrators access to the courts, and to allow recognition of foreign proceedings.[26] It has been adopted by more than fifteen countries including Great Britain, Japan, Mexico, and South Korea.[27] Because chapter 15 is based on the Model Law, the House Committee on the Ju-

21. Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C.). Chapter 15 was created by Title VII of BAPCPA. *Id.* §§ 801–802.

22. *Id.* § 802(d)(3).

23. Ranney-Marinelli, *supra* note 15, at 269.

24. Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law, G.A. Res. 52/158, Annex, U.N. Doc. A/RES/52/158/Annex (Jan. 30, 1998) [hereinafter Model Law].

25. H.R. REP. NO. 109-31, pt. 1, at 105 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 169; Ranney-Marinelli, *supra* note 15, at 269.

26. U.N. Comm'n on Int'l Trade Law [UNCITRAL], *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, ¶ 5, U.N. Doc. A/CN.9/442 (Dec. 19, 1997) [hereinafter UNCITRAL Guide].

27. UNCITRAL, Status, http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (last visited May 26, 2010).

diciary Report on BAPCPA calls the text of the Model Law and its guide to enactment persuasive authority.[28] The Model Law was developed at the same time as an early iteration of the European Union (EU) Regulations on insolvency proceedings,[29] and shares some concepts with them, including that of COMI.[30] U.S. court cases have made use of commentary on both the Model Law and the EU Regulations, as well as court cases under the EU Regulations, when interpreting chapter 15.[31] Indeed, chapter 15 itself instructs courts to consider its "international origin" and need for consistency with foreign jurisdictions when interpreting its provisions.[32]

Chapter 15 adopts the language and meaning of the Model Law almost completely.[33] Each article in the Model Law corresponds to a like numbered code section in chapter 15, with only minor changes to account for the unique legal environment of the United States and differences in terminology.[34] For example, in article 16(3), which deals with a foreign representative seeking recognition of a foreign bankruptcy case, the Model Law uses the phrase "in the absence of proof to the contrary"; § 1516(c) of the Bankruptcy Code changes the word "proof" to "evidence" to reflect the intention of the Model Law that the ultimate burden of proof lay with the party seeking recognition.[35]

Unlike other chapters of the Bankruptcy Code, chapter 15 includes a statement of its purpose.[36] In particular, the chapter is supposed to create "greater legal certainty for trade and investment," which it can do by making sure that creditors know which bankruptcy forum a company is likely to file in and can assess risk and plan accordingly.[37] Other purposes include "fair and efficient administration" of cross-border bank-

28. H.R. REP. NO. 109-31, pt. 1, at 106 n.101, *reprinted in* 2005 U.S.C.C.A.N. 88, 169; Ranney-Marinelli, *supra* note 15, at 273.

29. European Union: Convention on Insolvency Proceedings, Nov. 23, 1995, 35 I.L.M. 1223 (1996), *adopted in relevant part by* Council Regulation 1346/2000, 2000 O.J. (L160) 1 (EC) [hereinafter EU Regs].

30. *See* Samuel L. Bufford, *Global Venue Controls Are Coming: A Reply to Professor LoPucki*, 79 AM. BANKR. L.J. 105, 117–20 (2005). *Compare* UNCITRAL Guide, *supra* note 26, ¶ 31, *with* EU Regs, *supra* note 29, art. 3.

31. *E.g.*, *In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 374 B.R. 122, 128–29 (Bankr. S.D.N.Y. 2007) (using Model Law, *supra* note 24, and decision in Case C-341/04, Eurofood IFSC Ltd., ¶¶ 32, 35 (May 2, 2006), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004J0341:EN:HTML, to interpret COMI); *In re* Tri-Continental Exch. Ltd., 349 B.R. 627, 634 (Bankr. E.D. Cal. 2006).

32. 11 U.S.C. § 1508 (2006).

33. *See* H.R. REP. No. 109-31, pt. 1, at 106, *reprinted in* 2005 U.S.C.C.A.N. 88, 169.

34. *See id.*

35. *Id.* at 112–13. *Compare* Model Law, *supra* note 24, *with* 11 U.S.C. § 1516(c).

36. 11 U.S.C. § 1501; Ranney-Marinelli, *supra* note 15, at 271.

37. 11 U.S.C. § 1501(a)(2); *see* UNCITRAL Guide, *supra* note 26, ¶ 13; Pottow, *supra* note 4, at 788.

ruptcies, "protection and maximization" of the debtor's assets, and rescue of troubled companies.[38]

B. Procedure Under Chapter 15

In order to understand the importance of the meaning of COMI, it is necessary to examine the process that leads up to a recognition decision, as well as the importance and consequences of recognition. This Section first introduces the terminology used in chapter 15, and then gives a brief description of the process of recognition before detailing why recognition as a main proceeding is so important, even though the option of nonmain recognition may also exist.

1. Definitions

The Bankruptcy Code's general definition section, instead of the definition section in chapter 15, contains two of the more basic definitions important to international cases.[39] The Code defines a "foreign proceeding" as a "collective judicial or administrative proceeding in a foreign country" in which a foreign court controls the debtor's assets "for the purpose of reorganization or liquidation."[40] A "foreign representative" is a person or body "authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets."[41] The foreign representative acts for the debtor and is the person who seeks recognition in chapter 15.[42]

Other definitions are included within chapter 15 itself.[43] A "foreign main proceeding" is a foreign proceeding in the country where the debtor has its COMI, whereas a "foreign nonmain proceeding" is a foreign proceeding in a country where the debtor has an establishment.[44] Chapter 15 defines "establishment" as a "place of operations where the debtor carries out a non-transitory economic activity," a slight change from the definition used in the Model Law.[45]

On the other hand, COMI is not defined anywhere in the Bankruptcy Code, the Model Law, or the EU Regulations, and it is only in the last

38. 11 U.S.C. § 1501(a)(3)–(4). The House Committee on the Judiciary report places greater certainty for trade and investment first in its list of purposes, ahead of fairness and protection of debtors. H.R. REP. NO. 109-31, pt. 1, at 105, *reprinted in* 2005 U.S.C.C.A.N. 88, 169.

39. 11 U.S.C. § 101.

40. *Id.* § 101(23).

41. *Id.* § 101(24).

42. *See id.* § 1509.

43. *Id.* § 1502.

44. *Id.* § 1502(4), (5).

45. *Compare id.* § 1502(2), *with* Model Law, *supra* note 24, art. 2, ¶ f. The change in chapter 15 may be important in ways that will be discussed *infra* Part II.B.4, but the House Committee on the Judiciary report does not mention the change except to say that there have been "minor language variations necessary to comport with United States terminology." H.R. REP. NO. 109-31, pt. 1, at 107 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 170.

of these that there is much commentary regarding its meaning.[46] Miguel Virgos and Etienne Schmit state, in a report on the convention that developed what eventually became the EU Regulations, that COMI "must be interpreted as the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties."[47] U.S. courts have cited and used this European definition in interpreting COMI.[48] The courts have also said that the European understanding of COMI is close to the American concept of "principal place of business."[49] The actual language of chapter 15 does provide one hint of the meaning of COMI: § 1516(c) provides that a debtor's registered office is presumed to be the COMI in the absence of evidence to the contrary.[50] The registered office is a Model Law term that corresponds to place of incorporation in U.S. law.[51]

2. Obtaining Recognition

In order to start a chapter 15 case, and begin receiving the aid of U.S. courts, a foreign representative must file for recognition.[52] The documents that a foreign representative must file to obtain recognition of a foreign proceeding are listed in § 1515.[53] After receiving these papers, the bankruptcy court must decide whether to recognize the foreign proceeding based upon three requirements: that the foreign proceeding is either a main or nonmain proceeding, that the foreign representative is a person or a body, and that the petitioner has followed the requirements of § 1515 in the recognition petition.[54] Chapter 15 further states that the foreign proceeding will be recognized as a main proceeding if it is pending in a country that is the debtor's COMI, and that it will be recognized as a nonmain proceeding if it is in a country where the debtor has an es-

46. Samuel L. 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, 357–58 (2007); Ranney-Marinelli, *supra* note 15, at 279.

47. *Report on the Convention on Insolvency Proceedings* ¶ 75, EU Council Doc. 6500/96 DRS 8 (CFC) (May 3, 1996) (*prepared by* Miguel Virgos & Etienne Schmit) [hereinafter Virgos & Schmit]. The Virgos and Schmit report is considered by many courts to express the intent of the EU regulations, but Judge Markell provides a discussion of its somewhat attenuated connection to the eventual regulations in *In re* Betcorp Ltd., 400 B.R. 266, 286–87 (Bankr. D. Nev. 2009). In this case, the enacted regulations contain the same language about COMI that Virgos and Schmit used. EU Regs, *supra* note 29, recital 13.

48. *E.g.*, *In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 374 B.R. 122, 129 (Bankr. S.D.N.Y. 2007).

49. *E.g.*, *In re* Basis Yield Alpha Fund (Master), 381 B.R. 37, 47–48 (Bankr. S.D.N.Y. 2008); *In re* Tri-Continental Exch. Ltd., 349 B.R. 627, 634 (Bankr. E.D. Cal. 2006).

50. 11 U.S.C. § 1516(c).

51. Model Law, *supra* note 24, art. 16; *see also* H.R. REP. NO. 109-31, pt. 1, at 113 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 175.

52. 11 U.S.C. § 1504.

53. *Id.* § 1515(b), (c).

54. *Id.* § 1517(a).

tablishment.[55] A foreign proceeding must be recognized as either a main proceeding or a nonmain one; it otherwise cannot be recognized at all.[56]

As noted above, chapter 15 also includes a potentially important presumption about COMI that might affect recognition. Section 1516(c) says that "[i]n the absence of evidence to the contrary, the debtor's registered office . . . is presumed to be the center of the debtor's main interests."[57] "Registered office" is a Model Law term but should be understood to mean place of incorporation.[58] This presumption is supposed to increase "speed and convenience of proof where there is no serious controversy"[59] over the COMI of a debtor, and it is likely that the presumption is the end of analysis in many simpler cases where the appropriateness of the foreign forum is not questioned.[60]

3. Why Recognition Is Important

Once a foreign proceeding has been recognized, the foreign representative can receive considerable assistance from the bankruptcy court. In particular, the court has the discretion to turn over the administration of the debtor's assets in the United States or the distribution of those assets to the foreign representative or another person chosen by the representative.[61] After recognition, the foreign representative can also bring a full U.S. bankruptcy case instead of relying on the ancillary procedures in chapter 15,[62] participate in an already ongoing bankruptcy case,[63] intervene in any proceedings involving the debtor in state or federal court,[64] or bring suit to avoid acts that reduce the value of the debtor's assets.[65]

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55. *Id.* § 1517(b).

56. *See id.* § 1517. *But see In re* SPhinX, Ltd., 351 B.R. 103, 115, 122 (Bankr. S.D.N.Y. 2006) (separating the concept of recognition from the concept of recognition as a nonmain or main proceeding, a position that commentators and courts seem to almost universally disagree with); Daniel M. Glosband, SPhinX *Chapter 15 Opinion Misses the Mark*, AM. BANKR. INST. J., Dec. 2006–Jan. 2007, at 44, 45, 84 (disagreeing with and criticizing *SPhinX*).

57. 11 U.S.C. § 1516(c).

58. H.R. REP. NO. 109-31, pt. 1, at 113 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 175.

59. *Id.*; Burton Lifland, *Chapter 15 of the United States Bankruptcy Code: An Annotated Section-by-Section Analysis*, *in* CROSS-BORDER INSOLVENCY, *supra* note 6, at 31, 53.

60. Ranney-Marinelli, *supra* note 15, at 286; *see, e.g.*, *In re* Oversight & Control Comm'n of Avánzit, S.A., 385 B.R. 525, 539 (Bankr. S.D.N.Y. 2008) (finding COMI in Spain based on registered office, with only a passing reference to any other reason to find COMI); *see also* Wautelet, *supra* note 6, at 83–84 (estimating that in Europe ninety percent of all cases will have no doubt about COMI location).

61. 11 U.S.C. § 1521(a)(5), (b).

62. *Id.* § 1511.

63. *Id.* § 1512.

64. *Id.* § 1524.

65. *Id.* § 1523. Avoiding powers are statutory abilities to declare invalid transactions that benefit one creditor at the expense of treating all creditors in bankruptcy equitably. *See* CHARLES JORDAN TABB, THE LAW OF BANKRUPTCY § 6.2 (2d ed. 2009). Such actions can only be brought by the foreign representative in a currently pending bankruptcy case, not within the framework of chapter 15 itself. H.R. REP. NO. 109-31, pt. 1, at 116 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 178–79.

Finally, chapter 15 includes a catchall provision allowing additional relief to the foreign representative after recognition.[66]

Congress also intended recognition to be the sole method for U.S. courts to assist foreign insolvency proceedings.[67] The provisions of the chapter serve to close the door to most relief if recognition is not granted.[68] Indeed, if a bankruptcy court does not grant recognition, it is permitted to order all other federal courts to not cooperate with the foreign representative.[69] Therefore, recognition is essential for a foreign representative seeking to resolve the bankruptcy of a debtor who has assets in the United States.

4. Differences Between Main and Nonmain Recognition

A foreign representative must get recognition if she is seeking assistance from the U.S. courts, and it is relatively easy to obtain recognition as a nonmain foreign proceeding by showing an establishment in the foreign country.[70] The U.S. definition of establishment, "any place of operations where the debtor carries out a nontransitory economic activity,"[71] does not include a potentially important segment of the Model Law definition, which defines establishment in full as "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services."[72] That this language was removed should at least give U.S. courts leeway to broadly find establishments and therefore allow nonmain recognition.[73]

Given the ease with which a debtor might obtain nonmain recognition, the definition of COMI might appear to be of little interest. But there are significant benefits to main recognition over nonmain recognition. A primary advantage is that much of the relief that is available to a nonmain foreign proceeding at the court's discretion is automatic in a main case.[74] Main recognition brings the protection of an automatic stay

66. 11 U.S.C. § 1507.

67. H.R. REP. NO. 109-31, pt. 1, at 110, *reprinted in* 2005 U.S.C.C.A.N. 88, 173.

68. Ranney-Marinelli, *supra* note 15, at 281.

69. 11 U.S.C. § 1509(d).

70. *See In re* SPhinX, Ltd., 351 B.R. 103, 122 (Bankr. S.D.N.Y. 2006) (granting nonmain recognition to Cayman Island's proceeding when debtor had no assets in the Cayman Islands); Ranney-Marinelli, *supra* note 15, at 295 (noting the permissive language required to show an establishment and that it may be preferable to have broad nonmain recognition given the serious consequences of being denied recognition).

71. 11 U.S.C. § 1502(2).

72. Model Law, *supra* note 24, art. 2, ¶ f. The requirement of human means and goods or services suggests that a company that maintained a "brass plaque" or "file drawer" office in a country might not qualify as having an establishment under the terms of the Model Law, though it might under the broader language of chapter 15.

73. *See* Krys v. Official Comm. of Unsecured Creditors of Refco Inc. (*In re* SPhinX, Ltd.), 371 B.R. 10, 19 (S.D.N.Y. 2007) (recognizing proceedings as nonmain was a pragmatic decision, no reference to establishment); *cf. In re* Tradex Swiss AG, 384 B.R. 34, 42 (Bankr. D. Mass. 2008) (assuming that it will be rare to not find at least an establishment in the foreign country).

74. *Compare* 11 U.S.C. § 1520, *with id.* § 1521.

on all of the debtor's U.S. assets and all litigation against the debtor; creditors will then have the burden of convincing the court that they deserve to have their suits proceed or their judgments enforced.[75] Any stay in a nonmain case is discretionary and piecemeal; it requires that the court determine if the relief is appropriate and that the assets in question should be administered in the nonmain proceeding.[76] Similar provisions apply to the use of avoiding powers, the power of the debtor or the bankruptcy trustee to sue to invalidate obligations or transfers of wealth from the debtor's estate, which are easily available in main cases and harder to receive in nonmain ones.[77] Foreign representatives of main proceedings are also able to start voluntary domestic bankruptcy cases, whereas nonmain representatives may only start involuntary cases.[78] This is a clear advantage for main foreign proceedings, because in comparison to voluntary bankruptcy, involuntary bankruptcy is disfavored and hard to commence.[79] Recognition of a main proceeding amounts to a statement that the forum chosen in the foreign proceeding is the proper place for the debtor to seek relief and the U.S. courts will assist and defer to the foreign court to a great degree.[80] For example, any domestic bankruptcy case opened after a main recognition cannot affect any assets outside of the United States, meaning that the debtor can gain the assistance of U.S. courts in this country but avoid their intervention in its foreign affairs.[81]

C. Is There a Forum Shopping Problem in International Bankruptcy?

If there are no concerns about forum shopping in international bankruptcy then the interpretation of COMI is a relatively easy matter. The bankruptcy courts should feel free to find COMI in the country of the registered office nearly always, saving time for both creditors, when determining the risks of bankruptcy before becoming creditors, and the court, when trying to administer a complex foreign case. The simplicity of this rule is appealing if no one stands to suffer because of forum shopping. This Section attempts to briefly address the debate over whether there is forum shopping in international bankruptcy and then examines what the dangers of forum shopping are. Because the one thing that is

75. *Id.* §§ 362, 1520(a)(1); Jay Lawrence Westbrook, *Locating the Eye of the Financial Storm*, 32 BROOK. J. INT'L L. 1019, 1027 (2007). The automatic stay has been called "one of the most powerful forms of preliminary relief available in a U.S. court," which suggests why main recognition is so important. *In re* Pro-Fit Int'l, Ltd., 391 B.R. 850, 862 (Bankr. C.D. Cal. 2008).

76. 11 U.S.C. § 1521(a), (c).

77. *Id.* § 1523(b) (using the same language as § 1521(c) to describe the court's discretion in nonmain cases); *see supra* note 65.

78. 11 U.S.C. § 1511(a); Ranney-Marinelli, *supra* note 15, at 308.

79. Lynn M. LoPucki, *Global and Out of Control?*, 79 AM. BANKR. L.J. 79, 87 (2005); *see* TABB, *supra* note 65, § 2.1 (accessing involuntary relief is limited compared to voluntary cases where essentially nothing needs to be shown to start a bankruptcy). The person desiring to start an involuntary bankruptcy against the debtor essentially has to demonstrate that it is not paying its debts, something that is surprisingly not required for a voluntary case. *Id.* § 2.9.

80. *See* Westbrook, *supra* note 75, at 1026–27.

81. 11 U.S.C. § 1528; Westbrook, *supra* note 75, at 1027.

clear about international bankruptcy forum shopping is that the area is not well developed,[82] the starting point is a discussion of work done in regard to domestic bankruptcy forum shopping where the prevalence and harm seem more established.

1. Does Forum Shopping Occur?

Professor Lynn LoPucki has been tracking large corporate bankruptcies in the United States since 1979.[83] His database contains all bankruptcy cases of large public companies since that time, where a large company is one that reports more than $100 million in assets in constant 1980 dollars.[84] He reports that forum shopping occurs in U.S. bankruptcy courts, with first New York and then Delaware bankruptcy courts, in the 1980s and 1990s respectively, coming to dominate bankruptcy filings by large public companies.[85] Such concentration is possible because venue for a U.S. bankruptcy case is easy to establish.[86] One of the connections that allows a debtor to file in a particular district is being domiciled in the district;[87] when the sole bankruptcy judge in Delaware found that domiciles included the place of incorporation, Delaware became a possible bankruptcy venue for every corporation incorporated there.[88] By 1996 thirteen of the fifteen large bankruptcy cases in the United States were filed in Delaware.[89] In LoPucki's view, bankruptcy courts in major cities such as Houston, Dallas, and Chicago then began to compete with Delaware's court by adopting similar rules for procedure and substance,[90] although an alternative viewpoint is that changes in rules were not because of competition for large cases but instead an adoption of Delaware's procedures because they appeared to work well.[91]

As an empirical matter, forum shopping in international bankruptcy is not as well established as is that in the United States.[92] In fact, many examples of corporate forum shopping internationally involve foreign corporations seeking to open bankruptcy proceedings in the United

82. Bufford, *supra* note 30, at 106; *see* Pottow, *supra* note 4, at 798 n.55 (suggesting reference to forum shopping studies in other areas of law).

83. Web BRD: Lynn M. LoPucki's Bankruptcy Research Database, http://lopucki.law.ucla.edu/contents_of_the_webbrd.htm (last visited May 26, 2010).

84. *Id.*

85. *See* LYNN M. LOPUCKI, COURTING FAILURE 25–76 (2005) (describing the rise of bankruptcy filings in first New York and then Delaware and some circumstances that may have led to it).

86. *See* 28 U.S.C. § 1408 (2006); LOPUCKI, *supra* note 85, at 30–31.

87. 28 U.S.C § 1408(1).

88. LOPUCKI, *supra* note 85, at 56–57. Delaware is the state of incorporation for a majority of all large public companies. *Id.* at 53. It is also possible to file bankruptcy anywhere an affiliated company is undergoing bankruptcy, increasing the venue options even more. 28 U.S.C. § 1408(2).

89. LOPUCKI, *supra* note 85, at 50 fig.2.

90. *Id.* at 124–28.

91. Charles J. Tabb, *Courting Controversy*, 54 BUFF. L. REV. 467, 484 (2006).

92. Bufford, *supra* note 30, at 106; Pottow, *supra* note 4, at 797–98.

States.[93] A debtor can open a bankruptcy case in the United States just by having property in the country,[94] and that property might be as little as "marketing materials, advertising materials, equipment on [a] houseboat, and [a] bank account."[95] The maneuvering of Singer N.V. provides a more recent example. In 1999 Singer was headquartered in Hong Kong, owned by a Hong Kong corporation, incorporated in the Netherlands Antilles, and had more than three-fourths of its workforce in the Eastern hemisphere.[96] It was nevertheless allowed to file for bankruptcy in New York after it declared that New York was its new headquarters because it had hired a CEO there.[97] LoPucki also believes that cases like Daisytek and *Eurofood*[98] are some of the first examples of European courts competing for cases and that the reason such competition can occur is because COMI could mean so many things.[99]

There are some fears that the present economic troubles have led and will continue to lead to hedge fund bankruptcies; many of those hedge funds are incorporated overseas and U.S. courts will struggle with whether to recognize foreign proceedings in those cases.[100] But beyond the recent European Union and American cases, to be discussed below,[101] there are few other examples of attempted or alleged forum shopping under the new regime established by the Model Law and the EU Regulations, and adopted into chapter 15.[102] Without any recent examples to look to, the threat of international forum shopping is indistinct even if the costs of forum shopping are clear.

93. *See* LOPUCKI, *supra* note 85, at 185; *see also* Georges Affaki, *A European View on the U.S. Courts' Approach to Cross-Border Insolvency—Lessons from Yukos*, *in* CROSS-BORDER INSOLVENCY, *supra* note 6, at 13, 16–17 (discussing the considerable ability U.S. courts have to exercise jurisdiction over bankruptcies of foreign companies). Affaki believes that chapter 15 was intended to reduce the degree to which U.S. courts would exercise such jurisdiction, but that the discretionary provisions like the public policy exception might mean that little changes. *Id.* at 13, 28–29; *see also infra* note 264 and accompanying text (court denying recognition and implying that proper jurisdiction was in the United States).

94. 11 U.S.C. § 109(a) (2006).

95. *In re* Spanish Cay Co., 161 B.R. 715, 721–22 (Bankr. S.D. Fla. 1993). Interestingly the houseboat was neither owned nor leased by Spanish Cay, though it was claimed to be the principal place of business for the corporation, and the bank account had only $100 in it. *Id.* at 720–21.

96. LOPUCKI, *supra* note 85, at 227.

97. *Id.* at 227–28.

98. *See infra* Part III.A.

99. LoPucki, *supra* note 4, at 150–51.

100. Ranney-Marinelli, *supra* note 15, at 270; *see, e.g.*, *In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 374 B.R. 122, 124 (Bankr. S.D.N.Y. 2007) (discussed *infra* Part III.B.2 as an example of the struggles American courts have had with investment funds incorporated offshore); *see also, e.g.*, *In re* Grand Prix Assocs., No. 09-16545(DHS), 2009 WL 1410519, at *1 (Bankr. D.N.J. May 18, 2009) (bankruptcy proceeding for British Virgin Island companies that invested in private equity limited partnerships).

101. *See infra* Part III.

102. Bufford, *supra* note 30, at 108.

2. The Dangers of Forum Shopping

Domestic experience suggests that U.S. bankruptcy courts want large cases, despite the fact that they must mean more work and administrative hassles for the judges, and the reasons are likely some combination of prestige and providing ample work for the local bankruptcy bar.[103] Problems arise because to get these cases it is necessary to do the things that those who decide where a case will be filed, the management of the insolvent company and its lawyers, want.[104] Popular features of bankruptcy law among the management of companies are things that preserve their control of the company, such as giving the debtor a long time to file a reorganization plan without creditor interference or accepting prepacks, reorganization plans that are drawn up by the company before even entering bankruptcy, quickly and without much question.[105]

Domestic bankruptcy forum shopping is embarrassing because it suggests that a law that ideally, not to mention constitutionally,[106] should be uniform across the country is applied in such a way that corporations could benefit from filing in a small district like Delaware that never had more than two bankruptcy judges.[107] In 1997, the National Bankruptcy Review Commission recommended changing bankruptcy venue law so that the place of incorporation would no longer be a proper location for venue and thus indicated that they recognized the problem of forum shopping.[108] The embarrassment was even clearer when the chief judge of the U.S. District Court for the District of Delaware briefly revoked the automatic reference of the bankruptcy courts, the process by which bankruptcy cases, which are originally filed in the district courts, are sent to be handled by the bankruptcy courts.[109] Even more important than keeping up appearances, research indicates that the bankruptcy reorganizations in the most desirable fora for shopping were more likely to fail than others; Delaware reorganizations between 1991 and 1996 were about six times more likely to end up in bankruptcy court again than cas-

103. LOPUCKI, *supra* note 85, at 19–21. Bankruptcy judges serve fourteen-year terms and it is likely that the opinions of the local bar play a role in their reappointment. Thus it is sensible for bankruptcy judges to be receptive to what this "constituency" wants. *Id.*

104. *See* NAT'L BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS, FINAL REPORT 776–77 (1997), http://govinfo.library.unt.edu/nbrc/report/17bjuris.pdf; LOPUCKI, *supra* note 85, at 39–45.

105. LOPUCKI, *supra* note 85, at 41, 70–74. LoPucki thinks that the Delaware bankruptcy court became favored by large companies in part because in 1992 it approved a prepack in a then astonishing thirty-two days. *Id.* at 72–73.

106. U.S. CONST. art. I, § 8, cl. 4 (giving Congress power to create "uniform Laws on the subject of Bankruptcies throughout the United States").

107. LOPUCKI, *supra* note 85, at 77–78.

108. *See* NAT'L BANKR. REVIEW COMM'N, *supra* note 104, at 719. The Commission said that its recommendation was not directed at bankruptcy courts in either New York or Delaware but in recognition of a general problem. *Id.* at 779.

109. LOPUCKI, *supra* note 85, at 83–87; Tabb, *supra* note 91, at 483–84 ("The withdrawal of the reference . . . is stark evidence of a systemic embarrassment.").

es from all the other bankruptcy courts besides New York.[110] It appeared that the managers of insolvent companies were choosing fora that benefitted them and those choices were hurting the financial future of the companies.

Logically, in the international arena there is more room for damaging forum shopping because debtors can choose the entire law; within the United States debtors can only choose different discretionary applications of the law.[111] Small countries could choose to become bankruptcy havens that would have no compunction against making their law and practice very management friendly because the effects of the law would primarily be felt by creditors from larger countries and not local citizens.[112] Haven countries are also quite likely to not have acceptable procedures for filing bankruptcy.[113] They might not have procedures that allow or are capable of handling a restructuring of the insolvent company and would instead force it into liquidation without proper regard for the jobs lost or communities harmed.[114] Bermuda and the Cayman Islands, to provide concrete examples, allow only local lawyers access to court files, keep the very existence of the files secret, and do not have specialized bankruptcy courts or modern bankruptcy codes.[115] Yet both countries are used for insolvency cases.[116] Many of these bankruptcies are conducted in tandem with U.S. bankruptcy courts: the U.S. courts create the plan, the foreign court adopts it, and other countries grant recognition because the debtor is incorporated on the island haven.[117]

Such a use of bankruptcy havens to provide a legitimate veneer to U.S. court proceedings is certainly a problem for creditors in the rest of the world even if it is not of immediate concern to the United States and, therefore, of less interest in dealing with the domestic interpretation of COMI. In some ways, however, forum shopping options in international cases must be more limited than they are domestically. The international standard for where a bankruptcy case is appropriate is COMI,[118] whereas in the United States the 1997 recommendation for venue reform that would have brought a similar standard to domestic cases was politically

110. LOPUCKI, *supra* note 85, at 100–01. *But see* David A. Skeel, Jr., *European Implications of Bankruptcy Venue Shopping in the U.S.*, 54 BUFF. L. REV. 439, 445–49 (2006) (proposing a model under which the Delaware courts' advantage in speed and cost would lead companies who were in worse financial shape to file there; the higher rate of failure is then a selection effect).

111. LOPUCKI, *supra* note 85, at 183; Bufford, *supra* note 1, at 469.

112. Westbrook, *supra* note 75, at 1031. *Bear Stearns* provides an example of a hedge fund registered in the Cayman Islands that was statutorily forbidden from conducting much business in that country; clearly there would be little reason for citizens of the islands to care about the bankruptcy laws applicable in that case. *In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 374 B.R. 122, 131 (Bankr. S.D.N.Y. 2007).

113. Westbrook, *supra* note 75, at 1032.

114. *Id.* at 1031.

115. LOPUCKI, *supra* note 85, at 193–97.

116. *Id.*

117. *Id.* at 195–96.

118. *See supra* text accompanying notes 26–30.

infeasible.[119] As noted at the beginning of this Section, the actual empirical evidence for the existence and harm of international forum shopping is lacking and it seems sensible to take that into account when making decisions about the necessity of further protections from forum shopping. Forum shopping is a concern, but it may be best now to just monitor the risks instead of taking dramatic action.

Given the potential dangers of forum shopping in international insolvency cases and the substantial benefits that accrue to a debtor who receives main recognition, it seems strange that the meaning of the term COMI was left undefined by chapter 15 and the Model Law. The COMI concept is determinative in granting main recognition, but to understand it the statutes have only provided a registered office presumption that may not be particularly strong when the court or an interested party challenges it. Because of this ambiguity, the development of various interpretations of COMI by the courts is of paramount importance.

III. ANALYSIS

Domestic courts have now had several years to wrestle with the meaning of COMI and the resulting cases can shed light on the current state of interpretation as well as provide potential recommendations for future interpretation of the term. Before examining those cases it will be helpful to look at an important EU case. The EU Regulations have been in existence longer than chapter 15 and European courts were able to advance interpretations of COMI that were influential to the first U.S. courts to decide the matter.

A. Eurofood IFSC Ltd.

Eurofood IFSC Ltd.[120] is of much importance because it provides the first authoritative interpretation of the meaning of COMI under the EU Regulations,[121] and because of this U.S. courts have used the case as persuasive authority when trying to make sense of chapter 15.[122] The case adopts a strong form of the registered office presumption and refuses to consider placing COMI in the location where the corporation was controlled, a decision that has strong implications for corporate groups within the European Union.[123]

Eurofood was a small subsidy of Parmalat, an Italian conglomerate that made dairy products and other foods, that was registered in Ireland

119. NAT'L BANKR. REVIEW COMM'N, *supra* note 104, at 719; Tabb, *supra* note 91, at 468. Similar venue reform was initially a part of BAPCPA, but was removed at the behest of then Senator Joe Biden. Tabb, *supra* note 91, at 468 n.5.

120. Case C-341/04, Eurofood IFSC Ltd. (May 2, 2006), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004J0341:EN:HTML.

121. Bufford, *supra* note 46, at 351–52.

122. *E.g.*, *In re* SPhinX, Ltd., 351 B.R. 103, 118–19 (Bankr. S.D.N.Y. 2006).

123. Bufford, *supra* note 46, at 352; Westbrook, *supra* note 75, at 1028.

and only operated to procure financing for South American subsidiaries of Parmalat.[124] Because Eurofood was essentially a shell used to gain preferable tax treatment, it had a large amount of debt and its only real asset was a guarantee of that debt from Parmalat.[125] When Parmalat appeared likely to collapse in 2003 amid allegations of massive fraud, Eurofood itself became insolvent because Parmalat's guarantee of its debt was worthless.[126] Bank of America, which administered Eurofood and was a large creditor, sought an involuntary winding up of the subsidiary in Dublin on January 27, 2004.[127] At roughly the same time, Parmalat SpA, the main unit of the Parmalat conglomerate that was listed on the Italian stock exchange and owned all of Eurofood, was filing for relief under Italian law for restructuring large industrial concerns.[128] Parmalat SpA filed in Parma on December 24, 2003, and about twenty other units of Parmalat followed suit.[129] The Eurofood subsidiary ostensibly became part of this large Italian restructuring on February 9, 2004, when its own case was filed in Italian court.[130]

There was now a conflict between the Irish and Italian courts, both viewed themselves as the rightful location for an insolvency proceeding because they thought that Eurofood's COMI was located in their respective countries.[131] The administrator appointed by the Italian courts sought to have the Supreme Court of Ireland recognize Italy as the proper place for proceedings, but the Irish court found that it could not answer this question without recourse to the European Court of Justice (E.C.J.).[132] The E.C.J. takes questions on reference from the courts of the EU member countries and its decisions on those questions are binding.[133] The EU Regulations say, in article 3(1), that insolvency proceedings should be opened where the debtor has its COMI,[134] and the E.C.J. had to address what exactly this meant.

The E.C.J. framed the issue as whether, under the EU Regulations, the COMI should be found in the place where "the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties"[135] or in the location of the parent company when that parent company can control the subsidiary because of its stock

124. Bufford, *supra* note 46, at 364.
125. *Id.* at 364–65.
126. *Id.* at 362, 365.
127. Case C-341/04, Eurofood IFSC Ltd., ¶ 19, (May 2, 2006), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004J0341:EN:HTML; Bufford, *supra* note 46, at 364–65.
128. Bufford, *supra* note 46, at 362–64.
129. Case C-341/04, *Eurofood*, ¶ 18; Bufford, *supra* note 46, at 363.
130. Case C-341/04, *Eurofood*, ¶ 21.
131. *Id.* ¶¶ 22–23.
132. *Id.* ¶ 24; Bufford, *supra* note 46, at 376.
133. *See* Bufford, *supra* note 46, at 358–61.
134. EU Regs, *supra* note 29, art. 3(1).
135. *Id.* recital 13; Virgos & Schmit, *supra* note 47, ¶ 75. Recitals are usually treated as explanatory comments, and *Eurofood* gave unusually large weight to this one. Bufford, *supra* note 46, at 383.

ownership and ability to appoint directors.[136] The court noted that article 3(1) of the EU Regulations established a presumption that a company's COMI is in the place of its registered office.[137] The E.C.J. then said that evidence that is objective and ascertainable to third parties, showing that the situation of the company is different than the registered office presumption would suggest, is needed to rebut that presumption.[138] Evidence that the company is nothing more than a letterbox in the country of registration would be enough, but if the company is carrying on any business in that country then the mere fact that it might be controlled by a parent company elsewhere is not enough.[139] In this particular case, Eurofood was registered in Ireland and its major creditors thought of it as an Irish company so its COMI was properly found to be in Ireland.[140]

The E.C.J. based its decision in large part on a desire to have "legal certainty and foreseeability" in COMI determinations.[141] The EU Regulations in general want the risks of insolvency to be foreseeable to creditors and potential creditors, and knowledge of the forum that a bankruptcy case will be brought in is an important part of that foreseeability.[142] A potential problem is that it is not known to what degree creditors actually do rely on knowing where a company is likely to file for bankruptcy, at least in part because corporations may not prominently display or disclose their jurisdiction of incorporation or the location of their registered office.[143] It is also the case that predictability of forum does not necessarily mean that the laws used in bankruptcy will be either predictable or good. A predictable rule for finding COMI makes it relatively easier for a corporation to forum shop for a bankruptcy location that it finds desirable and that its creditors may not.[144] The corporation may choose a haven jurisdiction, such as Bermuda or the Cayman

136. Case C-341/04, Eurofood IFSC Ltd., ¶ 27 (May 2, 2006), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004J0341:EN:HTML. Indeed, the Italian Parmalat SpA administrator was removing an Irish Eurofood director and appointing new Italian ones in the middle of the controversy over which court should handle the Eurofood insolvency. Bufford, *supra* note 46, at 367.

137. Case C-341/04, *Eurofood*, ¶ 29. This presumption is of course very similar to that of § 1516(c).

138. *Id.* ¶ 34.

139. *Id.* ¶¶ 35–36.

140. Bufford, *supra* note 46, at 385. The E.C.J. only answers questions presented to it and so did not discuss the specific facts of the *Eurofood* case very much. Its position was clear enough that the Supreme Court of Ireland dismissed the case after receiving answers to its questions. *Id.* at 391.

141. Case C-341/04, *Eurofood*, ¶ 33.

142. Virgos & Schmit, *supra* note 47, ¶ 75; *see* Bufford, *supra* note 1, at 470 (providing examples of European COMI cases that were decided based upon various interests, including the expectations of creditors).

143. Westbrook, *supra* note 75, at 1029. Different groups of creditors may also have different expectations depending on their sophistication and position. International financiers and local employees might logically be judged differently when deciding what these creditors expect. Wautelet, *supra* note 6, at 100–03.

144. *See* Pottow, *supra* note 4, 788–90.

Islands,[145] that has secret proceedings or antiquated and poorly understood laws and thus reduces predictability for all of the creditors.[146]

Within the countries covered by the EU Regulations, there are probably not any countries that qualify as havens and so the E.C.J. decision may make more sense if EU countries can trust each other to have good and reliable laws.[147] It might also be harder to change COMI within the European Union because most of its countries do not allow letterbox corporations.[148] These facts underscore another reality about the *Eurofood* decision; it interprets a term, COMI, that it shares with U.S. law, but the structure of the statute around that term is quite different. The decision itself recognizes that the EU Regulations are unique and operate independent of any national law.[149] U.S. courts need at least to be aware of these differences in legal environs before making use of the *Eurofood* decision in this country.

B. American Cases

The bankruptcy courts have, to this point, dealt with relatively few chapter 15 cases where the existence or location of the COMI was seriously in doubt. A central line of those cases is *In re SPhinX, Ltd.*,[150] *In re Bear Stearns High-Grade Structured Credit*,[151] and *In re Basis Yield Alpha Fund (Master)*.[152] Together these cases build the framework that the bankruptcy courts use to analyze COMI, though other cases are useful to provide more specific development of particular issues or factual situations. This Section first looks at *SPhinX*, then the responses to that case largely contained in *Bear Stearns* and *Basis Yield*, and finally attempts to summarize the current state of the law.

145. LOPUCKI, *supra* note 85, at 193.

146. *Id.* at 194–95; Westbrook, *supra* note 75, at 1029–30.

147. Westbrook, *supra* note 75, at 1034–35.

148. Bufford, *supra* note 46, at 381 n.218. *But see* Reinhard Dammann, *Mobility of Companies and Localization of Assets—Arguments in Favor of a Dynamic and Teleological Interpretation of EC Regulation No 1346/2000 on Insolvency Proceedings*, *in* CROSS-BORDER INSOLVENCY, *supra* note 6, at 105, 106 ("At the time of the genesis of the Regulation the location of the registered office was stable and corresponded to the place where the headquarters and the main activities of the company were located. . . . [T]he economic and legal environment has radically changed."); Skeel, *supra* note 110, at 439–40 (suggesting that the move away from the real seat rule in EU corporate law, which prevented letterbox companies, may lead to forum shopping in insolvency proceedings). Patrick Wautelet suggests that the increasing frequency of European companies that are registered in a different country from where they carry on head office functions merits removing the registered office presumption entirely. Wautelet, *supra* note 6, at 86–87.

149. Case C-341/04, Eurofood IFSC Ltd., ¶ 31 (May 2, 2006), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004J0341:EN:HTML. At least two countries, Poland and the United Kingdom, are subject to the COMI provisions of both the Model Law and the EU Regulations. Bufford, *supra* note 46, at 381–82 n.222.

150. 351 B.R. 103 (Bankr. S.D.N.Y. 2006).

151. *In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 374 B.R. 122 (Bankr. S.D.N.Y. 2007).

152. 381 B.R. 37 (Bankr. S.D.N.Y. 2008).

1. In re SPhinX

SPhinX involved hedge funds registered in the Cayman Islands.[153] They apparently got favorable tax treatment because they were offshore, but had always been managed by a company located in New York City and at least ninety percent of the funds' assets were in the United States.[154] The hedge funds kept records in the Cayman Islands to the very limited degree required by law, but they had no other assets there, none of the directors resided there, and there was no evidence of board meetings taking place there.[155] The bankruptcy court concluded that the SPhinX funds "did not conduct a trade or business in the Cayman Islands."[156]

The SPhinX funds had received $312 million from Refco, a broker that was itself going through bankruptcy because of fraud and sought recovery of the money as a preference.[157] Rather than pay the money back, the SPhinX funds started winding up proceedings in the Cayman Islands.[158] The Cayman Islands provided a better insolvency forum for the investors in SPhinX, at least those besides Refco, because their claims would be treated as creditor claims and they would be more likely to recover some of their investments if the SPhinX funds were not solvent.[159]

The Cayman Islands court appointed liquidators for the hedge funds, who then appeared in the U.S. Bankruptcy Court for the Southern District of New York and asked that the Cayman Islands winding up procedure be recognized as a foreign main proceeding.[160] Refco's suit against SPhinX was on appeal from a court-approved settlement, and it is likely that the hedge funds sought to stop the appeal with the automatic stay that would be granted upon main recognition.[161]

Judge Drain of the bankruptcy court asserted that the difference between a main and a nonmain recognition may not be particularly large.[162] He also stated that the presumption of § 1516(c), that the country of the registered office is the COMI of the debtor, is more a shortcut for simple cases and does not carry much weight when the location of COMI is se-

153. *SPhinX*, 351 B.R. at 106–07.

154. *Id.* at 107.

155. *Id.*; Westbrook, *supra* note 75, at 1024.

156. *SPhinX*, 351 B.R. at 107.

157. Krys v. Official Comm. of Unsecured Creditors of Refco Inc. (*In re* SPhinX, Ltd.), 371 B.R. 10, 13 (S.D.N.Y. 2007) (district court affirming the judgment of the bankruptcy court). A preference is a transfer of assets that benefits one creditor over others and thus violates the Bankruptcy Code's principle that all similarly situated creditors should be treated equally. TABB, *supra* note 65, § 6.7.

158. *Krys*, 371 B.R. at 13.

159. *SPhinX*, 351 B.R. at 108–09. In contrast, the bankruptcy judge thought it likely that in the United States Refco would have priority over the investors and thus get paid first. *Id.*

160. *Id.* at 106.

161. Glosband, *supra* note 56, at 44.

162. *SPhinX*, 351 B.R. at 117. *Contra* Westbrook, *supra* note 75, at 1027 (disagreeing with Judge Drain and providing examples of important differences).

riously challenged.[163] Additionally, the court appeared to endorse *Eurofood*'s notion that a letterbox company could not have COMI in its country of registration and that where an objective observer would find the company's COMI is highly determinative.[164] Judge Drain also provided several types of factors that could be considered in determining COMI:

> [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.[165]

On top of these factors, the court indicated that it would grant substantial flexibility and deference to any agreement between debtors and creditors about the location of COMI in the interests of protecting parties and being fair.[166]

Judge Drain analyzed the facts of the case and found that COMI would most likely be outside the Cayman Islands.[167] No business was done there except that necessary to maintain the hedge funds registration, there were no employees in the Cayman Islands, and the hedge funds had very few assets there.[168] Additionally, the Cayman Islands court would have to seek a great deal of assistance from courts in other countries, particularly the United States, to obtain control over the assets of the SPhinX funds and to issue orders that creditors would be bound to follow, because neither the assets nor the creditors were subject to the jurisdiction of the Cayman Islands court.[169] Despite all of this, the judge expressed his willingness to recognize the Cayman Islands proceeding as main except for the fact that it was filed for the improper purpose of delaying the Refco settlement.[170] If it had not been for that bad faith motive, the judge might well have recognized the Cayman Islands proceeding as main simply because the court-appointed liquidators were "the only parties ready to perform the winding up function, and, importantly, the vast majority of parties in interest tacitly support[ed] that approach."[171] This dicta is somewhat strange considering that Refco ob-

163. 11 U.S.C. § 1516(c) (2006); *SPhinX*, 351 B.R. at 117 (citing H.R. REP. NO. 109-31, pt. 1, at 112–13 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 175).

164. *SPhinX*, 351 B.R. at 118–19.

165. *Id.* at 117.

166. *Id.*

167. *Id.* at 119.

168. *Id.*

169. *Id.*

170. *Id.* at 120–21.

171. *Id.* at 121. Though this Note argues that Judge Drain was correct for policy reasons if not on the law, *see infra* Part IV.B, there is something slightly absurd about a time-consuming COMI analysis that will not affect the final outcome. It is reminiscent of John Hodgman's *How to Cook Owls*:

> It's simple.
>
> 1. Look into its eyes.
> 2. Kill it.
> 3. Remove the thing that makes it purr.

jected to recognition, and was owed about $300 million from the SPhinX funds which had total assets of around $500 million.[172] Refco ought to have counted as a substantial party in interest.

The *SPhinX* court finally recognized the Cayman Islands winding up proceedings as nonmain, though without mentioning or analyzing the requirement that there be an establishment in the Cayman Islands for this to occur.[173] The district court affirmed on much the same reasoning; COMI could not be found in the Cayman Islands because the registered office presumption was rebutted and the hedge funds had an improper purpose in seeking main recognition.[174]

Courts and commentators have strongly criticized *SPhinX* for ignoring the importance of the structure that chapter 15 tries to impose.[175] The case is perhaps more consistent with the old § 304 than with chapter 15, because it does not acknowledge that recognition is supposed to be a streamlined and objective inquiry.[176] John Pottow notes that Judge Drain's outcome determinative concern with the improper purpose of the SPhinX funds could also have been solved more simply by lifting the automatic stay from the appeal in question under § 362(d)(1) so that the appeal could have proceeded despite the bankruptcy.[177] Further, other courts have not followed the *SPhinX* rule, which is essentially dicta, that creditors may consent to a main proceeding in a place where COMI does not objectively lie or that creditors have to object to recognition in order for the courts to examine the facts.[178] The *SPhinX* rule is not directly supported by chapter 15; § 1517 does not indicate that a proceeding that is neither main nor nonmain can be recognized if no one objects, but the potential of the rule is interesting. As Judge Drain noted, such a rule would allow the parties in interest to come to a mutually beneficial agreement about the proper location to have an insolvency proceeding.[179] As a result, the rule would serve the parties who agree to it well, though

4. Remove its clockwork innards.
5. Rub it all over with myrtle and salt.
6. Sacrifice 100 goats to Athena.
7. Don't discard the little bolus of mouse bones you find in its tummy—that's a delicacy!

Then cook as you would crows.

JOHN HODGMAN, MORE INFORMATION THAN YOU REQUIRE 348 (2008).

172. *SPhinX*, 351 B.R. at 107, 109.

173. *Id.* at 122. Arguably SPhinX had an establishment merely by being registered in the Cayman Islands, but later cases found that exempt companies, which were barred by Cayman Islands law from engaging in most business in the country, could not have an establishment. *In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 374 B.R. 122, 131 (Bankr. S.D.N.Y. 2007).

174. Krys v. Official Comm. of Unsecured Creditors of Refco Inc. (*In re* SPhinX, Ltd.), 371 B.R. 10, 18–19 (S.D.N.Y. 2007).

175. Westbrook, *supra* note 75, at 1024–28; Glosband, *supra* note 56, at 45, 84.

176. Glosband, *supra* note 56, at 45 (noting § 304 did not have a recognition step and instead moved to more subjective questions about what relief was appropriate immediately); *see* Westbrook, *supra* note 75, at 1027–28 (noting that *SPhinX* cites old § 304 cases extensively).

177. Pottow, *supra* note 4, at 815 n.124; *see also* Westbrook, *supra* note 75, at 1025–26.

178. Ranney-Marinelli, *supra* note 15, at 287–88; *see, e.g.*, *Bear Stearns*, 374 B.R. at 129–31 (declining to follow *SPhinX* dicta and refusing recognition even though no party in interest had objected).

179. *See In re* SPhinX, Ltd., 351 B.R. 103, 120–21 (Bankr. S.D.N.Y. 2006).

it might not be very good at providing certainty beforehand and thus might cause problems in calculating the risks of insolvency.

2. In re Bear Stearns *and In re* Basis Yield Alpha

In re Bear Stearns High-Grade Structured Credit disagreed extensively with *SPhinX*, especially in deciding that the court could deny main recognition even if no parties in interest objected to recognition; the court refused to be a "rubber stamp."[180] Two investment funds registered as limited liability companies in the Cayman Islands sought recognition of their liquidation proceedings in the Grand Court of the Cayman Islands.[181] The funds were administered by a Massachusetts company, the investments were managed by Bear Stearns in New York, the funds' assets were held in New York, and various books and records of the funds were held in Delaware and in Ireland.[182] No creditors objected to the recognition.[183]

Judge Lifland, who played a part in drafting the Model Law,[184] rejected much of the *SPhinX* court's preferred flexibility on the matter of recognition and instead stated that recognition was supposed to be a rigid and formulaic barrier prior to the discretion and flexibility that chapter 15 grants the judge to manage the case once it is recognized.[185] The court acknowledged the registered office presumption, but adopted the statement of the European Court of Justice in *Eurofood* that the presumption can be swiftly discarded in the case of a letterbox company.[186] The liquidators of the funds relied heavily on the dicta from *SPhinX* that the bankruptcy court could not refuse recognition unless a party to the case objected, but the judge did not accept this.[187] The facts that the funds were managed from, and that all of their liquid assets were in, the United States meant that COMI could not be found in the Cayman Islands but was instead in the United States.[188] The court also refused to grant nonmain recognition to the funds' Cayman Islands proceedings because there was no establishment there.[189] In particular, the fact that the funds were exempted companies, barred from conducting business on the Cayman Islands themselves, meant that they could not carry out non-

180. *Bear Stearns*, 374 B.R. at 130.
181. *Id.* at 124.
182. *Id.* at 124–25.
183. *Id.* at 125–26.
184. *See* Multinational Judicial Colloquium, UNCITRAL–INSOL International, Toronto, Can., Mar. 22–23, 1995, http://uncitral.org/pdf/english/news/FirstJC.pdf.
185. *Bear Stearns*, 374 B.R. at 126–27; *see* Westbrook, *supra* note 75, at 1024.
186. *Bear Stearns*, 374 B.R. at 127, 129; *see supra* note 139 and accompanying text.
187. *Bear Stearns*, 374 B.R. at 129–30.
188. *Id.* at 130. The court was also concerned that under U.S. law some of the most recent transactions by the funds could have been avoided, meaning that creditors would be better off if the bankruptcy took place in the United States. *Id.*
189. *Id.* at 131.

transitory economic activity on the islands as is required for an establishment.[190]

On appeal, the district court affirmed the decision of the bankruptcy court.[191] The court reiterated that main recognition is supposed to be a mechanistic process and mentioned that the UNCITRAL Guide to the Model Law advised against using any factors but COMI for main recognition because using more factors would tend to confuse the issue and make it possible for multiple proceedings to claim to be the main proceeding.[192] Subsequent to the bankruptcy court's decision, the putative foreign representative had put forth evidence suggesting that two directors of the funds lived in the Cayman Islands and had to approve decisions.[193] The district court refused to hear this evidence for the first time on appeal, but seemed to indicate that this factor would help the hedge funds' case, albeit not enough for them to win recognition in light of the facts suggesting that COMI was not in the Cayman Islands.[194]

In general it seems that *Bear Stearns* has been adopted by subsequent bankruptcy courts as the appropriate interpretation of the COMI provision.[195] *In re Tradex Swiss AG* cites *Bear Stearns* extensively in rejecting the registered office presumption.[196] That case found that COMI, which it defined as essentially the same as the principal place of business, was located in Massachusetts on the basis of trading facilities, employees, and a manager with signatory authority in the state, even though the registered office was in Switzerland and the company did have facilities there.[197] Most interestingly, the case held that the presence of a large number of creditors in the United States was another reason to find COMI here.[198] *SPhinX*, by contrast, is more often cited for basic, uncontroversial propositions or for its list of factors that could enter into the COMI determination.[199]

In re Basis Yield Alpha Fund (Master) approvingly adopts *Bear Stearns* both in finding that recognition is not a flexible process but a rigid requirement and that the court is not bound by the parties' failure to

190. 11 U.S.C. § 1502(2) (2006); *Bear Stearns*, 374 B.R. at 131.

191. *In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 389 B.R. 325, 327 (S.D.N.Y. 2008) (district court affirming bankruptcy court opinion).

192. *Id.* at 331–32 (citing UNCITRAL Guide, *supra* note 26, ¶ 127).

193. *Id.* at 339.

194. *Id.*

195. *E.g.*, *In re* Oversight & Control Comm'n of Avánzit, S.A., 385 B.R. 525, 532 (Bankr. S.D.N.Y. 2008) (quoting *Bear Stearns* but not *SPhinX*); *In re* Ernst & Young, Inc., 383 B.R. 773, 779–81 (Bankr. D. Colo. 2008) (analyzing "*Bear Stearns* factors" to find COMI).

196. 384 B.R. 34, 42–43 (Bankr. D. Mass. 2008).

197. *Id.* (citing EU Regs, *supra* note 29, recital 13).

198. *Id.* at 43. *But see In re* Tri-Continental Exch. Ltd., 349 B.R. 627, 639–40 (Bankr. E.D. Cal. 2006) (granting main recognition to foreign proceeding even though most creditors were in the United States).

199. *In re* Basis Yield Alpha Fund (Master), 381 B.R. 37, 47 (Bankr. S.D.N.Y. 2008); *see supra* note 165 and accompanying text. *Ernst & Young* also makes use of these factors but calls them the "*Bear Stearns* factors." *Ernst & Young*, 383 B.R. at 779–81.

object to recognition.[200] The court in *Basis Yield* further cited the UNCITRAL Guide for the proposition that the registered office presumption can be called into question by either the court or a party.[201] The hedge fund in *Basis Yield* sought summary judgment on the issue of main recognition based entirely on the registered office presumption, presumably because the fund learned from *Bear Stearns* that even its own proffered facts could be used to deny it recognition.[202] Even so, the court found that the very fact that the hedge fund was a Cayman Islands' exempted company, meaning that it was required to declare it would mainly conduct its business outside the islands, meant that there was an issue of material fact in the location of the fund's COMI.[203] The court also disregarded the § 1516(c) presumption because it felt the issue required more evidence; these two factors led it to deny summary judgment.[204] After rejecting summary judgment, the court scheduled an evidentiary hearing and ordered the foreign representative to present evidence on at least twenty-one different factors.[205]

One commenter disagrees with *Bear Stearns* for what are essentially public policy reasons.[206] *Bear Stearns* obviously will make it hard for companies registered in haven countries to obtain recognition of insolvency proceedings in those countries, but at the same time the laws of the havens might require that proceedings be commenced there.[207] If bankruptcy proceedings do start in the haven country and are not recognized in the United States, there may be no one with legal authority who can act to control or protect the U.S. assets of the company.[208] The decisions also make the use of haven countries for incorporation less beneficial, which may remove any incentive that those countries have to offer transparent and efficient legal systems.[209] Both *Bear Stearns* and *Basis Yield* impose additional costs on the debtors, and consequently the creditors who will ultimately receive the proceeds of the bankruptcy, by rebutting the presumption that the location of the registered office is also the COMI.[210] In particular, the *Basis Yield* court refused to accept the presumption, which is supposed to save time when there is no controversy over COMI,[211] and thus forced the investment fund to undergo the delay and expense of a full evidentiary hearing, even though none of the par-

200. *Basis Yield*, 381 B.R. at 46, 51–52.
201. *Id.* at 51; *see also* UNCITRAL Guide, *supra* note 26, ¶ 122.
202. *Basis Yield*, 381 B.R. at 46–47.
203. *Id.* at 48–49.
204. *Id.* at 52, 55.
205. *Id.* at 56–57.
206. Timothy T. Brock, *The Assault on Offshore Havens in* Bear Stearns *Undermines New Chapter 15: Part II*, AM. BANKR. INST. J., Feb. 2008, at 24.
207. *Id.* at 24 (stating that some haven companies must be wound up in their respective havens).
208. *Id.* at 72.
209. *Id.* at 74. Brock sees the Cayman Islands as currently doing this, acting swiftly to fix problems that had previously made it a bad global citizen. *Id.* at 74 n.85.
210. *Id.* at 73.
211. H.R. REP. NO. 109-31, pt. 1, at 113 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 175.

ties objected to recognition.[212] Arguably there was no controversy about the location of COMI because no party objected to main recognition, yet both *Bear Stearns* and *Basis Yield* were willing to reject that presumption in the name of not being a "rubber stamp."[213] With less automatic recognition comes increased cost which could represent considerable trouble for smaller scale cases, like these, where the money at stake may not be worth a long process in the courts.[214]

3. Current Conditions

Despite the scrutiny applied by *Bear Stearns* and *Basis Yield*, the average recognition probably proceeds relatively smoothly and quickly.[215] *In re Tri-Continental Exchange Ltd*. recognized a main proceeding when the registered office and all the employees were located in St. Vincent and the Grenadines, and all premium payments had been sent there, even though the company had little business except perpetrating fraud on United States and Canadian residents.[216] The court found that St. Vincent was the principal place of business of the company and that was enough, even though most of the money available for liquidation was located in the United States and Ireland.[217] Similarly, *In re Ernst & Young, Inc*. recognized a Canadian receivership as a main proceeding because management of the company, which the court strongly emphasized based on its reading of *Bear Stearns*, and control of its assets originated in Canada.[218] Recognition occurred in spite of the facts that most assets of the insolvent company were in Colorado and that there were allegations that U.S. creditors would suffer from recognition of the foreign proceeding.[219] Another case recognized a Spanish proceeding as main because the registered office was in Madrid and the company leased an office building there.[220] *In re Betcorp Ltd*. granted main recognition to an Australian proceeding because the debtor's registered office, management, and assets were there, even though its only two creditors were in the United States and the United Kingdom.[221] Even a case like *Tradex Swiss*, which refused to recognize a foreign proceeding as main, seems relatively

212. Brock, *supra* note 206, at 73.

213. *In re* Basis Yield Alpha Fund (Master), 381 B.R. 37, 52 (Bankr. S.D.N.Y. 2008); *In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 374 B.R. 122, 130 (Bankr. S.D.N.Y. 2007).

214. Brock, *supra* note 206, at 72.

215. *See* Ranney-Marinelli, *supra* note 15, at 286.

216. 349 B.R. 627, 629–30 (Bankr. E.D. Cal. 2006).

217. *Id.* at 629, 631.

218. *In re* Ernst & Young, Inc., 383 B.R. 773, 780–81 (Bankr. D. Colo. 2008).

219. *Id.*

220. *In re* Oversight & Control Comm'n of Avánzit, S.A., 385 B.R. 525, 539 (Bankr. S.D.N.Y. 2008).

221. 400 B.R. 266, 292 (Bankr. D. Nev. 2009).

straightforward: the court simply balanced the assets and connections that the company had to both potential COMI sites.[222]

There are also cases that are easy in the opposite way because the registered office presumption is clearly wrong. In *In re Innua Canada, Ltd.*, the bankruptcy court rejected the registered office presumption quickly for one of the debtors, because though the company was registered in the Turks and Caicos, its offices were in Ontario, its only employees were located there, and its insurance and audit documents were sent to Ontario.[223]

Future difficult cases are likely to be ones similar to *SPhinX*, *Bear Stearns*, and *Basis Yield* where the company is nothing but a letterbox or file drawer in its country of registration but also does not clearly carry on activities elsewhere. Complications arise in particular when none of the creditors object, perhaps because they also have subsidiaries and funds registered in bankruptcy havens.[224] It is difficult to decide what to do with cases where it is obvious that the principal place of business could not be found in the country of registration yet perhaps that country is the one that stands "ready to perform the winding up function."[225] With the exception of *SPhinX*, which is not commonly followed, as shown above,[226] the U.S. cases seem to be adopting a totality of the circumstances test to locate a disputed COMI.[227] This is very different from the rather strong registered office presumption that *Eurofood* created for the European Union.[228] It also raises the question of whether the courts should be so active in challenging COMI and the registered office presumption when none of the interested parties seems so concerned.

IV. RECOMMENDATION

The previous section showed that the current trend for the U.S. courts is to demand a great deal of evidence about COMI and freely apply it to the decision of whether to recognize a foreign proceeding. This Part first discusses the two theoretical goals that COMI interpretation

222. *In re* Tradex Swiss AG, 384 B.R. 34, 42–44 (Bankr. D. Mass. 2008).

223. *In re* Innua Canada Ltd., No. 09-16362(DHS), 2009 WL 1025090, at *1, *6 (Bankr. D.N.J. Apr. 15, 2009). The corporation and a related company that was incorporated in Canada were both granted main recognition in Canada. The companies' receiver asked that both Canadian proceedings be recognized as main, and no one opposed recognition. *Id.* at *1. In a similar case, main recognition was denied to a Bahamas reorganization when almost all operating functions of the company were carried out in Trinidad and its website listed Trinidad as the "Head Office." *In re* British Am. Ins. Co. Ltd., 425 B.R. 884, 889, 897–98 (Bankr. S.D. Fla. 2010).

224. *In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 374 B.R. 122, 129 n.7 (Bankr. S.D.N.Y. 2007); Ranney-Marinelli, *supra* note 15, at 286–87.

225. *In re* SPhinX, Ltd., 351 B.R. 103, 121 (Bankr. S.D.N.Y. 2006).

226. *See supra* notes 195–99 and accompanying text.

227. *See, e.g.*, *In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 389 B.R. 325, 337 (S.D.N.Y. 2008) (rejecting too close adherence to the holding of *Eurofood* because the opinion in that case did not present enough facts); *Tradex Swiss*, 384 B.R. at 43 (listing at least ten factors that could be considered in COMI analysis).

228. *See supra* Part III.A.

should attempt to fulfill—predictability and adequacy of the law and legal system that will be applied[229]—and then suggests that the courts are currently overaggressive in challenging recognition and the registered office presumption. It concludes by arguing that given the current statutory law the best possible course is to take a permissive view of COMI when no party objects to recognition.

A. Considerations in Picking an Ideal Rule

There are two primary considerations in picking a rule for locating COMI: that the rule provides predictable results and that the countries chosen have acceptable law.[230] Predictability is of particular importance to lenders and other contract creditors because they may assess the risks and costs of the borrower's bankruptcy to themselves differently based on the country the bankruptcy will occur in and, therefore, they need to know as reliably as possible what country that bankruptcy would be in at the time they make the loan.[231] Law that is acceptable, that can lead to good procedural or substantive results, is important to all creditors but especially those that do not know what they are getting into.[232] Involuntary creditors like tax collectors and the victims of torts, and even voluntary but less powerful creditors such as employees and small trade creditors, must rely on the insolvency law of the country where COMI is located to treat them fairly with respect to both process and substance.[233]

Acceptable law, the second objective of any recognition scheme, might just mean procedural safeguards, in which case various haven countries might not qualify because of secret or uncertain law and processes.[234] Acceptable law could have a substantive component as well; U.S. bankruptcy law allows the management of a failing company to remain in control during a bankruptcy, and foreign creditors might find this provision much less friendly to them than the laws of their country, even though U.S. creditors are resigned to the rule.[235] Cases show this as well: the largest creditor of *SPhinX*, Refco, might have received very different amounts of compensation in the Cayman Islands and the United States, a fact that certainly mattered to it and also played a part in the judge's decision.[236] Differing bankruptcy laws could have different schemes or priorities in paying creditors, as did those in *SPhinX*, so recognizing a certain proceeding as main might harm the local creditors in ways that they or the courts feel is unacceptable.[237] Choices of bankruptcy forum

229. Westbrook, *supra* note 75, at 1022.
230. *Id.*
231. Pottow, *supra* note 4, at 787–88; Westbrook, *supra* note 75, at 1022–23.
232. Westbrook, *supra* note 75, at 1030–31.
233. Guzman, *supra* note 12, at 2180–82; Westbrook, *supra* note 75, at 1031.
234. LOPUCKI, *supra* note 85, at 194–97; Westbrook, *supra* note 75, at 1031.
235. LOPUCKI, *supra* note 85, at 184; Westbrook, *supra* note 75, at 1031–32.
236. *In re* SPhinX, Ltd., 351 B.R. 103, 108–09, 121 (Bankr. S.D.N.Y. 2006).
237. Pottow, *supra* note 11, at 1910–12.

could be unacceptable for more practical reasons as well; the large expense of asserting a claim in a foreign country might mean that quite substantial creditors find it uneconomical to assert their rights.[238] Bankruptcy law can reflect a number of deeply held beliefs about economic and labor matters, so it is not surprising when there are strong feelings about the results a bankruptcy proceeding arrives at.[239]

The difficulty that remains is that there is likely a tradeoff, in whatever COMI interpretation is used, between having a predictable bankruptcy jurisdiction and picking jurisdictions with acceptable law.[240] Given a universalist scheme, one where a single country's courts take the lead in administering the bankruptcy and other countries only lend support,[241] the most predictable rule for finding COMI could also lead to inadequate law.[242] Predictability is required for forum shopping, else the management of an insolvent company would not be able to determine or choose what their COMI should be, and forum shopping can lead to companies choosing law that their creditors find inadequate.[243] Delaware began its ascendency as the domestic bankruptcy forum of choice at a time when it only had a single bankruptcy judge; corporations knew what judge they would get and could make accurate predictions about the results.[244] Predictable results for COMI determinations could be had by creating a strong registered office presumption like in *Eurofood*, but a stronger § 1516(c) presumption would have resulted in cases like *SPhinX*, *Bear Stearns*, and *Basis Yield* being conducted by courts in the Cayman Islands to the possible detriment of U.S. creditors.[245]

A counter argument might be that predictability and acceptable law can go hand in hand because creditors and debtors can reach an agreeable solution beforehand. Predictability might allow parties to agree to a forum for bankruptcy if it is needed in the same way that a contract can include a forum selection clause for potential litigation about the con-

238. Westbrook, *supra* note 75, at 1031; *see* NAT'L BANKR. REVIEW COMM'N, *supra* note 104, at 779; Pottow, *supra* note 11, at 1907–10. The National Bankruptcy Review Commission indicated that the costs of litigating in Delaware for a Chicago business might mean that a $50,000 claim was not worth pursuing. NAT'L BANKR. REVIEW COMM'N, *supra* note 104, at 779. The costs can only be greater in the international context. It might be possible to create mechanisms to allow small creditors in similar situations to pool their resources together. For example, all employees could have a representative to look after their interests in a distant proceeding. *See* Guzman, *supra* note 12, at 2192–93.

239. *See* 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, 269–70 (2007); Robert K. Rasmussen, *Resolving Transnational Insolvencies Through Private Ordering*, 98 MICH. L. REV. 2252, 2253 (2000).

240. Pottow, *supra* note 4, at 788–90; Westbrook, *supra* note 75, at 1024.

241. Guzman, *supra* note 12, at 2179.

242. *See* Westbrook, *supra* note 75, at 1032.

243. Pottow, *supra* note 4, at 788–90; Westbrook, *supra* note 75, at 1030–32.

244. LOPUCKI, *supra* note 85, at 56–57, 74; Tabb, *supra* note 91, at 483.

245. *See In re* Basis Yield Alpha Fund (Master), 381 B.R. 37, 48 (Bankr. S.D.N.Y. 2008); *In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 374 B.R. 122, 129–30 (Bankr. S.D.N.Y. 2007).

tract.[246] Unfortunately, some creditors will likely not be powerful enough to work out such a bargain and some will have no ability to do so because they are involuntary.[247] In a contract between large influential creditors and debtors, these small and unaware creditors could possibly be left out.[248]

B. Power Best Unexercised

The current law and court approach to determining COMI in the United States seems relatively clear. The registered office presumption of § 1516(c) can be readily ignored by the court.[249] The court will consider a large variety of circumstances in a sort of totality of the circumstances test that equates COMI with the principal place of business.[250] In contrast to what the *SPhinX* court thought, the court can deny main recognition or demand more evidence even if no interested party objects to recognition.[251] Adopting the views of *Bear Stearns* and *Basis Yield*, the courts will have considerable power to judge for themselves whether recognition is appropriate. It may not, however, make much sense for the courts to wield this power.

If *SPhinX* ever suggested that courts could not closely examine COMI when there was no objection from the creditors, it was certainly wrong. Yet it may have been right to suggest that a case in which no one objects to recognition ought to be recognized.[252] In the case, Judge Drain asserted an efficiency rationale for recognition in the absence of objection:

> Because their money is ultimately at stake, one generally should defer, therefore, to the creditors' acquiescence in or support of a proposed COMI. It is reasonable to assume that the debtor and its creditors . . . can, absent an improper purpose, best determine how to maximize the efficiency of a liquidation or reorganization and, ultimately, the value of the debtor . . . .[253]

Under the law, it is easy enough to recognize COMI when no party in interest objects; the House Committee on the Judiciary Report says that the registered office presumption exists for situations in which there

246. *See* Pottow, *supra* note 4, at 814–16; Rasmussen, *supra* note 239, at 2256–64 (advocating a contractual solution to international bankruptcy as superior to both territorialist and universalist schemes).

247. LOPUCKI, *supra* note 85, at 232.

248. *Id.*; Pottow, *supra* note 4, at 816.

249. *See Basis Yield*, 381 B.R. at 53; *Bear Stearns*, 374 B.R. at 127–28.

250. *Basis Yield*, 381 B.R. at 56–57 (ordering the petitioner to provide evidence on twenty-one different factors); *In re* SPhinX, Ltd., 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006) (suggesting many potential factors that could be relevant to determine COMI); *In re* Tri-Continental Exch. Ltd., 349 B.R. 627, 634 (Bankr. E.D. Cal. 2006).

251. *Basis Yield*, 381 B.R. at 52–53; *Bear Stearns*, 374 B.R. at 130.

252. *SPhinX*, 351 B.R. at 120–21.

253. *Id.* at 117.

is "no serious controversy."[254] It would be reasonable for individual courts to decide that if the debtor and creditors consent to recognition, there is no serious controversy about the location of COMI.[255] Furthermore, U.S. courts have so far followed *Eurofood* and the Virgos-Schmit Report, and demanded that COMI determinations be made on objective factors ascertainable to third parties.[256] But those courts have not often considered that the consent of creditors to a main recognition is a very strong indication that those creditors expected or were able to ascertain that COMI would be found in the proposed bankruptcy forum.[257] Along these lines, Judge Samuel Bufford has written, while discussing the EU insolvency laws, that "evidence of the location of [the corporation's] registered office should be sufficient unless a party in interest disagrees."[258] Of course Congress intended that the ultimate burden of proving COMI would be on the party seeking recognition; it might seem that the courts refusing to challenge the registered office presumption by themselves violates this intention, but if an interested party did object to recognition then the ultimate burden would still rest on the debtor.[259] A policy of additional leniency would merely decrease the degree to which the foreign representative has to convince a court when no other party seems concerned.

Such a rule, that the courts will not extensively examine COMI in the absence of objection, can go a long way toward reconciling the dual goals of predictability and adequacy of law. Finding that COMI is in the place where a company has its registered office is the very definition of predictability.[260] At the same time, the fact that no party is willing to object to recognition suggests that they all find the laws adequate. In *Bear Stearns*, Judge Lifland postulated complicity of the creditors with the Cayman Islands and other offshore havens to explain why none objected,[261] but another explanation is that they were happy with the law

254. H.R. REP. NO. 109–31, pt. 1, at 113 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 175.

255. *See id.*; Brock, *supra* note 206, at 73.

256. *SPhinX*, 351 B.R. at 118; Virgos & Schmit, *supra* note 47, ¶ 75; Bufford, *supra* note 1, at 437–38.

257. *SPhinX* is a partial exception because the court was very concerned with the consent of the creditors. Yet even in that case the court was more interested in how the consent of creditors showed the desirability of the substantive bankruptcy law and did not especially note that the consent of the creditors showed that the proposed COMI comported with their expectations. *See SPhinX*, 351 B.R. at 117–18; *cf. In re* Grand Prix Assocs. Inc., No. 09-16545(DHS), 2009 WL 1410519, at *8 (Bankr. D.N.J. May 18, 2009) (listing as a factor for finding COMI in the British Virgin Islands that those parties who initially objected have settled their differences, but also citing many other factors).

258. Bufford, *supra* note 1, at 475.

259. H.R. REP. NO. 109-31, pt. 1, at 112–13, *reprinted in* 2005 U.S.C.C.A.N. 88, 175.

260. Pottow, *supra* note 4, at 792. The E.C.J. in *Eurofood* was also principally concerned with predictability and it created a very strong registered office presumption. Case C-341/04, Eurofood IFSC Ltd., ¶¶ 33–34 (May 2, 2006), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004J0341:EN:HTML. Additionally *Eurofood* was a situation where quality of law was not likely a major concern, just as would be true in a chapter 15 recognition where the parties in interest do not object. *See supra* notes 147–49 and accompanying text.

261. *In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 374 B.R. 122, 129 n.7 (Bankr. S.D.N.Y. 2007).

that the Cayman Islands would bring to bear on the bankruptcy case at hand. Certainly the most economical and sensible assumption is that the creditors will object when their interests are threatened and that otherwise the jurisdiction the debtor has chosen will be a satisfactory one.

If the creditors do not object, it is hard to see why the court itself has an interest in ferreting out the location of the principal place of business and also declaring that location as the COMI. Cases like *Betcorp* or *Tradex Swiss* involve creditors vigorously asserting to the court that recognition is improper,[262] why should the court not assume that in a case like *Bear Stearns* anyone who objected would have done the same. In *Grand Prix Associates*, a creditor concerned about a potentially fraudulent transfer initially objected, but subsequently settled its concerns and supported recognition.[263] The bankruptcy court properly considered the settlement of all objections when granting recognition; interested parties acted to protect themselves and thus there was less need for judicial scrutiny.[264]

A potential objection is that recognition will lead to additional burdens on the court's time. Yet in *Bear Stearns* the court refused recognition by stating that the COMI of the hedge funds was the United States, not the Cayman Islands.[265] This seems to invite a domestic bankruptcy case, which would surely require as much of the court's time. Also, some cases where COMI is not found will still be eligible for nonmain recognition, as was true in *SPhinX*.[266] Because much of the relief available after nonmain recognition is discretionary, the court will have to devote proportionally more time to considering the merits of the case.

A more persuasive concern with a practice of granting recognition when no one objects is that there may be small or powerless creditors who lack the means to object, yet will still be injured by recognition.[267] This is a risk, but unfortunately it is one that is attendant in domestic bankruptcy cases as well, meaning that if a domestic case is the alternative then refusing recognition may not be much help to the small creditors.[268] Further, if recognition is denied in the United States the small

262. *See In re* Betcorp Ltd., 400 B.R. 266, 274–75 (Bankr. D. Nev. 2009) (U.S. creditor attacked recognition because it wanted to pursue its patent infringement claim in U.S. courts rather than as part of an Australian winding-up proceeding); *In re* Tradex Swiss AG, 384 B.R. 34, 40 (Bankr. D. Mass. 2008) (U.S. creditors wished to place company in involuntary bankruptcy and wanted to avoid participating in a Swiss proceeding that they claimed did not grant them many rights and was not concerned with the welfare of creditors); *see also In re* British Am. Ins. Co. Ltd., 425 B.R. 884, 895, 908–14 (Bankr. S.D. Fla. 2010) (extensively analyzing COMI when U.S. creditor objected to recognition and there were at least eleven foreign insolvency proceedings ongoing).

263. *In re* Grand Prix Assocs. Inc., No. 09-16545(DHS), 2009 WL 1410519, at *1–3 (Bankr. D.N.J. May 18, 2009).

264. *Id.* at *4, *8.

265. *Bear Stearns*, 374 B.R. at 129.

266. *In re* SPhinX, Ltd., 351 B.R. 103, 122 (Bankr. S.D.N.Y. 2006).

267. *See* LOPUCKI, *supra* note 85, at 232; *see also* NAT'L BANKR. REVIEW COMM'N, *supra* note 104, at 779.

268. NAT'L BANKR. REVIEW COMM'N, *supra* note 104, at 779.

creditors will not fare better should they have to seek relief or payment of their claims from the courts of a haven jurisdiction.[269] Finally, chapter 15 provides the court many opportunities to look out for these powerless debtors after recognition, including the restriction that no discretionary relief can be granted unless the interests of creditors are sufficiently protected.[270]

In the end, it seems possible that the court might be better off granting recognition to the foreign proceeding and thus bringing it under the supervision of the court than denying it, which leaves assets up for grabs in the United States and gives domestic creditors limited access to the ongoing foreign proceeding.[271] It might also be possible to apply pressure on haven jurisdictions by limiting the situations in which the registered office presumption is allowed to stand; for example, courts might examine potential COMI jurisdictions stringently unless their insolvency laws gave some priority to employees or tort victims or whatever group is thought especially deserving of protection.[272]

The suggestions of this Note are limited to what is possible under current law. Judge Bufford has suggested adding a residency requirement to COMI where, in order for main recognition to occur, the company's COMI must have been located in the jurisdiction for a certain length of time, perhaps six months as in the U.S. domestic bankruptcy statute.[273] This rule seems eminently sensible and a good way to stop debtors from acting at the last second to change their COMI to gain some benefit; the rule would also stabilize COMI so that creditors could have predictability and also know whether the law they faced was adequate. Yet it is hard to see how this rule could be anything more than a guideline to the courts, unless Congress amended chapter 15 to include it explicitly. Because no change in the Bankruptcy Code is likely to occur soon, the best option for the courts at the moment is to exercise their considerable power to contest and dispute COMI only when the interested parties disagree about the appropriate venue and otherwise use more precise methods of control to monitor the results when they themselves have doubts about the case. The courts have considerable power to determine where COMI is located, but they would be best served by using that power in cases where there is not consensus among the parties.

269. Westbrook, *supra* note 75, at 1031.

270. 11 U.S.C. § 1522(a) (2006); *see* Lifland, *supra* note 59, at 64 (bankruptcy court has power to mold relief to protect creditors, especially if foreign proceeding is harming them). Chapter 15 also contains an exception allowing the court to refuse to do anything "manifestly contrary to the public policy of the United States." 11 U.S.C. § 1506.

271. *See* Pottow, *supra* note 4, at 815 n.124 (suggesting that for *SPhinX* case chapter 15 could have provided alternative ways to protect Refco without denying main recognition); Brock, *supra* note 206, at 72.

272. *See* Rasmussen, *supra* note 239, at 2271–72.

273. *See* 28 U.S.C. § 1408(1); Bufford, *supra* note 30, at 139–40.

V. CONCLUSION

Currently the U.S. courts have interpreted chapter 15 to give themselves a large amount of discretionary power in finding COMI.[274] When considering whether to recognize a case, the courts consider many different sorts of evidence and apply that evidence to a totality of the circumstances type of test.[275] Yet sometimes the exercise of this power is unnecessary. In many cases, the type exemplified by *Bear Stearns* and *Basis Yield*, the parties in interest agree on the location of COMI. The courts are exercising their power not in an effort to aid one or the other side but instead out of a desire to avoid being a "rubber stamp."[276]

Yet by acting as a rubber stamp, the court is recognizing the legitimacy of a bankruptcy forum and laws that will please both the debtor and the creditors. Recognizing COMI where there is an unopposed registered office presumption will also provide a predictable forum for the bankruptcy, providing a resolution that has two important characteristics, predictability and acceptable law, that too often prove inimical.[277] Additional protections for involuntary and small creditors would be desirable, such as an employee representative or requirement that the agreed on bankruptcy forum give preference to tort victims or face additional scrutiny, but even in their absence it is not clear that those creditors would be much better off using U.S. domestic law.[278]

The courts have decided which tools they will use to determine COMI in the United States and it is clear that in subsequent cases parties will argue the issue with reference to *SPhinX*'s many factors and information that is objective and ascertainable to third parties.[279] The main questions will be when and why the courts choose to scrutinize COMI more closely than the registered office presumption suggests. The courts ought to avoid challenging recognition when the parties in interest all support it and instead devote their energies to policing subsequent proceedings with their other powers under chapter 15.

274. *See, e.g.*, *In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 374 B.R. 122, 129–30 (Bankr. S.D.N.Y. 2007).

275. *See In re* Ernst & Young, Inc., 383 B.R. 773, 780–81 (Bankr. D. Colo. 2008) (balancing five factors in considering recognition); *In re* Basis Yield Alpha Fund (Master), 381 B.R. 37, 53 (Bankr. S.D.N.Y. 2008) (despite the fact that recognition is supposed to be "as simple and expedient as possible, the court *may hear proof on any element stated*").

276. *See Bear Stearns*, 374 B.R. at 130.

277. Pottow, *supra* note 4, at 787–97.

278. Guzman, *supra* note 12, at 2192–93; *see* Rasmussen, *supra* note 239, at 2269–70 (arguing that tort creditors will not suffer much from forum shopping because they are rarely privileged above contract creditors in any nation's bankruptcy law).

279. *See Bear Stearns*, 374 B.R. at 129; *In re* SPhinX, Ltd., 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006).