

January 14, 2019



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Honorable Jerrold Nadler
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House of Representatives
Washington, DC 20515

Honorable Lindsey Graham
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Honorable Doug Collins
Ranking Member
Committee on the Judiciary
House of Representatives
Washington, DC 20515

Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: Proposed Revisions to Chapter 15 of the Bankruptcy Code

Dear Reps. Nadler and Collins, and Sens. Graham and Feinstein:

I am the global head of the Norton Rose Fulbright bankruptcy and financial restructuring group, which has been involved in some of the most complex and precedential cross-border bankruptcy cases.¹ By letter dated August 20, 2018, the National Bankruptcy Conference (the “NBC”) proposed certain amendments to Chapter 15 of the U.S. Bankruptcy Code. A copy of the NBC’s letter is attached for your reference. On behalf of my firm, as well as the numerous signatories to this letter, which includes some of the leading cross-border

¹ Some of the more well-known cases in which we played a key role include *Yukos Oil*, *OAS*, *Oi*, *ABC Learning*, and *Barnet*. Citations to those cases and our roles therein are as follows: *In re Rebgun*, Case No. 06-10775, 2006 WL 8084888 (Bankr. S.D.N.Y. April 13, 2006)(counsel for Yukos Oil Company and its Russian receiver); *In re OAS S.A.*, 533 B.R. 83 (Bankr. S.D.N.Y. 2015) (counsel for the BVI joint provisional liquidators of OAS Finance Ltd.); *In re Oi Brasil Holdings Coöperatief U.A.*, 578 B.R. 169 (Bankr. S.D.N.Y. 2017) (counsel for indenture trustee) *In re ABC Learning Centres Ltd.*, 728 F.3d 301 (3d Cir. 2013) (counsel for Australian liquidators); *In re Barnet*, 737 F.3d 238 (2d Cir. 2013)(counsel for Australian liquidators of Octaviar Administration Pty Ltd.). The latter two cases--ABC Learning and Barnet--resulted in precedential decision by the Courts of Appeals for the Third and Second Circuit, respectively.

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insolvency practitioners and insolvency associations, I am writing to express our views to the NBC's proposed changes.

While we are generally supportive of the NBC's proposed changes to Chapter 15, we disagree with the proposed change to the date of determining a foreign debtor's center of main interests ("COMI"). A change in the timing of the COMI determination would limit, if not foreclose, the ability of U.S. bankruptcy courts to aid foreign restructurings and liquidations pending in offshore jurisdictions. This would run counter to the stated goals of Chapter 15, which includes facilitating cooperation between courts in the U.S. and foreign courts overseeing cross-border insolvency proceedings and maximizing asset value for the benefit of a debtor's creditors.

Companies often incorporate in offshore jurisdictions—including, the British Virgin Islands, Bermuda and the Cayman Islands—to, among other things, ensure that they have the benefits of a well-established legal system that is equipped to deal with specialized organizations, such as investment funds and insurance companies. A significant number of companies are registered in the offshore jurisdictions, but do not conduct any actual business in their place of registration. In many instances, these companies may have assets, creditors, and operations in the U.S. When facing financial distress, an offshore company—whether as a result of an involuntary filing or because of the requirements of local law—may become subject to insolvency or restructuring proceedings in its jurisdiction of incorporation. Because of a company's ties to the U.S., the company or its foreign representative may reasonably need the assistance of a U.S. court to facilitate a restructuring or liquidation. Such assistance may include a stay of litigation in the U.S., centralizing disputes and the claims resolution process in the foreign jurisdiction, and the issuance of orders enforcing a restructuring plan on creditors and other parties that are subject to the jurisdiction of the U.S. courts, but that may not be subject to the foreign court's jurisdiction. The NBC's proposal on the timing of the COMI determination would severely limit a U.S. court's ability to grant offshore debtors (including their court-appointed foreign representatives) the critical assistance necessary for a successful reorganization or liquidation, as well as the protections benefiting creditors that reside in the U.S.

Highlighting the Issue

Under Chapter 15, a foreign proceeding can be recognized only if it is a "foreign main proceeding" or a "foreign nonmain proceeding." A foreign main proceeding is a proceeding pending where the debtor has its COMI. A foreign nonmain proceeding is a proceeding pending where the debtor has an establishment, which is defined as "any place of operations where the debtor carries out nontransitory economic activity." Consequently, in order for a foreign proceeding to be recognized under Chapter 15, the foreign debtor must have either its COMI or an establishment in the country where the foreign proceeding is pending. Given recent technological advances and the "virtual" nature of certain businesses, a company incorporated in an offshore jurisdiction may not have a physical place of operations or otherwise engage in traditional business activities in its place of incorporation, thereby creating certain challenges for

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recognition of offshore foreign proceedings. In particular, it may be difficult for an offshore company, such as a fund with employees working remotely, to demonstrate that it has an establishment for purposes of obtaining foreign nonmain recognition. Moreover, to the extent an offshore company has meaningful operations elsewhere, it may be difficult for it to establish that the place of its incorporation is its COMI at the time of the commencement of the foreign proceeding. Indeed, it was under these precise circumstances that the late Chief Judge Burton Lifland of the United States Bankruptcy Court for the Southern District of New York denied the Chapter 15 petitions filed by two Bear Stearns funds. *See In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122 (Bankr. S.D.N.Y. 2007), *aff'd*, 389 B.R. 325 (S.D.N.Y. 2008).

Following the *Bear Stearns* decision, there were inconsistent decisions by the courts in the Southern District of New York addressing the timing of the COMI determination. The bankruptcy court in *Millennium Global Emerging Credit Master Fund Ltd.* held that COMI should be determined as of the commencement of the foreign proceeding. *See Millennium Global Emerging Credit Master Fund Ltd.*, 458 B.R. 63 (Bankr. S.D.N.Y. 2011). Other courts, including the district court in *Fairfield Sentry Ltd.*, held that a bankruptcy court should determine COMI as of the Chapter 15 filing date. *See In re Fairfield Sentry Ltd.*, No. 10 Civ. 7311, 2011 WL 4357421 (S.D.N.Y. 2011). The Second Circuit resolved this issue and held that a court (1) should determine COMI as of the date of the filing of the Chapter 15 petition, and (2) may consider actions taken in the foreign proceeding when determining COMI. *See In re Fairfield Sentry Ltd.*, 714 F.3d 127 (2d Cir. 2013). Following the Second Circuit's ruling, foreign representatives from the offshore jurisdictions have on numerous occasions sought and obtained recognition under Chapter 15 based on activities occurring in the foreign proceeding. *See, e.g., In re Pioneer Freight Futures Company, Ltd.*, Case No. 13-12324 (Bankr. S.D.N.Y. Aug. 13, 2014) (recognizing BVI liquidation); *In re Suntech Power Holdings Co., Ltd.*, 520 B.R. 399, 416-17 (Bankr. S.D.N.Y. 2014) (finding that debtor's COMI was not in the Cayman Islands when the foreign proceeding was commenced, but shifted there as a result of liquidation activities); *In re Platinum Partners Arbitrage Fund L.P.*, Case No. 16-12925 (Bankr. S.D.N.Y. Nov. 22, 2016) (recognizing Cayman Islands liquidation); *cf In re Creative Finance Ltd.*, 543 B.R. 498, 518 (Bankr. S.D.N.Y. 2016) (denying recognition, but noting that "Fairfield Sentry now provides a means for U.S. recognition of letterbox jurisdiction insolvency proceedings—so long as the estate fiduciaries in those jurisdictions do enough work"). If the NBC's proposed amendment regarding COMI is adopted and those proceedings-based activities can no longer be considered when determining COMI, many offshore foreign proceedings will not be entitled to recognition.

Consequences of Non-Recognition

U.S. courts have repeatedly noted that the risk of not recognizing a foreign proceeding is that it "may forestall needed inter-nation cooperation." *See In re Fairfield*, 440 B.R. at 66 (citations omitted). If a foreign proceeding is not recognized, a foreign debtor or representative may be forced to pursue one of several unappealing options to protect the debtor's assets and

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maximize value for the estate. First, a foreign debtor could choose to commence a concurrent plenary proceeding (like a Chapter 11 case) in the U.S. to administer the debtor's assets or deal with creditors located in the U.S. However, such a proceeding, even with the implementation of a cross-border protocol, would be unnecessarily complex, expensive, and burdensome relative to an ancillary case under Chapter 15.

Alternatively, if filing a plenary case is not feasible, a foreign representative or debtor may need to pursue piecemeal litigation in the U.S. to halt creditor enforcement and collection actions or to seek other protective relief. This is exactly the "race to the courthouse" that bankruptcy is intended to prevent. *See In re ABC Learning Centres Ltd.*, 728 F.3d 301, 310 (3d Cir. 2013) ("Without bankruptcy proceedings, creditors would race to the courthouse to collect from a troubled entity, depleting assets and enabling some creditors to collect fully on the debts and others not at all, and with no regard for priority."). Chasing and defending claims throughout the U.S. would be expensive and time consuming, and for some foreign debtors would simply be economically and/or practically impossible.

Finally, a foreign representative or debtor could also decide to do nothing in the U.S., thereby allowing creditors to bring litigation against the debtor or attach a debtor's assets in the U.S. (again facilitating a race to the courthouse creditor scramble). Such an outcome would be inconsistent with the express purposes of Chapter 15, including the protection of creditors' interests and the maximization of the value of the debtor's assets. *See* 11 U.S.C. §1501(a).

There is No Reason to Change Current U.S. Law

It appears that the NBC's sole reason to propose legislation to address COMI is to make Chapter 15 consistent with recent revisions to the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency (the "Model Law"). The inclusion of the COMI concept in the Model Law was designed to prevent forum shopping and so-called COMI manipulation has been at the heart of discussions regarding when COMI should be determined. *See* 1 Collier on Bankruptcy ¶13.04[a] ("The purpose of testing for COMI in the Model Law was to assure the recognizing court of the legitimacy of the foreign proceeding by determining that the proceeding was pending in a forum with sufficient appropriate connections to the debtor.").

While abusive forum shopping should not be countenanced, legislatively repealing the practical and effective approach taken in *Fairfield* is not the answer. Under *Fairfield*, a U.S. court retains the discretion necessary to avoid improper forum shopping and may deny recognition if it finds that COMI was manipulated in bad faith. *See In re Fairfield*, 714 F.3d at 137 (holding that "a court may consider the period between the commencement of the foreign insolvency proceeding and the filing of the Chapter 15 petition to ensure that a debtor has not manipulated its COMI in bad faith"). Courts may also refuse to grant recognition if there is insufficient activity in the offshore jurisdiction to establish COMI there. For example, in *Creative Finance* the court denied recognition to a BVI liquidation after finding that the liquidators did not engage in activities sufficient to shift the debtor's COMI to the BVI prior to

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the Chapter 15 filing date. In denying recognition, the court further noted that “a bad faith invocation of the Code, even in the face of a literal compliance with the requirements of section 1517, can trump any apparent COMI premised on the locale of a foreign representative’s activities.” See *In re Creative Finance Ltd.*, 543 B.R. 498, 523 (Bankr. S.D.N.Y. 2016). Moreover, amending Chapter 15 so that a debtor’s COMI is determined at the time of the filing of the foreign proceeding would not eliminate forum shopping. As Judge Lifland opined, fixing the date for determining COMI as the commencement of the foreign proceeding “leaves the door open for an untoward gaming of the proceedings.” *In re Fairfield*, 440 B.R. at 67 n.3. Companies can, and indeed have, shifted COMI prior to commencing a foreign proceeding to obtain the benefits of the foreign country’s laws.²

In short, under existing law courts have the discretion, and have used that discretion, to deny recognition if the circumstances warrant denial. Repealing *Fairfield* would not solve a purported problem, it would instead create a real and significant problem by foreclosing Chapter 15 relief for many financially distressed offshore companies, and have adverse consequences for creditors in the U.S.

Alternative Proposal

Consistent with the position that COMI should be determined as of the date of the Chapter 15 filing, we propose the following revision to sections 1502 and 1517 of the Bankruptcy Code to ensure uniformity among the U.S. courts as to the timing of the COMI determination:

11 U.S.C. § 1502. Definitions

(4) “foreign main proceeding” means a foreign proceeding pending in the country where the debtor has the center of its main interests **as of the date the Chapter 15 petition is filed;**

² In many instances, there are legitimate reasons for a company to shift its COMI in order to take advantage of more developed liquidation and restructuring tools. The recent *Ocean Rig* case is one such example, where a pre-filing COMI-shift from the Marshall Islands to the Cayman Islands was necessary because the Marshall Islands does not have developed insolvency laws. See *In re Ocean Rig UDW Inc.*, 570 B.R. 687, 695 (Bankr. S.D.N.Y. 2017)(finding that the debtors moving COMI to the Cayman Islands to commence restructuring proceedings there and seeking Chapter 15 relief “offered them the best opportunity for successful restructuring and survival”).

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(5) "foreign nonmain proceeding" means a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment **as of the date the Chapter 15 petition is filed**;

11 U.S.C. § 1517. Order granting recognition

(b) Such foreign proceeding shall be recognized--

(1) as a foreign main proceeding if it is pending in the country where the debtor has the center of its main interests **as of the date the Chapter 15 petition is filed**

(2) as a foreign nonmain proceeding if the debtor has an establishment within the meaning of section 1502 in the foreign proceeding in the foreign country where the proceeding is pending **as of the date the Chapter 15 petition is filed**.

Conclusion

The NBC has ignored the consequences of requiring COMI to be determined as of the commencement of the foreign proceeding, which would preclude many offshore debtors from being able to obtain the protections of Chapter 15. As discussed herein, this change in the current law would cause uncertainty in the credit markets and have other consequences that are directly contrary to the objectives set forth in Chapter 15. We are hopeful that you will give due consideration to our position before advancing any amendment to Chapter 15 that would affect the timing of determining a debtor's COMI. We are available if you have any questions or wish to discuss any of the issues we have raised. Thank you in advance for your consideration.

Very truly yours,



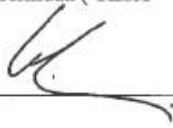
Howard Seife

HS/
Enclosure

cc: National Bankruptcy Conference (By Federal Express)
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[SUPPORTING SIGNATURES ON THE FOLLOWING PAGES]

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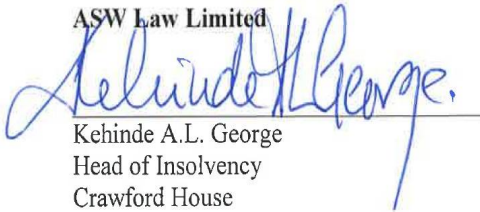
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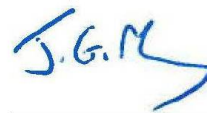
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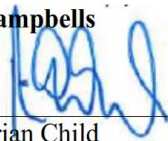
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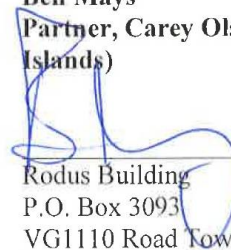
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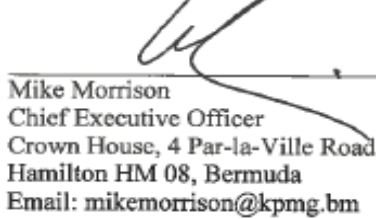
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