

TIME OUT: THE PROBLEMATIC
TEMPORALITY OF COMI ANALYSIS IN
CHAPTER 15 BANKRUPTCY CASES IN THE
SECOND CIRCUIT

Jesse Hallock*

*Under chapter 15 of the Bankruptcy Code, U.S. courts will only recognize foreign insolvency proceedings that are based in the location of the debtor’s center of main interests (“COMI”). In *In re Fairfield Sentry*, the Second Circuit held that courts should evaluate a debtor’s COMI at the time of its filing a chapter 15 petition, rather than the earlier date of when it commenced the underlying foreign proceeding. Unfortunately, this approach incentivizes forum shopping by allowing companies to file proceedings in the jurisdictions most friendly to their interests and utilize the extra time to reestablish it as their COMI for recognition purposes.*

This Note suggests the implementation of “COMI selection clause” requirements in company charters to combat this problem. While requiring companies to designate their COMI in their charters will not eliminate forum shopping, it will substantially increase transparency and allow potential creditors to ascertain the jurisdiction of future insolvency proceedings at the time they enter into contractual relations.

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* J.D. Candidate 2016, Columbia Law School; A.B. 2013, Princeton University. Many thanks to Professor Ronald Mann for his invaluable guidance. Additional thanks to Vicki Hallock for her support, and to the outstanding staff and editorial board of the *Columbia Business Law Review* for their assistance in preparing this Note for publication.

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I. INTRODUCTION

The Second Circuit’s recent ruling in *In re Fairfield Sentry* sends a message to debtors: launch your foreign insolvency proceeding wherever you want and worry about U.S. courts’ COMI analysis later. Under chapter 15 of the Bankruptcy Code, U.S. courts recognize foreign insolvency proceedings as long as they are based in the location of the debtor’s center of main interests (“COMI”). However, because the Bankruptcy Code does not define COMI, courts have faced two difficult questions—what factors determine a company’s COMI, and on what point in the company’s lifetime should the court focus when evaluating these factors? In *In re Fairfield Sentry*, the Second Circuit addressed a split between courts on the latter temporal issue, holding that courts should evaluate a debtor’s COMI at the time of its filing a chapter 15 petition, rather than at

the earlier date of its commencing a foreign proceeding. Unfortunately, this approach has the unintended effect of allowing companies to file proceedings in the jurisdictions most friendly to their interests and to use the extra time to reestablish the locale as their COMI for recognition purposes.

This Note argues that the Second Circuit's ruling on the temporality of COMI determination incentivizes forum shopping and necessitates corrective action. Part II identifies the key provisions of chapter 15 for the recognition process and discusses the substantive tests courts have used to determine a debtor's COMI. Part III compares the temporality standard adopted by the Second Circuit in *In re Fairfield Sentry* with an alternative approach used in *In re Millennium Global*, identifying the advantages and disadvantages of each approach. Part IV proposes solutions to mitigate the drawbacks of the *In re Fairfield Sentry* approach.

II. HISTORICAL BACKGROUND AND RECENT DEVELOPMENTS

A. Text, Legislative History, and Purpose of Chapter 15's Center of Main Interests (COMI) Analysis

Enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, chapter 15 of the United States Bankruptcy Code replaced 11 U.S.C. § 304 as the mechanism for U.S. courts to administer cross-border insolvencies.¹ The primary purposes behind the adoption of chapter 15 were to bolster cooperation between U.S. and foreign courts in cross-border cases, increase legal certainty for trade and investment, protect the interests of involved parties, and facilitate the rescue of financially troubled businesses.² In line with these goals, chapter 15 provides “an

¹ *In re British Am. Ins. Co. Ltd.*, 488 B.R. 205, 211 (Bankr. S.D. Fla. 2013).

² See 11 U.S.C. § 1501(a) (2012).

ancillary procedure to recognize and assist insolvency proceedings headquartered elsewhere.”³ Accordingly, recognition of a foreign proceeding under chapter 15 allows debtors to obtain access to crucial protections of the U.S. Bankruptcy Code, such as discovery and staying execution against assets.⁴

Under § 1504, a chapter 15 case is commenced, like bankruptcy cases under other chapters, by the filing of a petition.⁵ However, rather than an order for relief, a chapter 15 petition may be described as a request for recognition of a foreign proceeding.⁶ In this sense, the first issue to be dealt with in the administration of a chapter 15 case is “whether a debtor’s foreign insolvency proceeding can be recognized, a prerequisite to the debtor’s entitlement to chapter 15’s various forms of relief.”⁷

³ Jay Lawrence Westbrook, *Chapter 15 Comes of Age*, 129 ANN. REV. INSOLVENCY L. 173, 173–74 (2013).

⁴ 11 U.S.C. § 1521 (2012).

⁵ 11 U.S.C. § 1504 (2012) (“A case under this chapter is commenced by the filing of a petition for recognition of a foreign proceeding under section 1515.”); 11 U.S.C. § 1509(a) (“A foreign representative may commence a case under section 1504 by filing directly with the court a petition for recognition of a foreign proceeding under section 1515.”); 11 U.S.C. § 1515 (enumerating the documents that must accompany a chapter 15 petition); *In re British Am. Ins. Co.*, 488 B.R. at 213 (“A person seeking recognition of a proceeding in a foreign country must file a petition for recognition under sections 1504, 1509, and 1515.”); Douglas E. Deutsch & Francisco Vazquez, *Introduction to Recognition under Chapter 15*, AM. BANKR. INST. J., May 2010, at 46, 46 (“A case under chapter 15 is commenced, like other bankruptcy cases, by the filing of a petition.”).

⁶ 11 U.S.C. § 1502(7) (2012) (“[R]ecognition’ means the entry of an order granting recognition of a foreign main proceeding or foreign nonmain proceeding under this chapter.”); Deutsch & Vazquez, *supra* note 5, at 46 (“Although a chapter 15 petition may look like any other bankruptcy petition, it has a much more limited effect than a chapter 7, 11 or 13 petition. For example, a chapter 15 petition is not an ‘order for relief’ and does not result in the imposition of the automatic stay. Moreover, the filing of a chapter 15 petition does not create a bankruptcy estate under § 541 of the Bankruptcy Code.”).

⁷ William T. Reid & R. Adam Swick, *Second Circuit Clarifies Chapter 15 COMI Analysis*, AM. BANKR. INST. J., July 2013, at 54, 54.

The substantive test for recognition is found in § 1517:

[A]n order recognizing a foreign proceeding shall be entered if (1) such foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502; (2) the foreign representative applying for recognition is a person or body; and (3) the petition meets the requirements of section 1515.⁸

Given these minimal requirements, the procedure under § 1517 has been described as “formulaic” and is designed to be simple, straightforward, and predictable.⁹ Accordingly, a recognition hearing follows a rigid structure and leaves little room for judicial discretion.¹⁰ Nevertheless, ambiguities surrounding the definition of “foreign proceeding” have led to greater disagreement and judicial involvement than envisioned.

Under § 1502(4), a foreign main proceeding is defined as “a foreign proceeding pending in the country where the debtor has the center of its main interests.”¹¹ Under § 1502(5), a foreign nonmain proceeding is defined as “a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an

⁸ 11 U.S.C. § 1517(a) (2012). Recognition is also subject to § 1506, which allows courts to refuse to take any action governed by chapter 15 if that action would be manifestly contrary to the public policy of the United States. 11 U.S.C. § 1506 (2012). However, § 1506 has been read extremely narrowly and rarely will factor into recognition analysis. See *In re Fairfield Sentry Ltd.*, 714 F.3d 127, 139 (2d Cir. 2013) (“The statutory wording requires a narrow reading. Section 1506 does not create an exception for *any* action under Chapter 15 that may conflict with public policy, but only an action that is ‘manifestly contrary.’”).

⁹ *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 126 (Bankr. S.D.N.Y. 2007) (“The determination is a formulaic one.”).

¹⁰ See Jay Lawrence Westbrook, *Locating the Eye of the Financial Storm*, 32 BROOK. J. INT’L L. 1019, 1024 (2007) (“The Model Law grants great discretion as to specific relief, but imposes a fairly rigid procedural structure for recognition of foreign proceedings.”).

¹¹ 11 U.S.C. § 1502(4) (2012).

establishment.”¹² Thus in order to gain recognition of a foreign proceeding, a foreign representative must demonstrate that the proceeding is pending in a country where the debtor has either its center of main interests or an establishment.¹³ Section 1502(2) further defines establishment as “any place of operations where the debtor carries out a nontransitory economic activity.”¹⁴ In contrast, chapter 15 fails to define “center of main interests,” despite its centrality to the definition of a foreign main proceeding.

The only guidance offered by chapter 15 for determining a debtor’s COMI is found in § 1516. “In the absence of evidence to the contrary, the debtor’s registered office . . . is presumed to be the center of the debtor’s main interests.”¹⁵ In short, § 1516 offers a rebuttable presumption for COMI. Further adding to the ambiguity, § 1516 does not specify the evidence required to rebut this presumption, nor does it identify the characteristics of locations that might supersede the debtor’s

¹² 11 U.S.C. § 1502(5).

¹³ Recognition as a foreign nonmain proceeding provides a second avenue for recognition under chapter 15. The distinction is sometimes important, as § 1520 provides several automatic protections once a foreign proceeding is recognized as a main proceeding, including imposition of the automatic stay under § 362. 11 U.S.C. § 1520 (2012). In contrast, while many of the same protections are available to foreign nonmain proceedings under § 1521, the court must specifically grant approval. 11 U.S.C. § 1521 (2012). Alternatively, this distinction may be viewed as merely creating insignificant timing and procedural issues. *Deutsch & Vazquez, supra* note 5, at 100 (citing *In re SPhinX, Ltd.*, 351 B.R. 103, 116 (Bankr. S.D.N.Y. 2006), *aff’d* 371 B.R. 10 (S.D.N.Y. 2007) (“[A]s noted by the United States Bankruptcy Court for the Southern District of New York, the main vs. nonmain designation ultimately may have little consequence beyond timing and procedural issues ‘since the chapter [15] gives the bankruptcy court the ability to grant substantially the same types of relief in assistance of foreign nonmain proceedings as main proceedings.’”). While nonmain recognition will be discussed at times, it is not the focus of this Note and a full analysis is not included.

¹⁴ 11 U.S.C. § 1502(2) (2012). For a case finding that no establishment existed, see *In re Bear Stearns*, 374 B.R. at 122; for a case recognizing a foreign proceeding as nonmain, see *In re SPhinX*, 351 B.R. at 103.

¹⁵ 11 U.S.C. § 1516(c) (2012).

registered office as its COMI. As a result, bankruptcy courts have been forced to develop their own definitions of COMI, often by looking to chapter 15's legislative history, the policy goals behind chapter 15, its predecessor former § 304, and the international sources chapter 15 is based on—the European Union Convention on Insolvency and the Model Law on Cross-Border Insolvency.¹⁶ The result has been the implementation of occasionally inconsistent tests for COMI. These tests disagree on the relevant factors and time periods for analysis.

B. Judicially-Created Substantive Tests for COMI Analyses

Given the limited guidance provided by chapter 15, bankruptcy courts have had difficulty developing a universally accepted, workable definition of COMI. This uncertainty can have substantial ramifications for both debtors and creditors. Given the differences between bankruptcy regimes, debtors may want to structure their operations to ensure their ability to initiate proceedings in a particular jurisdiction, but such debtors also will want to ensure that U.S. bankruptcy courts will subsequently recognize the foreign proceeding. The less clarity surrounding the applicable definition of COMI, the greater uncertainty debtors face as to whether courts in the United States will recognize their foreign proceedings. Creditors also prefer certainty. Before lending to a company, lenders must consider their rights and remedies in the event that the debtor enters liquidation.¹⁷ While contractual terms, in theory, could address any uncertainty, the issue of COMI

¹⁶ United Nations Comm'n on Int'l Trade Law, Cross-Border Insolvency: Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, U.N. Doc. A/CN.9/442 (Dec. 19, 1997).

¹⁷ See Andrew T. Guzman, *International Bankruptcy: In Defense of Universalism*, 98 MICH. L. REV. 2177, 2207–08 (2000) (“In those few cases where ambiguity exists, creditors must take that uncertainty into account when they negotiate the loan.”).

determination may produce inefficiencies by adding further complexity to such agreements.

Though a company's COMI may be obvious in many instances, multinational companies confronted with insolvency often present multiple viable candidate jurisdictions. In these cases, the specific test and relative valuation of factors employed by a particular U.S. bankruptcy court will determine which jurisdiction is given primacy.¹⁸ A number of jurisdictions could hypothetically qualify as a company's COMI, namely its country of incorporation (registered office), the location of its headquarters, the jurisdiction that contains substantially all of its employees or day-to-day operations, and the locality featuring the preponderance of its assets.¹⁹ Some courts may choose to focus on the registration and geographic distribution of a company. Others might adopt a more

¹⁸ See Ulrik Rammeskov Bang-Pedersen, *Asset Distribution in Transnational Insolvencies: Combining Predictability and Protection of Local Interests*, 73 AM. BANKR. L.J. 385, 418 (1999) (“[I]n most cases determination of the home country will be obvious regardless of which standard is used.”); Guzman, *supra* note 17, at 2207 (“[T]here is widespread agreement among those interested in transnational insolvency that, in the vast majority of cases, the home country will be easy to identify—making the issue a minor question.”). *Contra* Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 MICH. L. REV. 2216, 2227 (2000) (“Universalists attempt to dismiss this issue with the assertion that the identity of the home country will be obvious in most cases. But that rationale contradicts their basic premise of increasing globalization. No one can deny the existence of a substantial number of multinational companies whose home countries are either not obvious or in flux. That number will grow naturally with the increasing globalization of business. In a prematurely universalist system, that growth might turn malignant, as financially ailing companies jockey to give themselves bankruptcy options.”). While these authors discussed this dilemma before the implementation of chapter 15, their contributions are equally relevant as COMI analysis has run into the exact problem envisioned by LoPucki.

¹⁹ LoPucki, *supra* note 18, at 2226–27.

abstract test that imputes numerous factors into unclear formulas to determine COMI.²⁰

The choice of analysis is especially relevant in the offshore hedge fund cases at the center of many of the most complex judicial COMI determinations. The entity's registered office, headquarters, employees, and assets may each be located in disparate countries around the globe, with each candidate jurisdiction presenting substantially differing bankruptcy regimes.²¹

In developing tests for COMI, a court's inevitable starting point is the text of chapter 15. As previously mentioned, the only direction provided by chapter 15 is that courts should presume, in the absence of evidence to the contrary, that the debtor's registered office is its COMI.²² As chapter 15's sole commentary on COMI, the § 1516 presumption seemingly invites courts to utilize a debtor's country of incorporation as the primary, perhaps even decisive, factor in their analysis.²³

²⁰ For a court adopting "principal place of business" as the foundation for its COMI analysis, see *In re Millennium Global Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 72–73 (Bankr. S.D.N.Y. 2011), *aff'd* 474 B.R. 88 (S.D.N.Y. 2012). For courts applying a factor-based analysis, see *In re British Am. Island of Venice, Ltd.*, 441 B.R. 713, 717 (Bankr. S.D. Fla. 2010), *In re SPhinX, Ltd.*, 371 B.R. 10, 19 (S.D.N.Y. 2007), and *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 128 (Bankr. S.D.N.Y. 2007).

²¹ See *In re Fairfield Sentry Ltd.*, 714 F.3d 127 (2d Cir. 2013) (recognition proceeding for feeder funds that invested with Bernard L. Madoff Investment Securities LLC, with registered office in British Virgin Islands, but with board based in New York and day-to-day operations handled by investment manager based in New York); *In re SPhinX*, 371 B.R. at 10 (recognition proceeding where hedge funds were established as offshore entities incorporated and registered in the Cayman Islands, with no offices or employees in the Cayman Islands and business conducted under contract with New York corporation); *In re Bear Stearns*, 374 B.R. at 122 (funds with registered offices in the Cayman Islands, but administered by corporation based in Massachusetts).

²² 11 U.S.C. § 1516(c) (2012).

²³ See Westbrook, *supra* note 10, at 1033 ("Along with the other presumptions in article 1516 of the Model Law, this one permits and encourages fast action in cases where speed may be essential, while

At first glance, this definition fulfills the objectives of providing a definitive and consistent starting point—after all, debtors and creditors alike would merely have to look to the company’s charter to determine its COMI and, consequently, where to initiate a foreign proceeding that will be recognized by U.S. courts.

However, chapter 15’s legislative history and subsequent court decisions have largely stripped the § 1516 presumption of consequence. Looking at legislative history, the word “proof” from § 1516’s Model Law precursor was changed to “evidence” in chapter 15 to emphasize that the ultimate burden remained on the foreign representative to prove its COMI.²⁴ In other words, challengers need not disprove that the debtor’s place of incorporation is its COMI to rebut the presumption; they merely need to provide evidence to the contrary. The ultimate burden of establishing COMI lies with the debtor. Indeed, legislative history provides that “[t]he presumption that the place of the registered office is also the center of the debtor’s main interest is included for speed and convenience of proof where there is no serious controversy.”²⁵ Courts have generally responded by attributing minimal importance to the presumption.²⁶ In fact, in *In re Bear Stearns*, the court, essentially raising the COMI issue *sua sponte*, found that the § 1516 presumption could be rebutted, even without any party raising the issue.²⁷

leaving the debtor’s true ‘center’ open to dispute in cases where the facts are more doubtful.”).

²⁴ H.R. REP NO. 109-31, pt. 1, at 112–13 (2005).

²⁵ *Id.* at 113.

²⁶ See Westbrook, *supra* note 10, at 1033–34 (“[T]he Model Law and Chapter 15 give limited weight to the presumption of the jurisdiction of incorporation as the COMI.”).

²⁷ *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 125–26 (Bankr. S.D.N.Y. 2007) (“No other party has filed a response or objection to the relief requested. However, recognition under section 1517 is not to be rubber stamped by the courts. This Court must make an independent determination as to whether the foreign proceeding meets the definitional requirements of sections 1502 and 1517 of the Bankruptcy Code.”). Given the *sua sponte*

In other words, if there is sufficient evidence in the record to challenge the presumption, the court may do so on its own.²⁸

In addition to minimizing the vitality of the § 1516 presumption, courts have similarly limited the significance of the debtor's place of incorporation when weighed against other relevant factors in their COMI analysis.²⁹ A COMI analysis focusing on a company's place of incorporation has tremendous potential to incentivize forum shopping: companies will register in the jurisdiction most favorable to liquidation despite not having any other connection to, or conducting any operations in, that particular country.³⁰ To prevent forum shopping, the Bankruptcy Court for the Southern District of New York in *In re Bear Stearns* conclusively rejected reliance on the place of incorporation alone as determinative of COMI.³¹ Given that the petitioner had no connection to the Cayman Islands other than as its place of incorporation, the court refused to recognize the Cayman proceeding as a main or nonmain foreign proceeding.³² Accordingly, so-called "letterbox" companies that do not conduct any business in the country where they are incorporated cannot use the mere formality of their

nature of the court's COMI analysis, in *In re Bear Stearns*, the court found the requisite evidence to rebut the § 1516 presumption in the Petitioner's own submission to the court. *Id.* at 129–30.

²⁸ *Id.* at 125–26.

²⁹ *Id.* at 127–28.

³⁰ See Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2316 (2000) ("[T]he law of the place of incorporation is unsatisfactory because of the risk of sham incorporation—a company organized under a flag of convenience unrelated to the location of its business, management, and assets."); Guzman, *supra* note 17, at 2206–07 ("If it is too easy for the debtor to change the main jurisdiction, it could choose in such a way as to disadvantage strongly nonadjusting creditors that are likely to interact with the firm. This, in turn, would generate an incentive for countries to provide regimes that grant nonadjusting creditors a low priority. For this reason a test based on the place of incorporation would be inappropriate.")

³¹ *In re Bear Stearns*, 374 B.R. at 127–28.

³² *Id.* at 130.

registered office to justify recognition.³³ In this sense, the debtor's registered office is merely one factor among many for courts to consider in their COMI analyses.

Consequently, courts have most widely adopted a totality of the circumstances approach to determine whether a proceeding is based in a debtor's COMI.³⁴ Rather than adopting one concrete, definitive indicator—such as the location of the company's registered office or its headquarters—most courts weigh all aspects of the company's operations to make a determination.³⁵ Generally,

[i]n determining the COMI of a foreign debtor, cases have examined a number of factors, including: the location of the debtor's headquarters; the location of those who actually manage the debtor . . . ; the location of the debtor's primary assets; the location of the majority of the debtor's creditors or of a majority of creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes.³⁶

The totality of the circumstances approach presents an array of advantages and disadvantages. By examining all facets of the company's operations rather than isolating a discrete, definitive element, courts gain a more thorough

³³ Compare *In re Bear Stearns*, 374 B.R. at 122, with *In re SPhinX, Ltd.*, 371 B.R. 10 (S.D.N.Y. 2007) (refusing to recognize a letterbox company's proceeding as a foreign main proceeding in a country where its only connection was its registered office when all other objective factors weighed against it, though the court did recognize the proceeding as a foreign nonmain proceeding).

³⁴ Some courts have alternatively described their COMI analysis as looking at the "principal place of business" or the "nerve center" of a company. Despite the different names, these analyses employ largely similar totality of circumstances approaches. Differences between them arise largely from the temporality of the analysis, which will be discussed in detail in Part II.

³⁵ See *In re SPhinX*, 351 B.R. at 117; see also *In re Fairfield Sentry Ltd.*, 714 F.3d 127, 137 (2d Cir. 2013); *In re Millennium Global Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 76 (Bankr. S.D.N.Y. 2011).

³⁶ *In re Millennium Global*, 458 B.R. at 76 (citations omitted).

portrait of the company's affairs. Presumably, placed under a larger microscope, companies will be compelled to file proceedings in jurisdictions that more closely approximate the realities of their business. This flexibility, particularly paired with the *In re Bear Stearns* prohibition against recognition of letterbox companies, eliminates recognition based on mere formalities, limiting a company's ability to forum shop.

However, a totality of the circumstances analysis presents several difficulties for debtors and creditors. Compared to a definitive concrete test, an analysis that weighs factors to determine COMI is less consistent and predictable.³⁷ For example, a corporation whose headquarters, main labor force, and assets are spread across different countries is likely to be unsure whether its foreign bankruptcy proceedings will be recognized by U.S. courts as a foreign main proceeding until the time of the court's ruling. Such a scenario could have significant consequences for creditors who cannot be sure whether a company's assets will be shielded by the United States Bankruptcy Code.³⁸ In these cases, companies face a tremendous risk of launching proceedings in inappropriate jurisdictions in good faith,

³⁷ See *In re SPhinX*, 351 B.R. at 117 (“[T]he flexibility inherent in Chapter 15 strongly suggests, however, that the Court should not apply such factors mechanically.”). Looking at factors on a case-by-case basis may lead courts to weigh various COMI factors differently, in accordance with their own interpretation and views of chapter 15. Though discussing “operational history” inquiries rather than “totality of the circumstances” COMI tests, the Fifth Circuit’s analysis of the perils of granting bankruptcy court’s wide discretion in COMI determinations in *In re Ran* is equally applicable. See *In re Ran*, 607 F.3d 1017, 1023, 1025 (5th Cir. 2010) (“[C]ourts may tend to attach greater importance to activities in their own countries, or may simply weigh the evidence differently which may lead to the possibility of competing main proceedings, thus defeating the purpose of using the COMI construct.”) (citations omitted).

³⁸ See *In re Ran*, 607 F.3d at 1025–26 (“[I]t is important that the debtor’s COMI be ascertainable by third parties. . . . The presumption is that creditors will look to the law of the jurisdiction in which they perceive the debtor to be operating to resolve any difficulties they have with that debtor”) (citations omitted).

without realizing their mistake until their chapter 15 petition is rejected. This imposes potentially massive financial and temporal inefficiencies. Similarly, creditors may find themselves lacking the rights and recourse to U.S. courts that they had expected when transacting with the debtor.³⁹

C. Temporality of COMI Analysis: Commencement vs. Petition Date

The challenges to developing an adequate COMI test are further compounded by questions of temporality. Given that the locations of a company's operations sometimes change, courts must determine which particular point in time, or what period of time, should be looked at to determine whether a foreign proceeding was based in the company's center of main interests. Unfortunately, the Second Circuit's recent decision in *In re Fairfield Sentry*, holding that the time a debtor files for chapter 15 recognition is the relevant temporal focus, has further complicated already opaque COMI analysis. This has rendered judicial decision-making even less predictable.⁴⁰ The remainder of this Note will discuss the positive and negative ramifications of *In re Fairfield Sentry* and suggest proposals for alleviating the temporality problems intensified by the court's ruling.

III. RAMIFICATIONS OF THE SECOND CIRCUIT'S ENDORSEMENT OF *IN RE FAIRFIELD SENTRY*

A. Two Approaches to Temporality

Courts have applied two contrasting approaches to temporality in their COMI analyses. The majority approach evaluates COMI based on a debtor's "activities at or around

³⁹ For example, if recognition is denied, creditors would not be subject to section 362's automatic stay. 11 U.S.C. § 1520 (2012).

⁴⁰ See generally *In re Fairfield Sentry*, 714 F.3d at 127.

the time the chapter 15 petition is filed . . .”⁴¹ In other words, courts determine the location of the debtor’s COMI by looking at all relevant factors present at or immediately preceding the time when the debtor files its chapter 15 petition. The court does not look to the debtor’s prior operational history in making this determination.⁴²

⁴¹ *Id.* at 137. The Second Circuit has somewhat inconsistently stated both that the relevant time period for determination of COMI is at the filing of the chapter 15 petition and that the court will look at the debtor’s activities around the time of the chapter 15 petition. Nevertheless, this Note focuses on the larger difference between the minority and majority approaches, and will not address slight discrepancies in application of the majority approach. *Compare id.* (“We therefore hold that a debtor’s COMI should be determined based on its activities at or around the time the Chapter 15 petition is filed . . .”), *with id.* at 133 (“We conclude that a debtor’s COMI is determined as of the time of the filing Chapter 15 petition.”).

⁴² Parties have frequently argued for a third approach—debtor’s operational history—distinct from the majority and minority approaches. Under this view, courts would evaluate a debtor’s entire operational history in making a COMI determination. However, courts have consistently rejected this approach. *Id.* at 134 (“[W]e reject Morning Mist’s invitation for us to consider the debtor’s entire operational history [in making a COMI determination].”); *In re Fairfield Sentry Ltd.*, No. 10 Civ. 7311, 2011 WL 4357421, at *6 (S.D.N.Y. Sept. 16, 2011), *aff’d*, 714 F.3d at 127 (“Appellants argue that Sentry’s recent activity in the BVI cannot displace Sentry’s 18-year center of main interests in the United States. On the contrary, courts . . . have consistently held that the relevant time for determining a debtor’s COMI is when the Chapter 15 petition was filed.”); *In re Ran*, 607 F.3d at 1025 (“[The bankruptcy receiver] contends that the COMI determination should be made with reference to Ran’s operation history, and not merely by focusing upon where Ran’s COMI lies on the date the petition for recognition was filed. . . . We disagree.”). Rather, courts have generally been willing to look at the period between commencement of the foreign proceeding and filing of the chapter 15 petition to determine whether the debtor fraudulently manipulated its COMI. *See In re Fairfield Sentry*, 714 F.3d at 133 (“To offset a debtor’s ability to manipulate its COMI, a court may also look at the time period between the initiation of the foreign liquidation proceeding and the filing of the Chapter 15 petition.”); *In re Fairfield Sentry Ltd.*, 440 B.R. 60, 66 (Bankr. S.D.N.Y. 2010), *aff’d*, 2011 WL 4357421, *aff’d*, 714 F.3d at 127 (“The jurisprudence . . . does not preclude looking into a broader temporal COMI assessment where there may have been an opportunistic shift to

In contrast, a minority of judges have made COMI determinations by examining relevant factors at the earlier date of the commencement of foreign proceedings. In contrast to the majority approach, these courts will not consider any activities between commencement of the foreign proceeding and the filing of the chapter 15 petition. Once the foreign proceeding begins, a debtor's COMI is static—it cannot change based on subsequent activities. In other words, a debtor's COMI at the time of the foreign proceeding is necessarily its COMI at the time of a chapter 15 petition.

The Second Circuit recently resolved a split between judges within the Bankruptcy Court for the Southern District of New York on this issue. In *In re Millennium Global Emerging Credit Master Fund Ltd.*, the bankruptcy court applied the minority approach in recognizing a foreign proceeding in Bermuda.⁴³ In contrast, in *In re Fairfield Sentry Ltd.*, the same court applied the majority approach in recognizing a foreign proceeding in the British Virgin Islands.⁴⁴ Hearing *In re Fairfield Sentry* on appeal, the Second Circuit endorsed the majority approach, solidifying the time of the filing of the chapter 15 petition as the relevant date for determining a debtor's COMI in the Second Circuit.⁴⁵

B. *In re Millennium Global* (Minority Approach)

In *In re Millennium Global*, the liquidators of two offshore investment funds (hereinafter the “Funds”) sought recognition of Bermuda liquidation proceedings as foreign main or nonmain proceedings before the Bankruptcy Court for the Southern District of New York.⁴⁶ BCP Securities

establish COMI [such as] insider exploitation, untoward manipulation, over thwarting of third party expectations[.]”).

⁴³ *In re Millennium Global Emerging Credit Master Fund Ltd.*, 458 B.R. 63 (Bankr. S.D.N.Y. 2011), *aff'd* 474 B.R. 88 (S.D.N.Y. 2012).

⁴⁴ *In re Fairfield Sentry*, 440 B.R. at 60.

⁴⁵ *In re Fairfield Sentry*, 714 F.3d at 130.

⁴⁶ *In re Millennium Global*, 458 B.R. at 65 (“The Liquidators seek recognition in order to investigate the Funds’ financial affairs, conduct

(“objectant”) opposed recognition on the ground that Bermuda was not the debtors’ COMI.⁴⁷ In response, petitioners argued that the Funds’ COMI was in Bermuda at the commencement of the liquidation proceedings. Alternatively, they argued that the Funds’ COMI had become lodged in Bermuda by the time of the chapter 15 petition due to the control exercised by the liquidators during the Bermuda proceeding.⁴⁸ Given that the debtors’ liquidation activities had been centered in Bermuda throughout the three-year proceedings, Bermuda was almost certainly the Funds’ COMI if the court focused on the time of the chapter 15 petition—the majority approach.⁴⁹ Accordingly, the court began its analysis by considering whether it should follow the majority approach or focus on an earlier point in the debtors’ history.

Notwithstanding authority to the contrary, the *Millennium Global* court rejected the majority approach of determining COMI by reference to a debtor’s activities at the time of the chapter 15 petition.⁵⁰ Rather, “[t]he substantive date for the determination of the COMI issue is at the date of the opening of the foreign proceeding for which recognition is sought.”⁵¹ In reaching this conclusion, the court emphasized the statutory text, international law, practical considerations, and the “principal place of business.”

The court stated that, “[n]otwithstanding the authority in support of using the chapter 15 filing date as the date for making a COMI determination, use of the chapter 15 petition date is not required by the ‘plain words’ of the

discovery related to potential causes of action against parties in the United States, and ultimately provide for a distribution of recovered property to creditors.”). Objectant BCP Securities was designated by liquidators as a target of their investigation. *Id.* at 68.

⁴⁷ *Id.* at 69 (“BCP contends that the Bermuda liquidation proceedings . . . are not entitled to recognition as either main or nonmain proceedings because Bermuda is not the ‘center of main interests’ . . .”).

⁴⁸ *Id.* at 68.

⁴⁹ *Id.* at 71–75.

⁵⁰ *Id.* at 72.

⁵¹ *Id.*

statute and produces a result wholly inconsistent therewith.”⁵² While § 1502 is written in the present tense—“a foreign proceeding pending in the country where the debtor has the center of its main interests”—the *Millennium Global* court found that it referred to the date of the commencement of the foreign proceeding rather than the chapter 15 proceeding.⁵³ After all, the chapter 15 proceeding is merely ancillary to the foreign proceeding and the petition for recognition is a “matter of happenstance.”⁵⁴ According to the court’s interpretation, it is more logical that § 1502 lodges COMI in the commencement of the underlying proceeding at the heart of the liquidation than the somewhat arbitrary filing of the chapter 15 petition.⁵⁵

⁵² *Id.* As emphasized in the Second Circuit’s opinion in *In re Fairfield Sentry*, a number of courts have emphasized the present tense of section 1502 as support for adopting the date of the chapter 15 petition for COMI determinations. See *In re Fairfield Sentry Ltd.*, 714 F.3d 127, 133 (2d Cir. 2013).

⁵³ 11 U.S.C. § 1502 (2012); *In re Millennium Global*, 458 B.R. at 72 (“Starting with the words of the statute, the cases stress that § 1502 speaks in the present tense, as it does. . . . However, the courts do not explain why they assume that the statute refers to the filing of the chapter 15 petition rather than the filing of the petition in the case for which recognition is sought. In a chapter 15 filing, the U.S. case is ancillary or secondary to the foreign proceeding.”).

⁵⁴ *In re Millennium Global*, 458 B.R. at 72 (“The date of the petition for recognition is a matter of happenstance; in this case, for example, the chapter 15 filing took place three years after the filing of the liquidation in Bermuda, apparently occasioned by the possible passage of one or more statutes of limitation on causes of action of the estates.”).

⁵⁵ The court also justified its decision by reference to international law underlying chapter 15. *Id.* at 73–74 (“[T]he Model Law from the European Insolvency Regulation (‘EU Regulation’) [which chapter 15 is in part based upon] . . . does not contemplate the commencement of a separate ancillary proceeding to seek recognition of a foreign insolvency case, as in the Model Law and chapter 15, as the members of the Union are automatically required to recognize foreign proceedings from the date of their opening. The date of the opening of initial insolvency proceeding is the only date that the original drafters of the term for the EU Regulation could have contemplated.”).

However, the foremost reason behind the *Millennium Global* court's rejection of the majority approach was its equation of "center of main interests" with "principal place of business."⁵⁶ Citing former § 304 and case law, the court found that COMI and principal place of business may be used interchangeably.⁵⁷ This substitution is significant, because once a debtor enters liquidation and stops operating, by definition, it no longer has a place of business.⁵⁸ If a business no longer possesses a principal place of business once it stops operating—at the moment of liquidation—its principal place of business and, accordingly its COMI, is

⁵⁶ *Id.* at 72 ("This construction is clear if one simply translates the arcane term 'center of main interests' into plain English.") As mentioned *supra* in note 20, the principal place of business has been used as a substantive COMI test in place of the most common totality of the circumstances test. While there may be substantive variance between the tests, this Note will only examine its effect on temporality.

⁵⁷ *Id.* at 72–73 ("Prior to the adoption of chapter 15, the Bankruptcy Code required the Court to consider the 'principal place of business' or 'principal assets' of a debtor in determining whether to recognize a foreign proceeding under § 304. . . . Section 101(23) made it clear that the determination as to 'principal place of business' was to be made as of 'the commencement of the proceeding,' *i.e.*, the foreign proceeding. . . . [T]here is no indication . . . that Congress intended to change the prior bankruptcy practice of looking to the date on which foreign proceedings were first commenced."). See *In re Basis Yield Alpha Fund (Master)*, 381 B.R. 37, 48 (Bankr. S.D.N.Y. 2008) and *In re Betcorp Ltd.*, 400 B.R. 266, 287–89 (Bankr. D. Nev. 2009) for cases using "principal place of business" interchangeably with COMI.

⁵⁸ While this may well be the case for a business entering liquidation, the court's reasoning is problematic for reorganization. Since a business may continue operating while reorganizing, it seemingly maintains a principal place of business. Recognizing this problem, the *Millennium Global* court explained that "although a debtor in reorganization may continue to have a principal place of business, this is the place of business of the reorganizing entity, not the debtor." *In re Millennium Global*, 458 B.R. at 73. See *In re SunTech* for an example of a case where this issue would arise if the court adopted *In re Millennium Global's* approach to temporality. *In re SunTech Power Holdings Co., Ltd.*, 520 B.R. 399, 417 (Bankr. S.D.N.Y. 2014). A more detailed discussion of the court's assertion is beyond the scope of this Note.

static.⁵⁹ Under this reasoning, a debtor would not have a principal place of business during the period between commencement of the foreign proceeding and the filing of the chapter 15 petition. Accordingly, there is no logical reason to make COMI determinations at the time of the chapter 15 petition. Instead, a court must determine a debtor's principal place of business, and therefore its COMI, with reference to business activities at and immediately preceding commencement of liquidation.

Accordingly, the *Millennium Global* court then addressed whether Bermuda was the Funds' COMI at the commencement of the Bermuda proceeding. Amongst the factors pointing toward recognition: the Funds were incorporated in Bermuda and board meetings were customarily held there.⁶⁰ Furthermore, two out of three directors, who exercised substantial control, resided in Bermuda.⁶¹ In contrast, day-to-day operations were managed from Guernsey, the Funds' investment manager was located in the United Kingdom, and substantially all of the Funds' assets were located outside of Bermuda.⁶² Though seemingly a close call, the court ruled that the balance of these factors pointed toward Bermuda as the debtors' COMI.⁶³ Therefore,

⁵⁹ *In re Millennium Global*, 458 B.R. at 72–73 (“If the term ‘principal place of business’ is substituted for ‘center of main interests,’ it is obvious that the date for determining an entity’s place of business refers to the business of the entity before it was placed into liquidation. A debtor does not continue to have a principal place of business after liquidation is ordered and the business stops operating.”).

⁶⁰ *Id.* at 77. Particularly important, the offering memorandum described the Funds as a Bermuda company, making the possibility of insolvency proceedings in Bermuda reasonably ascertainable to third parties. *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* (“A simple tally of the foregoing factors demonstrates that more point toward Bermuda than elsewhere.”). Also important, the factors weighing against Bermuda pointed to an array of countries and did not establish a clear alternative COMI. “Since every entity has a center of main interests, the fact that the evidence does not disclose a COMI other

even though it rejected the liquidators' argument that COMI should be determined at the time of the chapter 15 petition, the court still found Bermuda to be the debtors' COMI and granted recognition.

In this manner, *In re Millennium Global* became the foremost instance of a court deviating from the majority approach to COMI temporality. However, given the ultimate disposition of the case, its temporality analysis was merely superfluous and nothing more than dicta. The court noted that “[e]ven if the date for determining a foreign debtor’s COMI . . . [is] not the date of the opening of the proceedings for which recognition is sought, and if the contrary authority . . . is followed, the Funds’ COMI is Bermuda.”⁶⁴ In other words, regardless of whether the court evaluated COMI at the commencement of foreign proceedings exclusive of latter liquidation activities or at the time of the chapter 15 petition inclusive of liquidation, the Bermuda proceedings would be recognized. Accordingly, the court did not need to diverge from the majority approach to reach its result, and its approach to temporality did not possess precedential value.⁶⁵

On appeal before the United States District Court for the Southern District of New York (“SDNY”), the objectant did not challenge the bankruptcy court’s ruling on the temporality of COMI determinations.⁶⁶ Accordingly, the court did not reach the “more complicated question . . . of whether the Bankruptcy Court was correct in its conclusion regarding the timing of the COMI determination.”⁶⁷ Furthermore, mirroring the bankruptcy court, the district court also suggested that the temporality issue was not implicated in the case at hand—Bermuda was the debtor’s

than Bermuda operates in favor of granting recognition of the Bermuda proceedings . . .” *Id.* at 79 (citation omitted).

⁶⁴ *Id.* at 85–86.

⁶⁵ *Id.* at 86.

⁶⁶ *In re Millennium Global Emerging Credit Master Fund Ltd.*, 474 B.R. 88, 92 (S.D.N.Y. 2012).

⁶⁷ *Id.* at 94.

COMI both at the commencement of the foreign proceeding and the filing of the chapter 15 petition.⁶⁸

C. *In re Fairfield Sentry* (Majority Approach)

In *In re Fairfield Sentry*, the liquidators of feeder funds that had invested with Bernard L. Madoff Investment Securities LLC sought recognition of insolvency proceedings pending in the British Virgin Islands (“BVI”).⁶⁹ Morning Mist Limited Holdings (“objectant”) opposed recognition on the ground that the BVI was not the debtors’ COMI. The main point of contention between the parties was whether the debtors’ COMI should be measured at the commencement of the foreign proceeding exclusive of liquidation activities, as the objectant asserted, or at the filing of the chapter 15 petition, inclusive of liquidation activities, as the liquidators suggested.⁷⁰

At the time of the recognition proceeding, the debtors had already ceased doing business more than eighteen months beforehand, and had done so seven months before commencement of the BVI proceeding.⁷¹ While some factors suggested the debtors’ COMI was in New York prior to December 2008, at the appointment of a litigation committee, the debtors’ nerve center effectively became

⁶⁸ *Id.* (“[Bermuda is the debtor’s COMI] regardless of whether the COMI is determined as of the date of the commencement of the liquidation proceedings—as the Bankruptcy Court held—or as of the date of the filing of the Chapter 15 petition. Indeed, we see no evidence to suggest any change in the location of the Funds’ COMI with the commencement of liquidation proceedings.”).

⁶⁹ *In re Fairfield Sentry Ltd.*, 440 B.R. 60, 62 (Bankr. S.D.N.Y. 2010) (“[The objectants] are investors in Sentry and plaintiffs in a putative derivative action on Sentry’s behalf in New York State Supreme Court.”).

⁷⁰ *Id.* at 62–63.

⁷¹ *Id.* at 64. Upon revelation of the Madoff fraud in December 2008, the debtor stopped transferring funds to Bernard L. Madoff Investment Securities LLC, severed contracts, and transferred control to a litigation committee. *Id.*

lodged in the BVI.⁷² At the time of both the commencement of the BVI proceedings and the filing of the chapter 15 petition, Fairfield Sentry did not have a place of business, management, or any tangible assets located in the United States.⁷³ “Rather, the Debtors’ activities for an extended period of time [had] been conducted only in connection with winding up the Debtors’ business.”⁷⁴ For this reason, the court held that the BVI was the debtors’ COMI and granted recognition of the foreign proceedings.⁷⁵

The facts of *In re Fairfield Sentry* do not shed light on the breadth of the court’s temporality decision. The court held that “[u]nder these circumstances, it is appropriate for the Court to consider this extended period in determining COMI.”⁷⁶ In other words, for the specific situation where a debtor ceases business activities and begins winding up a corporation seven months before foreign liquidation proceedings and eighteen months before filing a chapter 15 petition, it is appropriate for the court to consider its liquidation activities in making a COMI determination. The court did not announce categorical adoption of the majority approach to making COMI determinations. In fact, the court stated, “[t]he contentions of both parties [about the appropriate temporality for COMI analysis] are misplaced,

⁷² *Id.* (“Although the Debtors’ assets and investors are international, the facts before the Court suggest that the Debtors’ most feasible administrative ‘nerve center’ has existed for some time in the BVI. In the approximately 7 months between December 2008 and the commencement of the BVI Liquidation Proceedings, an independent litigation committee governed Sentry’s affairs. This committee was comprised of non-United States-based directors, and the majority of its administrative decision-making originated in the BVI.”) (citation omitted). In December 2008 Fairfield Sentry ceased its routine operations and preemptively began winding down the company in anticipation of litigation. *See In re Fairfield Sentry Ltd.*, No. 10 Civ. 7311, 2011 WL 4357421, at *1 (S.D.N.Y. Sept. 16, 2011).

⁷³ *In re Fairfield Sentry*, 440 B.R. at 64.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

as a review of the relevant factors places the COMI focus in the BVI for the pre- and post-liquidation periods.”⁷⁷

Accordingly, the bankruptcy court perhaps never intended its ruling to universally adopt the filing of the chapter 15 petition as the pertinent time for COMI analysis. Nevertheless, on appeal, the SDNY and later, the United States Court of Appeals for the Second Circuit (“Court of Appeals”) seized *In re Fairfield Sentry* as an opportunity to speak definitively on the majority-minority divergence on the temporality of COMI analysis in the Second Circuit.

D. *In re Fairfield Sentry* in the Court of Appeals for the Second Circuit

On appeal before the SDNY, appellants claimed that the bankruptcy court erred in considering Fairfield Sentry’s liquidation activities and that its prior eighteen years of operations in New York required a finding that New York was its COMI.⁷⁸ In contrast to its ruling in *In re Millennium Global*, the SDNY’s ruling in *In re Fairfield Sentry* addressed the appropriate temporality of COMI determinations.⁷⁹ The court held that “the Bankruptcy Court appropriately considered the time at and around Sentry’s Chapter 15 filing in determining Sentry’s COMI.”⁸⁰ The court then affirmed recognition of the BVI proceedings.⁸¹

Unlike the SDNY opinion, which did not reference the bankruptcy court’s application of the minority approach in *In re Millennium Global*, the Court of Appeals seized *In re Fairfield Sentry* as an opportunity to discuss the relative merits of the two approaches to temporality. It conclusively

⁷⁷ *Id.* at 63.

⁷⁸ *In re Fairfield Sentry Ltd.*, No. 10 Civ. 7311, 2011 WL 4357421, at *4 (S.D.N.Y. Sept. 16, 2011).

⁷⁹ *See id.* at *6. Interestingly, the SDNY opinion did not reference the bankruptcy court’s application of the minority approach to temporality in *In re Millennium Global* from the preceding month.

⁸⁰ *Id.*

⁸¹ *Id.* at *1.

adopted the majority approach as the universal standard for the Second Circuit.

In ruling for the majority approach, the Court of Appeals considered many of the same sources as the *In re Millennium Global* court—namely the text of chapter 15, international sources, and guidance from other federal courts.⁸² First, the Court of Appeals noted that the present tense of § 1517—a “foreign proceeding shall be recognized . . . if it *is pending* in the country where the debtor *has* the center of its main interests”—suggests a court should examine a debtor’s COMI at the time of the filing of the chapter 15 petition.⁸³ “A foreign proceeding ‘is pending’ only after it has been commenced. . . . [T]herefore, the filing date of the Chapter 15 petition should serve to anchor the COMI analysis.”⁸⁴

The Court of Appeals similarly dispensed with the *In re Millennium Global* court’s emphasis on the sources underlying chapter 15. While § 304 did provide for a debtor’s principal place of business to be determined at the time of the commencement of the foreign proceeding, the Court of Appeals noted that “Congress abandoned that provision in enacting Chapter 15.”⁸⁵ The Court of Appeals further noted that the drafters of chapter 15 deliberately selected the term “center of main interests” instead of incorporating the more familiar “principal place of business.” This indicated their intention that chapter 15 deviate from its predecessor.⁸⁶ Next, the Court of Appeals suggested that the *In re Millennium Global* court’s reference to the European Union Council Regulation enacting the Convention on Insolvency Proceedings was also inapposite. “Under the EU Regulation, a main insolvency proceeding in one EU member state is automatically recognized by all other EU member states. So

⁸² *In re Fairfield Sentry Ltd.*, 714 F.3d 127, 133 (2d Cir. 2013).

⁸³ *Id.* (citing 11 U.S.C. § 1517(b)(1)). While the *In re Millennium Global* court instead focused its analysis on § 1502, both provisions employ the same language.

⁸⁴ *In re Fairfield Sentry*, 714 F.3d at 134 (citation omitted).

⁸⁵ *Id.* at 135–36.

⁸⁶ *Id.* at 135.

the EU has no need for a recognition petition such as provided under Chapter 15.”⁸⁷ The court therefore concluded that “[a]lthough the EU Regulation might refer to a broader time frame for considering a debtor’s COMI, it is not a fit for construing Chapter 15.”⁸⁸ Finally, the court observed that “[n]early every federal court to address [the temporality question] has determined that COMI should be considered as of the time the Chapter 15 petition is filed.”⁸⁹

Accordingly, the Court of Appeals recognized the BVI proceedings, holding that COMI determinations should be made with reference to the time of the chapter 15 petition. However, given the uncertainties about whether the temporality of the COMI analysis would actually alter the outcomes in *In re Millennium Global* and *In re Fairfield Sentry*, the impact of the court’s opinion was not immediately felt. Ultimately, it was not until the following year, in *In re Suntech Power Holdings Co., Ltd.*, that a court’s COMI determination would confirm the significance of embracing the majority approach to temporality.⁹⁰

E. *In re Suntech*

In *In re Suntech*, liquidators of a holding company with worldwide subsidiaries involved in the solar panel industry sought recognition for a foreign proceeding pending in the Cayman Islands.⁹¹ While the debtor’s registered office was in the Cayman Islands, the debtor and its subsidiaries never conducted business there—rather, their operations were

⁸⁷ *Id.* at 136 (citation omitted).

⁸⁸ *Id.*

⁸⁹ *Id.* at 134–35 (citing *In re Ran*, 607 F.3d 1017, 1025 (5th Cir. 2010); *In re British Am. Isle of Venice (BVI), Ltd.*, 441 B.R. 713, 720–21 (Bankr. S.D. Fla. 2010); *In re British Am. Ins. Co.*, 425 B.R. 884, 909–10 (Bankr. S.D. Fla. 2010); *In re Betcorp Ltd.*, 400 B.R. 266, 290–92 (Bankr. D. Nev. 2009)).

⁹⁰ *In re Suntech Power Holdings Co., Ltd.*, 520 B.R. 399 (Bankr. S.D.N.Y. 2014).

⁹¹ *Id.* at 403–04.

centered in China.⁹² Thus, the court found that when the foreign proceeding commenced, the debtor's COMI was located in China, not the Cayman Islands.⁹³ Therefore, had the Court of Appeals adopted the *Millennium Global* approach and evaluated COMI at the time of the commencement of the foreign proceeding, the *Suntech* court would have rejected the debtor's petition for recognition of the Cayman proceeding.

However, following *In re Fairfield Sentry*, “[t]he issue to be decided . . . is the Debtor's COMI at the time of the commencement of the chapter 15 case. This comes down to whether the [liquidation activities in the Caymans] had the effect of transferring the COMI from Wuxi, China to the Cayman Islands.”⁹⁴ Ultimately, the court held that the liquidators had centralized administration of the foreign proceeding in the Caymans—they had changed the debtor's address on SEC filings, informed creditors to send notices to their offices, and conducted board meetings in the Caymans.⁹⁵ In short, during the period between commencement of the foreign proceeding and the filing of the chapter 15 petition, the debtor's COMI had shifted from China to the Cayman Islands.

Thus, while the significance of the temporality issue was uncertain in *In re Millennium Global* and *In re Fairfield Sentry*, *In re Suntech* presented a case where the Court of Appeals' adoption of the majority approach proved decisive. Under the minority approach, recognition of the Cayman proceeding would have been rejected; under the majority approach, it was granted. Accordingly, there is no longer any

⁹² *Id.* at 404–05 (“Aside from the Debtor, none of the Suntech Group is incorporated in the Cayman Islands, and none of the Suntech Group conducts business in the Cayman Islands. Moreover, it is undisputed that prior to the commencement of the Foreign Proceeding on November 5, 2013, the Debtor did not conduct business in the Cayman Islands and regularly listed the location of its principal executive offices . . . in China”).

⁹³ *Id.* at 416.

⁹⁴ *Id.* at 416–17.

⁹⁵ *Id.* at 418.

doubt about the temporality of COMI determinations in the Second Circuit. While the majority approach offers several benefits for recognition proceedings, it also risks potentially detrimental consequences.

F. Practical Benefits of the *In re Fairfield Sentry* Approach

Two of the principal purposes behind the adoption of chapter 15 were to bolster cooperation between the United States and foreign courts in cross-border insolvencies and to increase legal certainty for trade and investment.⁹⁶ The *In re Fairfield Sentry* ruling targets these goals by purporting to offer efficiency and consistency across recognition proceedings.

First, by including liquidation activities in reaching COMI determinations, the *In re Fairfield Sentry* approach increases the likelihood that foreign proceedings will be recognized. Given that a debtor's liquidation activities will logically be centered in the same jurisdiction as the foreign proceeding, including these activities in COMI determinations will almost always improve the prospects for recognition.⁹⁷ Increasing recognition of foreign proceedings—essentially easing access to U.S. courts—facilitates Congress' goal of bolstering international cooperation.⁹⁸

⁹⁶ 11 U.S.C. § 1501(a) (2012).

⁹⁷ As of 2013, courts have granted some form of recognition (main or non-main) in 96% of chapter 15 cases. Even counting cases that granted non-main recognition when the debtor sought main recognition as denial, main recognition was granted in 93% of cases. Jay Lawrence Westbrook, *An Empirical Study of the Implemental in the United States of the Model Law on Cross-Border Insolvency*, 87 AM. BANKR. L.J. 247, 254–55 (2013). Given the overwhelming popularity of the majority approach, there is insufficient data to compare the relative success rate of chapter 15 petitions for the majority approach compared to the minority approach. Accordingly, it is unclear to what extent near-universal adoption of the date of the filing of the chapter 15 as the appropriate period of COMI analysis has affected the recognition rate.

⁹⁸ Jay Lawrence Westbrook, *Bankruptcy Tourism*, 3 INT'L J. PROC. L. 159, 161 (2013) (“Territorialism dominated international bankruptcy law,

Furthermore, the *In re Fairfield Sentry* approach decreases the likelihood of courts declining foreign proceedings for technical reasons and potentially forcing debtors to launch costly duplicative proceedings in order to eventually obtain recognition.⁹⁹ For example, under the *In re Millennium Global* approach, if a debtor mistakenly commenced a foreign proceeding in an inappropriate jurisdiction, the debtor would not recognize its mistake until a U.S. court rejected its chapter 15 petition.¹⁰⁰ Since its COMI remained static from the time of commencement of the foreign proceeding, the debtor's liquidation activities would offer no refuge, and its only opportunity to obtain chapter 15 recognition would be to launch a new proceeding in its actual COMI.¹⁰¹ In contrast, under *In re Fairfield Sentry*, good faith mistakes are excused—a debtor essentially is given a second bite at the apple to shift its COMI to the jurisdiction of the foreign proceeding through its liquidation activities. In this sense, *In re Fairfield Sentry* offers the more efficient approach.

Second, the *In re Fairfield Sentry* decision purports to provide more consistency across courts than alternatives

with each country grabbing the local assets and distributing them to creditors who claimed locally In the last two decades or so scholars, practitioners, and courts have turned towards 'universalism,' which contemplates a single worldwide forum for bankruptcy administration of a given company or corporate group").

⁹⁹ See Reid & Swick, *supra* note 7, at 91 ("[F]ailing to recognize an established foreign proceeding would deny that proceeding access to U.S. courts and could compel a foreign liquidator to file a brand new proceeding in another jurisdiction to possibly obtain recognition in the future, likely costing creditors millions of dollars.").

¹⁰⁰ Such a mistake will often be tremendously costly to the debtor—and by extension—its creditors. See *In re Millennium Global Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 69 (Bankr. S.D.N.Y. 2011) ("BCP contends that the Bermuda liquidation proceedings in question, which have been pending in Bermuda for more than three years . . . and which have cost more than \$9 million in fees and expenses, are not entitled to recognition . . . because Bermuda is not the 'center of main interests' of either of the Funds. . . .").

¹⁰¹ See Reid & Swick, *supra* note 7, at 91.

such as looking at the debtor's operational history. Under alternative approaches,

there would be an increased likelihood of conflicting COMI determinations, as courts may tend to attach greater importance to activities in their own countries, or may simply weigh the evidence differently which may lead to the possibility of competing main proceedings, thus defeating the purpose of using the COMI construct.¹⁰²

In other words, by determining COMI at the time of the filing of the chapter 15 petition, the court avoids a potentially complicated inquiry into the debtor's operating history—the more extensive and complex the input into the COMI analysis, the more room for variation across courts.¹⁰³ Accordingly, simplifying the time period for the determination makes consistency across courts more feasible.

IV. PROBLEMS CREATED BY *IN RE FAIRFIELD SENTRY* AND TWO SOLUTIONS

A. Problems Created By *In re Fairfield Sentry*

Despite its purported benefits, *In re Fairfield Sentry* has created several critical problems for COMI analysis in the Second Circuit. By determining COMI at the time of the filing of the chapter 15 petition, the court paradoxically determines jurisdiction based on where a proceeding is filed, thus facilitating forum shopping and shattering the expectations of creditors. It is contradictory that a debtor can commence proceedings in a jurisdiction where it does not have its COMI on the grounds that the proceeding itself will establish the jurisdiction as appropriate. In a sense, this is much like a U.S. court determining that there is initially no

¹⁰² *In re Ran*, 607 F.3d 1017, 1025 (5th Cir. 2010).

¹⁰³ While this supports the desirability of the *In re Fairfield Sentry* approach over an inquiry into a debtor's entire operational history, it does not distinguish that approach from the *In re Millennium Global* approach.

personal jurisdiction over parties before the court, but that by commencing the proceeding, personal jurisdiction over the parties is established.¹⁰⁴ In this sense, under the *In re Fairfield Sentry* approach, COMI determinations are largely contrary to U.S. legal procedure.¹⁰⁵ Debtors are able to commence proceedings in inappropriate jurisdictions with the knowledge that they will still likely be recognized by U.S. courts.

Furthermore, by allowing debtors to lodge their COMI in another country by commencing a foreign proceeding and conducting liquidation activities, courts have increased the opportunity for forum shopping.¹⁰⁶ Unconstrained by their prior operational history, debtors are virtually free to launch insolvency proceedings in the country of their choice. Accordingly, debtors are incentivized to commence proceedings in haven jurisdictions most favorable to their interests.¹⁰⁷ This has created a sort of “bankruptcy tourism,”¹⁰⁸ with an increasing prevalence of “opaque proceedings on distant islands” where debtors had little or no

¹⁰⁴ See Westbrook, *supra* note 3, at 186 (“[F]inding that a company that had ceased to do business could file in its haven jurisdiction and after a year could claim that legal proceeding as its center of main interests . . . is about the same as saying that the place of a tort claim for choice-of-law purposes is the court where the negligence suit has been brought.”).

¹⁰⁵ Given how narrowly courts have interpreted chapter 15’s “contrary to public policy” exception, it is not a viable avenue for voiding the *In re Fairfield Sentry* determination. See *supra* note 8.

¹⁰⁶ See *In re Millennium Global Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 75 (Bankr. S.D.N.Y. 2011) (“Use of the chapter 15 petition date as the date for determining recognition also leads to the possibility of forum shopping, as it gives *prima facie* recognition to a change of residence between the date of opening proceedings in the foreign nation and the chapter 15 petition date.”).

¹⁰⁷ See Westbrook, *supra* note 3, at 185, 185 n.37 (“Sadly, the haven jurisdictions, where insolvencies proceed beyond the range of the radar and beyond the reach of most lawyers, are working their way into recognition under Chapter 15. . . . By a haven jurisdiction, I mean one only formally connected with the company and its business. Typically these jurisdictions are also identified as tax havens.”).

¹⁰⁸ See Westbrook, *supra* note 98, at 166.

prior operations.¹⁰⁹ While courts may take precautions against such manipulation of COMI, such precautions increase the difficulty of COMI analysis, and no court has yet put forward workable safeguards.¹¹⁰

In this manner, the *In re Fairfield Sentry* ruling also conflicts with the Court of Appeals' decision in *In re Bear Stearns*. As previously discussed, in *In re Bear Stearns* the Second Circuit prohibited recognition of "letterbox" proceedings—COMI may not be established through mere formalities.¹¹¹ However, under *In re Fairfield Sentry*, companies are able to establish letterbox outposts as their COMI by commencing insolvency proceedings in that jurisdiction. At best, *In re Fairfield Sentry* has created a massive loophole in the *In re Bear Stearns* rule by narrowing "letterbox" inquiries to the time of liquidation activities; at worst, it directly conflicts with the decision, granting debtors near certainty that U.S. courts will recognize their letterbox proceedings.¹¹²

¹⁰⁹ Westbrook, *supra* note 3, at 186 ("[T]he trend toward recognition of opaque proceedings on distant islands is disturbing.").

¹¹⁰ See *In re Fairfield Sentry Ltd.*, 440 B.R. 60, 65 (Bankr. S.D.N.Y. 2010) ("In any proceeding for foreign recognition, of great concern to the Court is the potential for mischief and COMI manipulation"); *In re Ran*, 607 F.3d 1017, 1026 (5th Cir. 2010) (explaining how a foreign proceeding brought immediately after a party's arrival in that country following a long period of domicile in another country would raise concerns about fraudulent manipulation of COMI). Part IV.B of this Note will discuss the most widespread tactic courts have employed to prevent manipulation: bad faith COMI manipulation tests. As will be discussed in greater detail, this mechanism has serious flaws, limiting its effectiveness.

¹¹¹ See *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 129–30 (Bankr. S.D.N.Y. 2007).

¹¹² See Westbrook, *supra* note 3, at 185–86 ("The *Bear Stearns* case excluded [haven jurisdictions] from recognition as any sort of foreign proceeding for Chapter 15 purposes unless they had a real connection with the debtor company, rather than merely a formal one. More recently, however, [*In re Fairfield Sentry*] created a substantial loophole in that rule by finding that a company that had ceased to do business could file in its haven jurisdiction and after a year could claim that legal proceeding as its center of main interests"). In this sense, *In re Bear Stearns* remains

In addition to forum shopping, the *In re Fairfield Sentry* approach is problematic because it renders COMI unascertainable to third parties throughout the life of the debtor company.¹¹³ “The presumption is that creditors will look to the law of the jurisdiction in which they perceive the debtor to be operating to resolve any difficulties they have with that debtor, regardless of whether such resolution is informal, administrative, or judicial.”¹¹⁴ In other words, when structuring their relationships with debtors, third parties presumably take into account a possible future insolvency proceeding’s jurisdiction. However, courts refuse to appraise a debtor’s operational history when making COMI determinations. Accordingly, third parties cannot predict the location of a company’s COMI in the event of a future insolvency through reliance on a company’s activity level at the time of agreement. Furthermore, under *In re Fairfield Sentry*, even at the commencement of a foreign insolvency proceeding, creditors cannot ascertain whether the proceeding will be recognized by U.S. courts, as liquidation activities may ultimately lodge the debtor’s COMI in another jurisdiction. In this way, it is nearly

meaningful only to the extent that liquidation activities resemble a letterbox proceeding. For example, companies may launch proceedings in jurisdictions where they merely have a “letterbox” so long as tangible liquidation activities actually occur in that location. However, if a company only formalistically shifts its liquidation activities to the letterbox jurisdiction, and is actually operating and making decisions elsewhere, *In re Bear Stearns* might require denial of recognition. But, given the relative ease of avoiding this scenario—i.e., holding meetings and centering liquidation activities where the liquidation is actually occurring—*In re Bear Stearns* now seems unlikely to ever block recognition efforts of sophisticated parties.

¹¹³ Courts have frequently mentioned that rendering COMI ascertainable to third parties is one of the foremost considerations of COMI analysis. *In re Ran*, 607 F.3d at 1025 (“[I]t is important that the debtor’s COMI be ascertainable by third parties.”). See *In re Fairfield Sentry Ltd.*, 714 F.3d 127, 130 (2d Cir. 2013) (“The relevant principle . . . is that the COMI lies where the debtor conducts its regular business, so that the place is ascertainable by third parties.”).

¹¹⁴ *In re Betcorp Ltd.*, 400 B.R. 266, 291 (Bankr. D. Nev. 2009).

impossible for third parties to fully ascertain their rights until the U.S. court rules on the debtor's chapter 15 petition.

Accordingly, despite its progress toward standardizing COMI analyses and increasing foreign cooperation, the *In re Fairfield Sentry* decision has created significant problems that undermine many of the central purposes of chapter 15. Going forward, the Second Circuit should affirmatively mitigate forum shopping and simplify COMI analysis for third parties. The subsequent sections propose mechanisms that the Second Circuit might implement to render the *In re Fairfield Sentry* approach more workable and harmonious with the underlying purposes of chapter 15.

B. Solution One: Bad Faith COMI Manipulation Tests

The most common mechanism adopted by courts to temper the pitfalls of *In re Fairfield Sentry* has been a COMI manipulation test.¹¹⁵ Under this test, courts conduct an inquiry into potential manipulation of a debtor's COMI when there is evidence of an improper opportunistic shift.¹¹⁶ Unfortunately, the parameters of such a test have been left largely undefined.

Upon adopting the majority approach to COMI temporality in *In re Fairfield Sentry*, the Court of Appeals acknowledged the potential for COMI manipulation in the period between the commencement of the foreign proceeding and the filing of the chapter 15 petition.¹¹⁷ Accordingly, the court expressed a willingness to expand its analysis beyond the time of the chapter 15 petition to protect against untoward manipulation. “To offset a debtor's ability to manipulate its COMI, a court may also look at the time period between the initiation of the foreign liquidation

¹¹⁵ See *In re Fairfield Sentry*, 714 F.3d at 137; *In re Suntech Power Holdings Co., Ltd.*, 520 B.R. 399, 419–20 (Bankr. S.D.N.Y. 2014).

¹¹⁶ See *In re Fairfield Sentry Ltd.*, 440 B.R. 60, 65–66 (Bankr. S.D.N.Y. 2010).

¹¹⁷ *In re Fairfield Sentry*, 714 F.3d at 130 (“[T]he relevant time period is the time of the Chapter 15 petition, subject to an inquiry into whether the process has been manipulated.”).

proceeding and the filing of the Chapter 15 petition.”¹¹⁸ In this sense, though still unwilling to look at the debtor’s entire operational history, the Second Circuit will analyze the debtor’s liquidation activities for any bad faith or fraudulent behavior.¹¹⁹

While manipulation tests purport to provide a safeguard against improper COMI shifts, their parameters are vague, rendering their effectiveness unclear. The Second Circuit has left unclear what circumstances will trigger a manipulation inquiry. Whereas the *In re Fairfield Sentry* bankruptcy court suggested courts will examine a broader time period when “there may have been an opportunistic shift to establish COMI,” the Court of Appeals did not employ such a qualification.¹²⁰ In this sense, it is ambiguous as to whether there is an evidentiary threshold that must be met before courts will examine a broader temporality for manipulation.

Similarly, the Second Circuit has not explicated “bad faith” in the COMI manipulation context. In *In re Fairfield Sentry*, the bankruptcy court listed “insider exploitation, untoward manipulation, [and] overt thwarting of third party expectations” as examples of improper shifting of COMI.¹²¹ However, the court did not offer any further explanation. In *In re Suntech*, the Bankruptcy Court for the Southern District of New York offered the most intensive factual analysis of COMI manipulation in the Second Circuit. There, liquidators’ activities—transferring stock certificates, shareholder registries, and statutory records to offices in the Caymans, opening the debtor’s only Cayman bank account solely for payment of professional fees, appointing a director

¹¹⁸ *Id.* at 133. See also *In re Fairfield Sentry*, 440 B.R. at 66 (“The jurisprudence emerging from [other] courts does not preclude looking into a broader temporal COMI assessment where there may have been an opportunistic shift to establish COMI . . .”).

¹¹⁹ *In re Fairfield Sentry*, 714 F.3d at 138.

¹²⁰ *Id.* at 130 (“We conclude . . . that the relevant time period is the time of the Chapter 15 petition, subject to an inquiry into whether the process has been manipulated.”).

¹²¹ *In re Fairfield Sentry*, 440 B.R. at 66 (citations omitted).

who resides in the Cayman Islands, and holding one board meeting in the Caymans—did not qualify as manipulation.¹²² These activities were valid because they were consistent with the liquidators’ duties, served a legitimate business purpose, and were convenient.¹²³ Furthermore, the court found that the liquidators “would have taken these actions even if they had never intended to file a chapter 15 case.”¹²⁴

On the other hand, the *In re Suntech* court suggested that a liquidator’s statements to the newly-appointed Cayman director that a resident Cayman Islands board member might be beneficial in securing chapter 15 recognition were evidence of manipulation.¹²⁵ However, because the debtor’s COMI had been lodged in the Caymans even excluding the appointment of the Cayman director, the court did not further discuss the liquidator’s potential manipulation and upheld recognition.¹²⁶ In this sense, *In re Suntech* offers some evidence that a direct statement by the debtor’s agent that certain liquidation activities were conducted to improve the prospects of chapter 15 recognition—if these activities later proved decisive in the court’s recognition decision—is sufficient evidence of COMI manipulation. However, given that appointment of the Cayman director was superfluous to the court’s recognition of the foreign proceedings, such an inference is inconclusive.

COMI manipulation tests face several shortcomings as a viable means for controlling forum shopping and improving third-party ascertainment in the aftermath of *In re Fairfield Sentry*. First, without explicit guidelines and criteria for manipulation, it is unpredictable when a court in the Second Circuit might find ample evidence of manipulation. Further, it is unclear what evidentiary burden objectants must carry to trigger manipulation analysis. Accordingly, the first step

¹²² *In re Suntech Power Holdings Co., Ltd.*, 520 B.R. 399, 419–20 (Bankr. S.D.N.Y. 2014).

¹²³ *Id.*

¹²⁴ *Id.* at 420.

¹²⁵ *Id.*

¹²⁶ *Id.*

for courts is to establish definitive guidelines for when to undertake a COMI manipulation analysis and what criteria must be met to establish bad faith. Given the difficulty of proving subjective bad faith—it likely requires statements by actors about their improper motivations as in *In re Suntech*—manipulation tests can only be effective if courts set a low threshold for objectants.

Whenever an objectant sufficiently alleges that a debtor's COMI shifted between the time of the commencement of the foreign proceeding and the filing of the chapter 15 petition, it should be sufficient to trigger the court's broader temporal analysis.¹²⁷ Furthermore, once it is established that the debtor's COMI shifted, the debtor should have the burden of demonstrating it was not improperly manipulated.¹²⁸ This construction is logical since the debtors or liquidators themselves are likely to be the party in the best position to present evidence about the intentions and motivations behind their liquidation activities. In this manner, manipulation analysis would reflect COMI analysis, where

¹²⁷ The Fifth Circuit Court of Appeals suggested something to this effect in *In re Ran*. In that case, the court rejected manipulation allegations where the debtor's COMI had shifted over a decade earlier. However, the court stated that “[a] similar case brought immediately after the party's arrival in the United States following a long period of domicile in the country where the bankruptcy is pending would likely lead to a different result.” *In re Ran*, 607 F.3d 1017, 1026 (5th Cir. 2010).

¹²⁸ While the Second Circuit does not explicitly place the burden of proving manipulation on objectants, it appears they currently bear the burden. See *In re Fairfield Sentry Ltd.*, 714 F.3d 127, 137–39 (“[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.”). In this sense, courts have the option of conducting a bad faith manipulation analysis if there is sufficient evidence. In contrast, a bad faith manipulation test would be more strenuous if the debtor had the burden to prove that there was no bad faith *whenever* the debtor's COMI was altered via liquidation activities.

the party seeking recognition has the burden of proving its COMI.¹²⁹

While these suggestions will make manipulation tests more workable for objectants, they still have many shortcomings in addressing the challenges created by *In re Fairfield Sentry*. First, it remains difficult to acquire evidence about parties' subjective intent—such as the statement in *In re Suntech*. Accordingly, even if the burden is shifted to the party seeking recognition to prove they did not improperly manipulate COMI, it is unclear whether manipulation tests will prove a sufficient mechanism to constrain forum shopping. Furthermore, such tests—because like COMI determinations they are made at the time of the recognition proceeding—do nothing to increase the ascertainability of COMI throughout the life of the debtor company. Not only will creditors have to wait until a debtor's liquidation activities before ascertaining whether a foreign proceeding will ultimately be recognized—they would also need to acquire sufficient information to determine whether these activities improperly manipulated COMI. Finally, manipulation tests do not solve the inefficiency problem of determining the validity of foreign proceedings well after they have commenced. If a party is found to have manipulated its COMI, the proceedings will not be recognized, and the debtors may need to launch costly duplicative proceedings in the proper jurisdiction.

C. Solution Two: COMI Selection Clauses

Given the shortcomings of manipulation tests, it may be more productive to take a disparate approach to managing the problems created by *In re Fairfield Sentry*: rather than directly confronting them, manage them. In this vein, one potent solution to the problems created by *In re Fairfield*

¹²⁹ See H.R. REP. NO. 109-31, pt. 1, at 112–13 (2005) (emphasizing that despite the § 1516 presumption that the location of the debtor's registered office is the location of its COMI, the burden remained on the debtor's foreign representative to prove the location of its COMI).

Sentry is requiring—or at least allowing—companies to adopt “COMI selection clauses” in their charters or agreements with creditors. Under such a regime, companies would explicitly designate in their documents the location of their COMI—for chapter 15 purposes, the potential debtor acknowledges that U.S. courts should only recognize a foreign proceeding launched in that jurisdiction. In this manner, COMI selection clauses are somewhat reminiscent of forum selection clauses in the United States.¹³⁰ However, while forum selection clauses designate the jurisdiction where plaintiffs must bring claims against a company, COMI selection clauses would bind both the debtor and its creditors to launching foreign insolvency proceedings in the specified country.

The foremost benefit of COMI selection clauses is rendering COMI ascertainable to third parties at all times throughout a company’s life. By forcing companies to explicitly state their COMI in their charters or agreements with third parties, potential creditors will always know where the debtor must commence foreign insolvency proceedings to gain recognition by U.S. courts. Thus, third parties will be able to ascertain their rights in a potential future insolvency and incorporate this knowledge into their interactions with the debtor.

Furthermore, COMI selection clauses neutralize the necessity of determining proper jurisdiction after the foreign proceeding has already progressed. Under chapter 15, recognition proceedings often occur many years after a foreign proceeding has commenced.¹³¹ Accordingly, if the petition is denied, the debtor will need to commence

¹³⁰ For the most prominent case upholding the validity of forum selection clauses, see *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

¹³¹ See *In re Millennium Global Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 69 (Bankr. S.D.N.Y. 2011) (“BCP contends that the Bermuda liquidation proceedings in question, which have been pending in Bermuda for more than three years . . . and which have cost more than \$9 million in fees and expenses, are not entitled to recognition . . .”).

duplicate proceedings in the appropriate jurisdiction to gain recognition—creating substantial risk of inefficiency and financial waste.¹³² In contrast, by endorsing COMI selection clauses, the jurisdiction question—for recognition purposes—would already be decided before commencing the foreign proceeding.¹³³

Under this proposal, in contrast to *In re Fairfield Sentry*, interested third parties would be able to foretell the outcome of a future chapter 15 filing without the uncertainty of knowing whether liquidation activities might shift the debtor's COMI. In this manner, they will be able to evaluate their rights and definitively react to the debtor's insolvency at an earlier date. Accordingly, implementing COMI selection clauses would both improve efficiency and increase ascertainment by third parties.

At first glance, COMI selection clauses appear to clash with the *In re Bear Stearns* holding that COMI determinations should not be based on mere formalities such as the location of a debtor's registered office.¹³⁴ After all, a COMI selection clause seems to be a mere formality, ungrounded in any of the debtor's actual operations. However, this critique does not condemn such clauses. On one hand, as previously mentioned, *In re Fairfield Sentry* has already created a loophole largely obliterating the significance of *In re Bear Stearns*, suggesting that—even if COMI selection clauses do conflict with the decision—the

¹³² *Id.* See also Reid & Swick, *supra* note 7, at 91 (“[F]ailing to recognize an established foreign proceeding would deny that proceeding access to U.S. courts and could compel a foreign liquidator to file a brand new proceeding in another jurisdiction to possibly obtain recognition in the future, likely costing creditors millions of dollars.”).

¹³³ This is also desirable from the standpoint of cooperation since there should be fewer instances of declining recognition as long as parties commence proceedings in jurisdiction specified in the COMI selection clause. Of course, there is a risk that a proceeding, otherwise valid under current law, would not be recognized because the COMI selection clause specifies a different jurisdiction.

¹³⁴ See *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 129 n.8 (Bankr. S.D.N.Y. 2007).

Court of Appeals may be willing to endorse another loophole.¹³⁵ Alternatively, the clauses may be viewed as a commitment that the debtor will lodge its COMI in the specified jurisdiction at the time of its insolvency—in a sense fitting under the *In re Fairfield Sentry* umbrella and not necessitating an additional loophole to *In re Bear Stearns*. Under *In re Fairfield Sentry*, a debtor's liquidation activities can lodge COMI in the country of the foreign jurisdiction despite the absence of any prior operations. In other words, without the COMI selection clause, the debtor could lodge its COMI in the location of the foreign proceeding merely through its liquidation activities. In this sense, the clause merely expedites the inevitable, eliminating the often multi-year charade of lodging COMI in the new jurisdiction.¹³⁶ Accordingly, COMI selection clauses are temporally efficient and are grounded in substantive operations—the debtor's future liquidation activities—as required by *In re Bear Stearns*.¹³⁷

Similarly, COMI selection clauses superficially appear to render *In re Fairfield Sentry* superfluous. After all, a debtor's COMI would be established at the time of the clause's inclusion in its charter or in agreements with third parties, not at the time of the filing of the chapter 15 petition.

¹³⁵ See Westbrook, *supra* note 3, at 186 (“[*In re Fairfield Sentry*] created a substantial loophole in [*In re Bear Stearns*] by finding that a company that had ceased to do business could file in its haven jurisdiction and after a year could claim that legal proceeding as its center of main interests . . .”).

¹³⁶ See *In re Suntech Power Holdings Co., Ltd.*, 520 B.R. 399, 416–19 (Bankr. S.D.N.Y. 2014). The debtor's COMI was located in China at the commencement of the foreign proceeding. Nevertheless, the debtor commenced a foreign proceeding in the Cayman Islands. Liquidation activities had the effect of transferring the debtor's COMI from China to the Cayman Islands by the time of the filing of the chapter 15 petition. In this sense, rather than having to wait for the liquidation activities to reestablish the COMI, a forum selection clause would have immediately validated the foreign proceeding. In this way, COMI selections clauses actually eliminate a formality.

¹³⁷ See generally *In re Bear Stearns*, 374 B.R. at 122.

However, the decision to evaluate COMI at the time of the filing of the chapter 15 petition rather than at the time of the commencement of the foreign proceeding remains meaningful. Assuming COMI selection clauses can be altered, the latter determination date endorsed in *In re Fairfield Sentry* might still result in lodging COMI in a different jurisdiction at the time of the chapter 15 filing than it would have at the commencement of the foreign proceeding.¹³⁸ For example, assume that at the time of the commencement of the foreign proceeding, the debtor's agreements with creditors specify a particular COMI. Under *In re Fairfield Sentry*, a debtor would still be able to validly alter its COMI selection clause, with creditor approval, after the commencement of foreign proceedings. Thus, its COMI could foreseeably shift during its liquidation activities and be different at the time of the filing of the chapter 15 petition. In contrast, the *In re Millennium Global* approach would invalidate such a shift—the debtor's COMI would have become static at the commencement of the foreign proceeding. Accordingly, COMI selection clauses would not render *In re Fairfield Sentry* superfluous.

A more substantial weakness in the COMI selection clause solution is its inability to eradicate forum shopping.¹³⁹

¹³⁸ Courts would need to adopt criteria for allowing companies to alter COMI selection clauses to avoid the same problems with forum shopping and unpredictability that the clauses are designed to mitigate. Presumably, some proportion of interested parties would need to consent to alterations.

¹³⁹ In fact, an inquiry into operational history would be more likely to eliminate forum shopping by examining the entire life of the company to determine its COMI. Presumably, this would make opportunistic shifts easier to identify. That said, it gives rise to problems of inefficiency and has been unanimously rejected by courts. *See In re Ran*, 607 F.3d 1017, 1025 (5th Cir. 2010) (“If we were to assess COMI by focusing upon . . . operational history, there would be an increased likelihood of conflicting COMI determinations In fact, a meandering and never-ending inquiry into the debtor's past interests could lead to a denial of recognition in a country where a debtor's interests are truly centered, merely because he conducted past activities in a country at some point well before the petition for recognition was sought.”).

In fact, by allowing companies to designate their COMI, such clauses will almost certainly result in debtors targeting the haven jurisdictions most favorable to their position.¹⁴⁰ However, this shortcoming is balanced against the tremendous increase in predictability created by forcing companies to designate these jurisdictions long before entering insolvency. While refuge to haven jurisdictions will improve the position of debtors in the insolvency proceedings, by including these clauses in the debtor's charter or agreements with third parties, creditors will be able to ascertain their rights up front—any increased risks will be included in their calculations and be reflected in pricing. In this sense, while not eliminating forum shopping, COMI selection clauses offer the best solution to mitigating its effects.¹⁴¹

Finally, another possible challenge to COMI selection clauses is lodged in the debate between the public and private nature of insolvencies.¹⁴² If bankruptcy law has primarily private purposes, “it would be perfectly acceptable to have the parties contract for the effects of financial difficulty and the methods of its resolution.”¹⁴³ COMI selection clauses are a private solution, emphasizing the

¹⁴⁰ Courts have granted chapter 15 recognition in about 96% of the cases filed. Westbrook, *supra* note 97, at 254. However, 63% of the rejected petitions came from haven jurisdictions. *Id.* at 255. While the rate of recognition of these proceedings would increase under a COMI selection clause scheme, the ultimate jurisdiction of a company's future insolvency would be far more ascertainable to potential creditors at the time of entering an agreement.

¹⁴¹ Third parties entering into agreements with companies designating their COMI in haven jurisdictions would have to determine whether, and at what price, to make a deal that includes a haven jurisdiction as the COMI.

¹⁴² See Westbrook, *supra* note 98, at 169 (“The larger question is whether there is a public interest in bankruptcy law or merely a conglomeration of private ones.”). There is an extensive debate on the public-private nature of insolvency but it is beyond the scope of this Note.

¹⁴³ *Id.*

importance of contractual arrangements.¹⁴⁴ In contrast, if there is a substantial public interest in bankruptcy, it may be more desirable to leave more power in the hands of courts to restrain private actors.¹⁴⁵

In this sense, COMI selection clauses may grant too much power to private actors to shape insolvency proceedings. However, in extreme instances of private actions overwhelming public interest, recognition proceedings would remain subject to chapter 15's public policy exception.¹⁴⁶ In this sense, chapter 15 already has a built-in mechanism to constrain the ability of COMI selection clauses to threaten the public good.

In sum, COMI selection clauses offer a viable means to improve the efficiency, cooperation, and ascertainment of foreign proceedings within the framework of chapter 15 and in compliance with the *In re Fairfield Sentry* and *In re Bear Stearns* rulings. While not eliminating forum shopping, they

¹⁴⁴ If COMI selection clauses are included in contractual agreements, this solution clearly functions as a private solution between the company and third parties. Similarly, if COMI selection clauses are included in a company's charter, this solution assumes parties will take them into account in structuring contractual arrangements. For either method of COMI selection clauses to prove successful, the burden is placed largely on private actors.

¹⁴⁵ See Westbrook, *supra* note 98, at 170 (“[I]t is self-evident that bankruptcy has public purposes that go beyond the needs of the direct stakeholders in the economic entity that is in financial difficulty. To pick the obvious example, the community has an interest in employment that is more extensive than the immediate interests of employees that might be displaced. That displacement may cripple the economy of an entire community and might have a domino effect on other businesses in that community.”).

¹⁴⁶ Recognition is subject to § 1506, which allows courts to refuse to take any action governed by chapter 15 if that action would be manifestly contrary to the public policy of the United States. 11 U.S.C. § 1506 (2012). However, § 1506 has been read extremely narrowly and rarely will factor into recognition analysis. See 11 U.S.C. § 1517 (2012); *In re Fairfield Sentry Ltd.*, 714 F.3d 127, 139 (2d Cir. 2013) (“The statutory wording requires a narrow reading. Section 1506 does not create an exception for any action under Chapter 15 that may conflict with public policy, but only an action that is ‘manifestly contrary.’”).

offer a means of diminishing its impact on creditors. Despite these benefits, COMI selection clauses may pose a threat to the balance between private and public involvement in insolvency proceedings. Furthermore, they raise numerous questions that must be answered by Congress or courts to ensure their proper function—including whether selection clauses would be adopted via charter or at the time of contractual agreements, whether they would be mandatory or optional for all companies, and what mechanisms to implement for altering clauses once they are incorporated.¹⁴⁷

V. CONCLUSION

In sum, the Court of Appeals ruling in *In re Fairfield Sentry* that a debtor's COMI is determined at the time of the filing of the chapter 15 has significant ramifications for recognition proceedings in the Second Circuit. The decision significantly increases the likelihood of forum shopping and renders it nearly impossible for creditors to ascertain a debtor's COMI throughout the life of a company. For this reason, it is crucial for courts in the Second Circuit to adopt procedures to mitigate the negative repercussions of *In re Fairfield Sentry*. Though inquiries into a debtor's operational history and potential bad faith manipulation directly target forum shopping, these mechanisms have proven largely unworkable in courts. Accordingly, an approach such as requiring companies to adopt COMI selection clauses designed to manage the negative consequences of *In re Fairfield Sentry*, rather than directly oppose them, may be more desirable. By rendering companies' COMI ascertainable to third parties at the time they enter into agreements, COMI selection clauses provide the best

¹⁴⁷ Presumably, interested parties would have to agree to shift from the COMI selected in the clause. However, there are many questions that would need to be answered before a COMI selection clause scheme could function effectively. Who qualifies as an interested party? Must such votes be unanimous or just a certain percentage of voters? Must courts approve shifts?

mechanism for allowing potential creditors to mitigate the risks of forum shopping.