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# Chapter 15 and COMI Migration: A Proposal to Petition Congress to Codify Well-Settled Law

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# Chapter 15: Seeking Recognition of Foreign Insolvency within the United States

- The representative of a foreign debtor may file a petition in a U.S. bankruptcy court seeking "recognition" of a "foreign proceeding." 11 U.S.C. § 1515.
- Foreign Representative: Defined as "A person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding." 11 U.S.C. § 101(24).
- Foreign Proceeding: "A collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation." 11 U.S.C. § 101(23)

# Foreign Main vs. Foreign Nonmain Proceeding

- More than one foreign proceeding may be pending with respect to the same foreign debtor in different countries.
  - Foreign Main Proceeding: a foreign proceeding “pending in the country where the debtor **has** the center of its main interests”;
  - Foreign Nonmain Proceeding: “if the debtor **has** an establishment (non-transitory economic activity) ... in the foreign country where the proceeding is pending”

11 U.S.C. § 1517(b)

## Center of Main Interests (COMI)

- Center of Main Interests is undefined in the Bankruptcy Code.
- But there is a presumption that the foreign debtor's "registered office, or habitual residence in the case of an individual, is presumed to be" the foreign debtor's COMI. 11 U.S.C. § 1516(c)
- There is no presumption in the Bankruptcy Code concerning what qualifies as "nontransitory economic activity" for purposes of determining a foreign debtor's establishment. See *In re British Am. Ins. Co.*, 425 B.R. 884 (Bankr. S.D. Fla. 2010).

## Center of Main Interests (COMI)

Often-used factors in determining COMI for a foreign debtor:

- Location of Debtor's business operations and headquarters (Debtor's "nerve center");
- Location of Debtor's managers and employees;
- Location of Debtor's assets; and
- Location of Debtor's creditors

# COMI Migration

- However, Courts have found that a foreign debtor's COMI may shift over time due to the existence of a foreign proceeding. See *Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127 (2d Cir. 2013). ("[R]egularity and ascertainability" are relevant to the determination of COMI)
- Sometimes referred to as "COMI migration" where the nerve center of the foreign debtor shifts to the location of the insolvency proceeding due to the activities of the debtor's liquidators.
- *Fairfield Sentry*: Leading case on COMI migration. Due to the present tense of Section 1517 ("has the center of its main interests"), COMI is to be decided as of the chapter 15 petition date, rather than commencement of the foreign proceeding. This is well-settled law at this point. *Lavie v. Ran (In re Ran)*, 607 F.3d 1017 (5th Cir. 2010).

## Why Is This Important?

Upon recognition of a foreign main proceeding, certain Bankruptcy Code protections are automatically triggered (11 U.S.C. § 1520(a)):

- Automatic stay as to all the foreign debtor and its assets within the territorial jurisdiction of the United States;
  - Section 363 and bankruptcy sale protections;
  - Continuance of business operations; and
  - The foreign representatives obtain certain of the benefits of a bankruptcy trustee
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- In a foreign nonmain proceeding, the above relief is discretionary, and only granted if “the court [is] satisfied that the relief relates to assets that, under the law of the United States, should be administered in the foreign nonmain proceeding or concerns information required in that proceeding.”

# National Bankruptcy Conference Proposal

- The NBC has petitioned Congress to amend the language of Chapter 15, so that it is clear that the COMI analysis is limited in time to the commencement of the foreign insolvency proceeding, effectively overruling the well-settled law that COMI migration is possible.
- NBC cites to legislative history of the UNCITRAL Model Code that the drafters did not intend for liquidation proceedings to factor into the COMI analysis
- Blames the U.S. legal system's overreliance on "plain meaning" statutory interpretation as to why cases such as *Fairfield Sentry* do not follow legislative intent



# Proposal for Consideration

- The NBC proposal has already received significant pushback. See December 2, 2019 letter from the American College of Bankruptcy.
- Proposal for the Committee: draft a more in-depth letter as to why COMI Migration is good law, from both a legal and practical perspective. Petition Congress to amend Chapter 15 Consistent with the *Fairfield Sentry* holding:
  - "[R]egularity and ascertainability" are relevant to the determination of COMI
  - Liquidators are fiduciaries often tasked with managing the foreign debtor's affairs for multi-year engagements
  - A foreign insolvency proceeding is a "collective judicial proceeding" a collection of the assets and liabilities of a debtor in a single forum. Of course the existence of a foreign insolvency proceeding would factor into the COMI analysis
  - As detailed in *Fairfield Sentry*, any allegations of COMI manipulation can be addressed by the trier of fact

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