THE JETSETTER'S GUIDE TO BANKRUPTCY: CHAPTER 15 AND RECOGNITION AS A FOREIGN MAIN PROCEEDING FOR INDIVIDUAL DEBTORS

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I. INTRODUCTION

It is no secret that millionaires and billionaires occasionally file bankruptcy. But how should the average billionaire get the most out of their bankruptcy? The debtor should consider taking a trip to a country with forgiving bankruptcy laws, settling down and establishing themselves as a member of the community during their vacation, filing bankruptcy, and then enforcing that bankruptcy discharge in the debtor's home country. In this way an individual debtor can discharge their unsecured debts, but also continue to live the high life. Compare, for instance, the bankruptcy of Sean Quinn, revered Irish entrepreneur

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and formerly the world's 164th richest person, with Paul Kemsley, vice chairman of the Trottenham soccer club. Sean Quinn decided to stay in Ireland when he filed bankruptcy, and will now have to wait about 12 years to receive a discharge due to the Irish bankruptcy system.[1] On the other hand, Paul Kemsley decided to take his bankruptcy on the road by moving to the United States, staying in high-rises in New York City and luxury homes in Los Angles. Kemsley's debts have been discharged, but Sean Quinn is still waiting.[2] With the help of Chapter 15 of the U.S. Bankruptcy Code, millionaires and billionaires can get the most out of bankruptcy.

Although built for corporations, individuals (also referred to in the literature as consumers, personal insolvencies, non-traders, or natural persons) are eligible for Chapter 15 relief.[3] After all, there are a handful of rich international jetsetters, some with balance sheets comparable to individual nations,[4] who may require bankruptcy relief in more than a single country. For individuals with assets scattered across the globe, including in the United States, it is understandable that they would want to have a foreign insolvency recognized in the United States, which is where Chapter 15 of the Bankruptcy Code comes into the picture. To receive the full range of tools offered to a typical U.S. debtor, a foreign debtor needs to be granted foreign main recognition[5] rather than the discretionary relief of being granted foreign non-main recognition.[6] Thus, the "center of main interest" (COMI) requirement for foreign main recognition carries special importance for a hopeful Chapter 15 debtor.[7]

However, courts have adopted differing approaches in applying Chapter 15 to individuals;[8] judges have disagreed over the relevant factors for the COMI requirement, as well as on the relevant timeframe for the COMI determination.[9] The Fifth Circuit in *In re Ran* allowed the introduction of testimony of a debtor's subjective intent to influence the COMI analysis and held that the relevant time frame for determining a debtor's COMI is the petition for recognition.[10] On the other hand, the District Court for the Southern District of New York in *In re Kemsley* disallowed introduction of a debtor's subjective intent, holding that the

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[1] Edwin Durgy, *Former Billionaire Declares Personal Bankruptcy*, FORBES (Nov. 11, 2011, 2:03 PM), http://www.forbes.com/sites/edwindurgy/2011/11/11/former-billionaire-declares-personal-bankruptcy/#1156a3fb1c4d.

[2] Barclays Bank PLC v. Kemsley, 992 N.Y.S.2d 602, 603-04 (N.Y. Sup. Ct. 2014)

[3] *See infra* Part II.C.

[4] Keren Blankfeld, *Countries Billionaires Could Buy*, FORBES (Sep. 30, 2009, 6:00 PM), http://www.forbes.com/2009/09/29/forbes-400-gates-dell-walton-charney-rich-list-09-billionaires-vs-world.html.

[5] *See infra* notes 35-50 and accompanying text.

[6] *See infra* Parts III.A; *see also* Douglas E. Deutsch & Francisco Vazquez, *Introduction to Recognition Under Chapter 15*, AM. BANKR. INST. J. 46, 2010.

[7] *See infra* Part II.B.

[8] *See infra* Part III.A.

[9] *See infra* Part III.A.

[10] *In re* Ran, 607 F.3d 1017, 1024-25 (5th Cir. 2010).

relevant time to determine an individual's COMI is the commencement of the foreign proceeding.[11]

A future court faced with deciding an individual COMI issue will be left with a difficult decision in light of *Ran* and *Kemsley*. If a court follows the approach of *Ran,* it may result in a debtor's ability to manipulate the COMI determination and exploit differences between different countries' insolvency laws. Setting the COMI inquiry at the date of the petition for recognition allows a debtor to make strategic moves just before the petition for recognition with the purpose of forum shopping.[12] Further, under *Ran*, a debtor is permitted to introduce testimony that she intends to stay or leave a particular nation and thereby influence the COMI determination to the detriment of her creditors.[13] But following the *Kemsley* approach instead of *Ran* could produce harsh results contrary to the Code's fresh start goal.[14] Because under *Kemsley* the appropriate time for the COMI analysis is the commencement of the foreign proceeding, an honest debtor who has legitimately relocated her COMI after the commencement of the foreign bankruptcy will not be granted relief under Chapter 15.[15]

To solve the issue, the United States should adopt a statutory look-back scheme to determine an individual Chapter 15 debtor's COMI, analyzing COMI factors as of two years prior to the petition for recognition of a foreign main proceeding. Additionally, courts should not allow introduction of a debtor's testimony regarding subjective intent. This solution provides a middle ground between the harsh results under *Kemsley* and the potential manipulation under *Ran*.

II. BACKGROUND

A. Evolution of Chapter 15, Policies, and Goals

Over the past twenty years there has been a significant increase in Multinational Corporations (MNCs), truly global entities that operate across borders.[16] MNCs now occupy a very prominent place in the global economy; they constitute 51 of the 100 richest entities when compared with individual nations.[17] Globalization and the proliferation of MNCs created a need to develop international insolvency law to administer the assets of MNCs located in various

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[11] In re Kemsley, 489 B.R. 346, 354-55, 360 (Bankr. S.D.N.Y. 2013).

[12] *See infra* Part III.B.3.

[13] *See infra* Part III.B.2.

[14] *See infra* Part III.B.2.

[15] *See infra* Part III.B.3.

[16] *World Trade Report: Trends in International Trade*, WTO 54, https://www.wto.org/english/res_e/booksp_e/wtr13-2b_e.pdf. (last visited Mar. 20, 2016).

[17] Sarah Anderson & John Cavanagh, *Top 200: The Rise of Global Corporate Power*, GLOBAL POL'Y F. (2000), https://www.globalpolicy.org/component/content/article/221/47211.html.

countries.[18] To meet this need, the United States added Chapter 15 to the Bankruptcy Code in 2005.[19]

Prior to the enactment of Chapter 15, the Code dealt with international insolvencies through Section 304.[20] Chapter 15 incorporated some of the practices and procedures under Section 304, but also created new procedural requirements and substantive rights for international debtors.[21] Under Section 304, there was not a stringent recognition requirement for an individual to file a petition in U.S. courts;[22] instead, a party attempting to contest a debtor's 304 petition needed to argue for abstention.[23]

Chapter 15 is the United States' incorporation of the United Nations Commission on Model Laws (Model Law), which contains similar provisions.[24] In fact, Congress enacted Chapter 15 with the express purpose of codifying the Model Law.[25] According to the legislative history, courts should look to the Model Law for guidance when faced with ambiguities in the implementation of

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[18] Jay Lawrence Westbrook, *Multinational Enterprises in General Default: Chapter 15, The ALI Principles, and The EU Insolvency Regulation*, 76 AM. BANKR. L. J. 1, 7-8 (2002).

[19] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, S. 256, 112-23 (2005) (enacted); *see also* Justin Luna, *Thinking Globally, Filing Locally: The Effects of The New Chapter 15 On Business Entity Cross-Border Insolvency Cases*, 19 FLA. J. INT'L L. 671, 673-77 (2007) (discussing Chapter 15 in the context of economic globalization). Unless otherwise indicated, the "Code" or "bankruptcy code" refer to chapters, sections, and provisions of the U.S. Bankruptcy Code §§ 101-1532.

[20] 11 U.S.C.A. § 304 (repealed 2005).

[21] Paul J. Keenan, *Chapter 15: A New Chapter to Meet the Growing Need to Regulate Cross-Border Insolvencies*, 15 J. BANKR. L. & PRAC. 2 Art. 4 (April 2006).

[22] *In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 389 B.R. 325, 333 (Bankr. S.D.N.Y. 2008) ("Prior to the enactment of Chapter 15, access to the US courts by foreign representative was not dependent on recognition; rather, all relief under section 304 was discretionary and based on subjective, comity-influenced factors.") (citation omitted).

[23] Keenan, *supra* note 21. Courts would consider six factors when confronted with a request for abstention, including (1) just treatment of all holders of claims against or interest in such estate; (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such proceedings; (3) prevention of preferential or fraudulent dispositions of property of such estate; (4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title; (5) comity; and (6) if appropriate, the provision of an opportunity for a fresh start the individual that such foreign proceeding concerns. 11 U.S.C. § 304(c).

[24] U.N. COMM'N ON INT'L TRADE LAW (UNCITRAL), UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND GUIDANCE, U.N. Sales No. E.14.V.2 (2014), https://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf [hereinafter UNCITRAL MODEL LAW].

[25] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 801(a), 11 U.S.C. § 1501(a) (2005).

Chapter 15.[26] Chapter 15 and the Model Law have parallel goals: (1) encourage international cooperation, increase trade and investment; (2) ensure fairness for cross-border insolvencies; (3) protect the value of a debtor's assets; and (4) rehabilitate financially troubled businesses.[27] A number of provisions of Chapter 15 differed from Section 304 in order to meet the goals stated in Section 1501(a) and in the Model Law preamble.[28] Ultimately, Chapter 15 prevents the "piecemeal distribution of the debtor's assets just as bankruptcy law itself, on a national level, is designed to coordinate the insolvency proceedings of domestic entities that face a general default with respect to their financial obligations."[29]

B. Starting a Chapter 15 Case

An international debtor seeking relief from a U.S. bankruptcy court is required to use the procedure set out in Chapter 15.[30] The first step in the process is filing a petition for recognition.[31] The petition for recognition is filed by the debtor's foreign representative,[32] a court-appointed person or body authorized to administer the debtor's bankruptcy or foreign proceeding.[33]

After the debtor's foreign representative files petition for recognition, the court must enter an order granting recognition.[34] Recognition is defined as an order granting recognition as either a main or non-main proceeding.[35] The court

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[26] LOOK CHAN HO, CROSS-BORDER INSOLVENCY: A COMMENTARY ON THE UNCITRAL MODEL LAW 444 (3rd. ed. 2012) (interpreting HR Rep no. 109-31, at 105 (2005)).

[27] 11 U.S.C. § 1501(a)(1)-(4); UNCITRAL MODEL LAW, *supra* note 24, at Preamble.

[28] *See* Laura Shidlovitsky, Note, *Adoption of Chapter 15: A Necessary Step In International Bankruptcy Reform*, 10 SW. J.L. & TRADE AM. 171, 174 (2003-2004) (discussing various provisions of Chapter 15 and how they serve the goals and policies of Chapter 15).

[29] Lynn P. Harrison 3rd & Jerrold L. Bregman, *Chapter 15 of the U.S. Bankruptcy Code: A Hands-on Guide to the New World Order of Ancillary and Cross-border Cases*, 14 J. BANKR. L. & PRAC. 5 Art. 1 (2005).

[30] HOUSE COMMITTEE REPORTS, BANKRUPTCY ABUSE AND CONSUMER PREVENTION ACT OF 2005: LAW & EXPLANATION, 109TH CONG., COMM. REP. ON § 1509 OF BAPCPA (l 2005), 2009 WL 2752633 (WEST) ("Subsections (b)(2), (b)(3), and (c) [of Section 1509] make it clear that Chapter 15 is intended to be the exclusive door to ancillary assistance to foreign proceedings.").

[31] 11 U.S.C. § 1504 (2005).

[32] *Id*. at § 1515(a).

[33] 11 U.S.C. § 101(24) (2012). For instance, a trustee or debtor in possession from another country would be able to administer the Chapter 15 case in the United States. *Id.*; Hon. Sid Brooks & Robert Lantz, *Transactional Insolvency 101: A Guide to Cross-Border Bankruptcy Proceedings*, 16 J. BANKR. L. & PRAC. 5 ART. 1 (2007).

[34] *See* 11 U.S.C. § 1517(a)-(b) (2005).

[35] *Id*. at § 1502(7).

will grant an order for recognition if the foreign proceeding is main or non-main, there is a qualified foreign representative, and the filing requirements of Section 1515(c) have been met.[36] But the foreign representative must provide evidence of the foreign proceeding and a statement identifying all of the foreign representatives before the court may grant recognition.[37] The Code provides a presumption of recognition "in the absence of evidence to the contrary" in order to expedite the recognition process.[38]

A court may grant two types of recognition: recognition as a foreign main proceeding or recognition as a foreign non-main proceeding.[39] A Chapter 15 debtor is best served if they are granted recognition as a foreign main proceeding rather than recognition as a non-main proceeding, which is nonetheless better than the no-man's-land of neither main nor non-main proceedings. Relief under a foreign main proceeding is more extensive than that provided in a foreign non-main proceeding.[40] For instance, recognition in a main proceeding immediately triggers the automatic stay provisions of Section 362,[41] and allows a debtor to continue to use, sell, and lease property and operate business generally.[42] A non-main proceeding only receives the benefits of discretionary relief, meaning that there is "no automatic stay, no automatic authorization to operate the debtor's business, [and] no automatic prohibition on transfers of property."[43] Instead, a debtor who has qualified for non-main recognition must affirmatively request the forms of relief that are guaranteed for debtors granted main recognition.[44] Thus, it is in a debtor's interest to obtain recognition as a foreign main proceeding if at all possible.[45] Least useful of all is the in-between zone of recognition proceedings that are neither main nor non-main: a debtor who is denied both main recognition and non-main recognition will not be availed of *any* of the benefits of Chapter 15.[46]

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[36] *Id*. at § 1517(a).

[37] *See id*. at § 1515(b)-(c).

[38] *Id*. at § 1516(c); Richard Levin et al., *The Madoff Feeder Fund Cases—Chapter 15, Comity, and Related Bankruptcy Issues*, 25-SPG INT'L L. PRACTICUM 67, 74 (2012).

[39] 11 U.S.C. § 1517(b)(1)-(2).

[40] *See infra* notes 39-42 and accompanying text.

[41] 11 U.S.C. § 1520(a)(1); *see also* 11 U.S.C. § 362(a) (2010).

[42] 11 U.S.C. § 1520(a)(2); *see also* 11 U.S.C. § 363(b)(1) (2010).

[43] LEIF M. CLARK, ANCILLARY AND OTHER CROSS-BORDER INSOLVENCY CASES UNDER CHAPTER 15 OF THE BANKRUPTCY CODE 69 (Daniel M. Glosband ed. 2009).

[44] 11 U.S.C. § 1521(a).

[45] *But see In re* SPhinX, Ltd., 351 B.R. 103, 115-16 (Bankr. S.D.N.Y. 2006) (characterizing the differences of recognition between main and non-main proceedings as negligible).

[46] *See* H.R. REP. 109-31(I), at 175-76, 2005 WL 832198 (2005) (discussing Model Laws drafters' intent only to grant recognition to Main and Non-Main Proceedings); *see*, *e.g.*, *In re* Bear Stearns, 289 B.R. 325 (Bankr. S.D.N.Y. 2008); *see*, *e.g.*, *In re* Kemsley, 489 B.R. 346 (Bankr. S.D.N.Y. 2013). Some observers have found, to the contrary, that in some circumstances a debtor whose proceeding that is neither main nor non-main could still have access to bankruptcy proceedings. CLARK, *supra* note 43, at 52.

The determination of whether a debtor is eligible for a foreign-main proceeding is dependent on the debtor's COMI.[47] On the other hand, a debtor is eligible for recognition as a foreign non-main proceeding regardless of COMI so long as they have an establishment in the country of the foreign proceeding where a debtor carries out non-transitory economic activity.[48] Thus, a lesser connection to the foreign jurisdiction is required for recognition under a non-main proceeding than under a main proceeding.[49]

C. The Individual and Chapter 15

Although Chapter 15 may have been designed for MNCs, individuals are still entitled to seek the benefits of a Chapter 15 proceeding. The threshold issue facing an individual in a Chapter 15 is whether Section 1501(c)(2) excludes the individual from relief. Section 1501(c)(2) provides that Chapter 15 does not apply to individuals "who have debts within the limits specified in Section 109(e) and who are citizens of the United States or aliens lawfully admitted for permanent residence in the United States."[50] In other words, if a debtor has a level of debt that permits them to file under Chapter 13 and is a citizen or permanent resident of the United States, then she may not file under Chapter 15.[51] A debtor is excluded from Chapter 15 only if both of the conditions in Section 1501(c)(2) are met.[52] The policy behind the Section 1501(c)(2) exclusion is to weed out debtors with small amounts of debt from seeking Chapter 15 relief: "[t]he Chapter 13 limits represent Congress' judgment about debt levels that are sufficiently small as not to require the procedural safeguards of Chapter 11 and therefore it made sense to use those limits to determine the exclusion of 'small fry' from Chapter 15 as well."[53]

The next hurdle for the individual seeking relief under Chapter 15—and the subject of this text—is recognition. COMI is not defined in Section 1502 or Section 101.[54] Rather, the Code simply characterizes the COMI in terms of the presumption that "[i]n the absence of evidence to the contrary, the debtor's

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[47] 11 U.S.C. § 1502(4); *see* discussion *infra* Part II.C.

[48] 11 U.S.C. § 1502(2), (5).

[49] William H. Schrag et al., *Cross-Border Insolvencies and Chapter 15: Recent U.S. Case Law Determining Whether a Foreign Proceeding Is "Main" or "Nonmain" or Neither*, 17 J. BANKR. L. & PRAC. 5 Art. 4 (2008).

[50] 11 U.S.C. § 1501(c)(2) (2005).

[51] *See id*.; 11 U.S.C. § 109(e) (2012) (defining who may be a debtor for Chapter 13).

[52] *See* In re Steadman, 410 B.R. 397, 403 (Bankr. D. N.J. 2009) (finding that the first prong was established because debtor's total debt was within the parameters of 109(e) and that the second prong was met because of a green card marriage; the debtor was lawfully admitted for permanent residence).

[53] Westbrook*, supra* note 18, at 22.

[54] *See* 11 U.S.C. § 1502; 11 U.S.C. § 101 (Section 101 contains common definitions used throughout the Code).

registered office, or habitual residence in the case of an individual, is presumed to be the center of the debtor's main interests."[55] As a result of this crude characterization of the COMI requirement, the task of providing better meaning to the phrase is left to the courts. The case law establishing the commonly used COMI factors was based on Chapter 15 petitions for recognition filed by MNCs,[56] which were later adapted and applied to individuals.[57]

III. ANALYSIS

A. The COMI Split for Individuals

In re SPhinX was the first case in the United States to address the COMI requirement for recognition as a main proceeding.[58] There the court found that SPhinX, a hedge fund, did not qualify for recognition as a main proceeding, but was granted recognition as a non-main proceeding.[59] The court analyzed the COMI requirement by reference to six factors:

> [T]he location of the debtor's headquarters; the location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company); the location of the debtor's primary assets; the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes.[60]

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[55] 11 U.S.C. § 1516(c).

[56] *See* In re SPhinX, Ltd., 351 B.R. 103, 106-7, 117 (Bankr. S.D.N.Y. 2006); In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd. 389 B.R. 325, 327, 334 (S.D.N.Y. 2008); In re Basis Yield Alpha Fund (Master), 381 B.R. 37, 41, 47-48 (Bankr. S.D.N.Y. 2008).

[57] *See* In re Loy, 380 B.R. 154, 162 (Bankr. E.D. Va. 2007); In re Ran, 607 F.3d 1017, 1022-23 (5th Cir. 2010).

[58] *In re* SPhinx, Ltd., 351 B.R. at 103.

[59] *Id*. at 122.

[60] *Id*. at 117. The factors enumerated in *SPhinX* roughly track some of the factors provided in the Model Law. *See* UNCITRAL MODEL LAW, *supra* note 24, ¶¶ 145-47. The Model Law instructs that the two primary factors are "where the central administration of the debtor takes place, and (b) which is readily ascertainable by creditors." *Id*. ¶ 145. Where the two factors just mentioned are unavailing a court may analyze the following:

> [T]he location of the debtor's books and records; the location where financing was organized or authorized, or from where the cash management system was run; the location in which the debtor's principal assets or operations are found; the location of the debtor's primary bank; the location of employees; the location in which commercial policy was determined; the site of the controlling law or

The court explained that the COMI factors should not be applied mechanically, but instead should be based on the particular facts of each case.[61] The court stated that the creditors' support of a debtor suggested COMI is also an important consideration because it is the creditors' money that is at stake in the bankruptcy.[62] A number of factors weighed in favor of finding that the foreign proceeding was not a main proceeding in *SPhinX*: (1) SPHinx filed its foreign proceeding in the Cayman Islands even though it operated elsewhere; (2) its investors were also located outside of the Cayman Islands; (3) The only business SPHinx conducted in the Cayman Islands was registering there; (4) no employees or managers lived in the Cayman Islands and it held no board meetings there; and (5) orders from the Cayman court would require orders of other courts to bind the company.[63]

In 2008, the *Bear Stearns*[64] court built on the *SPhinX* framework for analyzing a debtor's COMI. The court in *Bear Stearns* faced a similar factual scenario, involving a hedge fund that had filed a proceeding in the Cayman Islands largely for tax benefits. The court agreed with the *SPhinX* factors and found that the debtor did not qualify for recognition either as a main proceeding or non-main proceeding, effectively ending the debtor's chances of Chapter 15 relief.[65]

In re Loy was the first case under Chapter 15 involving an individual debtor and the recognition issue.[66] The debtor entered into an agreement with creditors in the United Kingdom to resolve debts arising from a failed business.[67]

> the law governing the main contracts of the company; the location from which purchasing and sales policy, staff, accounts payable and computer systems were managed; the location from which contracts (for supply) were organized; the location from which reorganization of the debtor was being conducted; the jurisdiction whose law would apply to most disputes; the location in which the debtor was subject to supervision or regulation; and the location whose law governed the preparation and audit of accounts and in which they were prepared and audited.

Id. ¶ 147.

[61] *In re* SPhinx, Ltd., 351 B.R. at 117.

[62] *Id*.

[63] *Id*. at 119.

[64] *In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd. 389 B.R. 325 (S.D.N.Y. 2008).

[65] *See id*. at 336-39. The *SPhinX* and *Bear Stearns* courts differed on the non-main analysis because in *SPhinX* the court did not analyze whether the debtor had an "establishment" in the foreign jurisdiction. *Id.*; *see also* William H. Schrag & William C. Heuer, *Cross-Border Insolvencies and Chapter 15: Recent U.S. Case Law Determining Whether a Foreign Proceeding is "Main," "Nonmain" or Neither*, 23-SPG INT'L L. PRACTICUM 37, 38-39 (2010).

[66] *In re* Loy, 380 B.R. 154, 161-62 (Bankr. E.D. Va. 2007).

[67] *Id.* at 159.

The trustee overseeing the United Kingdom proceeding filed a petition for recognition in the United States while the debtor was residing at property he owned in Virginia.[68] The court granted main recognition to the United Kingdom proceeding based on a combination of the *SPhinX* factors and application of several new factors that the court considered appropriate for individual cases.[69] The court applied the *SPhinx* factors relating to the location of the creditors, the jurisdiction's law that would govern issues in the case, and the location of the property.[70] It then added to the analysis the debtor's right to remain in the country.[71] The court found that right limited since the debtor had only temporary visas.[72] The court also interpreted the meaning of "habitual residence" in relation to an individual.[73] It found the debtor's habitual residence was in the United Kingdom based on the customary meaning of "habitual residence."[74] The debtor had only a temporary visa and had stated a desire to return to the United Kingdom.[75]

In 2010 the Fifth Circuit in *Ran* adopted and added to the *Loy* analysis.[76] As in *Loy*, the *Ran* court applied the *SPhinX* factors of location of debtor's assets, location of debtor's creditors, and the jurisdiction that would be used to resolve most disputes.[77] In addition, the court looked at the debtor's U.S. employment, U.S. citizenship of the debtor and his children, the location of his family outside of Israel, and the location of his finances.[78] Significantly, the court also factored in the debtor's testimony that he intended to remain in the United States.[79] Put another way, the court was willing to consider the debtor's subjective intent regarding his COMI.[80] Consideration of the debtor's subjective intent was in line with *Loy* but broke with *Bear Sterns*, which explained "[r]ecognition turns on the strict application of objective criteria."[81]

In addition to adding subjective intent to the mix of COMI factors, *Ran* also added a COMI timing determination.[82] The *Ran* court determined that the proper time to determine an individual's COMI is at the time the petition for

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68 *Id*.

69 *Id*. at 163.

70 *Id*.

71 *In re* Loy, 380 B.R. at 163.

72 *Id*.

73 *Id.* at 162.

74 *Id.* at 162-63.

75 *Id*. at 163. The court defined "habitual" using Black's Law Dictionary to mean customary or usual. *In re* Loy, 380 B.R. at 162.

76 *In re* Ran, 607 F.3d 1017, 1024-26 (5th Cir. 2010).

77 *Id*. at 1024.

78 *Id*.

79 *Id*.

80 *Id*.

81 *In re* Ran, 607 F.3d at 163; *In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd. 389 B.R. 325, 333 (S.D.N.Y. 2008).

82 *In re* Ran, 607 F.3d at 1025.

recognition is filed.[83] The court's reasoning was threefold. First, the operative verbs were written in the present or present progressive tense, indicating a congressional intent not to create a look-back period.[84] Second, a "meandering and never-ending inquiry" would lead to incorrect results due to a debtor's past actions.[85] Third, because the COMI should be ascertainable by third parties, activities occurring before the petition for recognition should be irrelevant.[86] However, in dicta, the court did preserve the possibility of utilizing a greater look-back period to prevent bad faith COMI manipulation.[87]

Ran thus effectively defined the standard for the individual COMI determination. Courts following *Ran* have recognized that not all of the factors from *SPhinX* are appropriate for individual debtors: "[i]n the case of an individual debtor, a party needs to use the appropriate factors and not the factors applicable exclusively to a corporate debtor."[88] Conversely, courts have recognized that the *Ran* framework is not appropriate for corporate debtors under Chapter 15.[89]

Although the District Court in *Fairfield Sentry* rejected the *Ran* factors for individual debtors as applied to corporations,[90] in *Kemsley* the court went further, rejecting (1) that certain *Ran* factors applied to individuals and (2) the timing analysis in *Ran*.[91] The debtor in *Kemsley* filed for bankruptcy in the United Kingdom, which he asserted was his COMI even while he resided in the United States.[92] The debtor made multiple moves within the United States during his United Kingdom bankruptcy, moving from the United Kingdom to Boca Raton, to New York City, to Beverly Hills, to West Hollywood, where he was when he filed

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[83] *Id*.

[84] *Id*.

[85] *Id*.

[86] *Id.* at 1025-26.

[87] *In re* Ran, 607 F.3d at 1026 ("We note that this case does not involve a recent change of domicile by the party in question. 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."). *See also* In re Fairfield Sentry Ltd., 714 F.3d 127, 135 (2nd Cir. 2013) (interpreting this quoted language as creating a bad-faith look-back exception).

[88] In re Chiang, 437 B.R. 397, 404 (Bankr. C.D. Cal. 2010). *Chiang* analyzed the location of the debtor's family, personal connection with the foreign jurisdiction, the debtor's subjective intent to return to the foreign jurisdiction, and the debtor's permanent legal status in the foreign jurisdiction. *Id*. The court rejected the party opposing recognition's argument because it tried to apply the corporate standards for recognition, and granted foreign main recognition. *Id*.

[89] In re Fairfield Sentry Ltd., 2011 WL 4357421, *5 (Sept. 16, 2011 S.D.N.Y.) (rejecting the debtor's argument for recognition on the basis of *Ran* because the debtor was a corporation).

[90] *Id*. (rejecting appellant's analogy to *Ran* by noting "by contrast, here a *corporate* debtor maintains its finances and business primarily in the BVI and has its corporate headquarters in the BVI") (emphasis in original).

[91] In re Kemsley, 489 B.R. 346, 360-61 (Bankr. S.D.N.Y. 2013).

[92] *Id*. at 349-50.

his petition for recognition, and ultimately back to New York City.[93] The court held that the debtor's COMI was in Los Angeles, finding it dispositive that his children were living in Los Angeles when the debtor filed for bankruptcy in the United Kingdom.[94] The factors the court analyzed to determine the debtor's COMI included "the jurisdiction where a person lives and works and may have children enrolled in school, possible club memberships or affiliations with religious organizations and other recognized ties to the community that are indicative of residential status and community involvement."[95]

In contrast to *Ran,* the *Kemsley* court rejected the use of subjective intent to determine an individual's COMI.[96] The court explained that it would not consider a debtor's testimony about future decisions for COMI purposes, reasoning that setting the COMI inquiry at a later date would introduce a "speculative element" into the COMI analysis.[97] The court instead looked at other features of the debtor's behavior, like the relationship between the debtor and his children, as proxies for subjective intent.[98]

The *Kemsley* court also attempted to clarify the phrase "habitual residence" in the case of an individual debtor.[99] The feature of habitual residence that the court emphasized was the notion of permanence and stability, comparable to an individual's domicile.[100] The court may have established a test for habitual residence, stating that it is where "an individual is living and has manifested the expectation of remaining for an indefinite period of time."[101]

The court in *Kemsley* also split from *Ran* on the timing analysis.[102] It found that the debtor's COMI is determined at the time of the petition for bankruptcy in the foreign jurisdiction and not at the time petition for recognition is

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93 *Id*. at 351.

94 *Id*. at 363.

95 *Id*. at 360. Contrasted with *Ran*, where the second factor the court considered weighing against the debtor's COMI in Israel was the fact that "Ran has no intent to return to Israel." *In re* Ran, 607 F.3d 1017, 1024 (5th Cir. 2010).

96 *In re* Kemsley, 484 B.R. at 360; *but see* Edward E. Neiger & Marianna Udem, *Like a Rolling Stone: SDNY Tackles Its First Individual Chapter 15*, AM. BANKR. INST. J. 36, 37 (2014) (characterizing the *Kemsley* analysis as a "hybrid of subjective intent as seen through largely objective actions.").

97 *In re* Kemsley, 484 B.R. at 360. Although the court explicitly states that testimony regarding the debtor's subjective *future* intent is irrelevant in the COMI analysis, the debtor's testimony was still relevant in determining the importance of the location of the debtor's family as a factor in the COMI analysis. *Id*. at 361 ("the Court has noted one consistent theme that became evident throughout the Debtor's testimony, namely the central role of his family, and his children in particular, play in his life.").

98 *Id*. at 355.

99 *Id*. at 354.

100 *Id*.

101 *Id*.

102 *Compare In re* Ran, 607 F.3d 1017, 1025 (5th Cir. 2010) *with Kemsley*, 489 B.R. at 354.

filed.[103] The court reasoned that "[c]onceivably, the COMI for this particular Debtor may have started to change around the time that he was separated from his children, but it is not possible to relate that changed circumstance to the date of commencement of the United Kingdom Proceeding."[104] Unfortunately, the court's reasoning regarding the timing of the COMI determination is limited.[105] The court explains that the filing of the foreign proceeding is a "fixed and readily verifiable date" and that if the COMI were determined at the time of the petition for recognition, a COMI would "vary greatly depending on circumstances and the diligence of the foreign representative."[106]

B. The Benefits and Disadvantages of the *Ran* and *Kemsley* Approaches

The different *Ran* and *Kemsley* approaches towards the COMI analysis each come with a set of advantages and disadvantages. The strengths and weaknesses of each approach can be divided into three areas: (1) whether a debtor's COMI is ascertainable to third parties; (2) whether a debtor may effectuate her subjective intent; and (3) whether a debtor may immigrate to a different country for the purpose of taking advantage of more favorable bankruptcy laws. This section analyzes how each approach fares along these metrics and how well each approach accords with the Model Law.

1. Ascertainability to Third Parties

The split between *Ran* and *Kemsley* for the COMI determination of individuals can be reduced to two main issues: (1) the timing determination and (2) subjective intent as a relevant factor. One explanation for the variance between the approaches is that they reflect attempts to ensure that the COMI is "ascertainable to third parties."[107] The notion of having a debtor's COMI be ascertainable was originally recognized in the Model Law, which used it as the defining feature of a debtor's COMI.[108] The principle that a debtor's COMI should be ascertainable to third parties is also ingrained in U.S. COMI litigation.[109]

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[103] *In re* Kemsley, 489 B.R. at 354.

[104] *Id.* at 362.

[105] *See id*. at 354.

[106] *Id*.

[107] *In re* Ran, 607 F.3d at 1025-26; *Kemsley*, 489 B.R. at 360.

[108] UNCITRAL MODEL LAW, *supra* note 24, ¶¶ 75, 144-48. The Model Law provides that a debtor's COMI is "the place where the debtor conducts the administration of its interests on a regular basis and that is *therefore ascertainable by third parties*." *Id*. at ¶ 84 (emphasis added).

[109] *See*, *e.g.*, *In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 389 B.R. 325, 336-37 (S.D.N.Y. 2008) (quoting Case C–341/04, *In re* Eurofood

The *Ran* court felt that tying the timing of the COMI to the ascertainability to third parties was appropriate because inquiry into the date of the petition for recognition would promote uncertainty for third parties: "[i]f the debtor's main interests are in a particular country and third parties observe this situation, it should be irrelevant that the debtor's interests were previously centered in a different country."[110] For instance, if a creditor has a dispute with a debtor, courts would look to the place where the debtor currently carries on its business to resolve disputes.[111]

On the other hand, the *Kemsley* court presumably rejected subjective intent to ensure that the debtor's COMI was ascertainable to third parties.[112] The court explained that the COMI determination should be based on what "an objective observer must presume or infer [from] the existence of subjective judgments by the individual debtor. . ."[113] The *Kemsley* approach is similar to other Chapter 15 decisions coming out of the Southern District of New York, where the timing analysis is divorced from the question of whether the COMI is observable to third parties.[114]

The timing split illustrated in *Kemsley* and *Ran* is a dispute that has been an issue for entity debtors in Chapter 15 as well.[115] After *Kemsley* was decided, the Second Circuit weighed in on the timing question in an entity case and agreed with the *Ran* court that the relevant time for the COMI determination is as of the petition for recognition.[116] Before *Fairfield* was decided, the Southern District of New York in *Millennium Global Emerging Credit Master Fund Ltd*. agreed with the *Kemsley* court that the relevant time for the COMI determination is as of the

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IFSC Ltd., 2006 E.C.R. I–3813); *In re* Betcorp Ltd., 400 B.R. 266, 286 (Bankr. D. Nev. 2009); *In re* Basis Yield Alpha Fund (Master), 381 B.R. 37, 47 (Bankr. S.D.N.Y. 2008); *In re* Ran, 607 F.3d at 1025-26; *In re* Millennium Glob. Emerging Credit Master Fund Ltd., 458 B.R. 63, 77-78 (Bankr. S.D.N.Y. 2011).

[110] *Ran*, 607 F.3d at 1025-26.

[111] *Id*. at 1026.

[112] *Kemsley*, 489 B.R. at 360. However, the *Kemsley* decision does not couch its discussion in terms of "being ascertainable to third parties," instead the decision speaks of "objective observers." *See id.*

[113] *Id*.

[114] For example, in *In re* Millennium Global Emerging Credit Master Fund Ltd. the court found Bermuda was the hedge fund's COMI because the Offering Memorandum specified that the company was subject to the laws of Bermuda, 458 B.R. at 77-78, but then analyzed the COMI as of the date of the foreign proceeding. *Id*. at 85-86.

[115] *See generally* Mark Lightner, *The Timing Requirement Under Chapter 15*, AM. BANKR. INST. J. 56, 60-61 (2010). However, some courts sidestep the timing issue entirely by arguing that the outcome would be the same if analyzed as of the date of the petition for recognition or the date of the commencement of the foreign proceeding. *See*, *e.g.*, *In re* Gerova Fin. Grp., Ltd., 482 B.R. 86, 92 (Bankr. S.D.N.Y. 2012).

[116] *In re* Fairfield Sentry Ltd., 714 F.3d 127, 133-34 (2d Cir. 2013).

commencement of the foreign proceeding.[117] The Second Circuit is now in line with the majority of courts that have addressed the timing issue.[118] It is unclear whether the holding in *Fairfield* applies to all Chapter 15 cases or only entity debtors since in *Fairfield* the debtor at issue was a corporation and the court did not address the reasoning in *Kemsley* or even mention the case.[119]

Although the *Kemsley* approach might make sense for entity debtors in terms of making the debtor's COMI ascertainable to third parties, the court appeared to tailor its reasoning to a desired result. The court from the outset appeared reluctant to allow the debtor to use the automatic stay to his advantage.[120] Barclays, a creditor in *Kemsley*, brought suit against the debtor in the United Kingdom and, when the debtor moved, brought suit in Florida state court and later in New York state court.[121] Thus, the court explained, "Mr. Kemsley is not an incidental subject of this cross-border skirmishing but an economically motivated participant who wants the automatic stay for his personal benefit."[122] Moreover, the court seemed highly troubled by the relationship between the trustee and the debtor, characterizing the debtor's financing of the trustee as a component of a "coordinated trans-Atlantic litigation strategy orchestrated by Mr. Kemsley and his advisers to shield the Debtor's assets."[123] Hence, one of the apparent concerns in declaring the operative date to be the date of the commencement of the foreign proceeding was to ensure that the debtor's trans-Atlantic litigation strategy was thwarted.[124]

Although the court in *Kemsley* did effectively prevent the debtor from using Chapter 15 as a tool to avoid creditors, it may have done so at the expense of the "ascertainability to third parties."[125] Even though the court states that the commencement of a foreign proceeding is a "fixed and readily verified date,"[126]

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[117] *In re* Millennium Glob. Emerging Credit Master Fund Ltd. 458 B.R. 63, 72-76 (reasoning that "the COMI inquiry need not be construed by courts in a manner that allows it to be used as a shield against foreign creditors.").

[118] *See 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* Betacorp Ltd., 400 B.R. 266, 290-92 (Bankr. D. Nev. 2009); *In re* Ran, 607 F.3d 1017, 1025 (5th Cir. 2010).

[119] *See In re* Fairfield Sentry Ltd., 714 F.3d at 130, 133-37.

[120] *In re* Kemsley, 489 B.R. 346, 351-52 (Bankr. S.D.N.Y. 2013).

[121] *Id*. at 350.

[122] *Id*. at 352.

[123] *Id*. at 351-52.

[124] Ironically, by the time Barclays actually litigated its breach of contract claims against Kemsley in the New York Supreme Court, Kemsley had received a discharge in the United Kingdom. *Barclays Bank PLC v. Kemsley*, 992 N.Y.S.2d 602, 603-04 (N.Y. Sup. Ct. 2014). As a result, the New York Supreme Court, addressing an issue of first impression, granted summary judgment in favor of Kemsley reasoning that it was warranted on the grounds of international comity and that Chapter 15 did not preempt recognition of a foreign discharge order. *Id*. at 606-09.

[125] *In re* Ran, 607 F.3d 1017, 1025-26; *Kemsley*, 489 B.R. at 360.

[126] *Kemsley*, 489 B.R. at 354.

there is little reason to think that a third party would know where the debtor's COMI was at that time without going through a winding history of the debtor's life. The facts of *Kemsley* illustrate this very problem. There, the debtor travelled to the United Kingdom to commence his bankruptcy, but his COMI was in Los Angeles.[127] Consequently, if a creditor had a dispute with the debtor in *Kemsley* when the petition for recognition was filed, they would have no reason to look to the law of Florida or New York—where the debtor operated in the past—if they perceived that his home base was in the United Kingdom or Southern California at the time.[128] Why not go further? Why not determine the COMI at the time the debtor became insolvent under Section 101(32)? Ultimately, the *Kemsley* approach of determining a debtor's COMI, as of the commencement of the foreign proceeding, fares poorly when considering the ascertainability of third parties.

Moreover, the length of time required to receive a discharge and end a bankruptcy compounds this winding look-back period that is determined at the commencement of the foreign proceeding.[129] Suppose an Irish debtor moved to the United States eight years after filing for bankruptcy in Ireland and petitioned for main recognition. A U.S. bankruptcy court would need to look at the *Kemsley* factors after an eight-year period. A debtor may have forgotten certain facts in favor of recognition, such as to what clubs or organizations the debtor belonged or where the debtor's family was at the time.

On the other hand, the *Kemsley* timing analysis is closer to the Model Law's recommendation for timing. The Model Law explains:

> With respect to the date at which the centre of main interests of the debtor should be determined, having regard to the evidence required to accompany an application for recognition under article 15 and the relevance accorded the decision commencing the foreign proceeding and appointing the foreign representative, the date of commencement of that proceeding shall be the appropriate date.[130]

In other words, a debtor's COMI should be determined as of the commencement of the foreign proceeding.[131] The Model Law justifies this approach by pointing

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[127] *Id.* at 356.

[128] *Id.* at 361-62. This is the sort of inquiry that the court in *Ran* suggests is needed to determine if a COMI is ascertainable: whether a creditor with a conflict with a debtor would be able to identify the appropriate law to pursue the debtor. 607 F.3d at 1025-26.

[129] For instance, in Germany discharge is entered after the debtor has demonstrated good behavior for six years. JASON J. KILBORN, COMPARATIVE CONSUMER BANKRUPTCY 78-79 (2007). Other countries, like France, the Netherlands, and Austria have a more restricted discharge for individuals. *See id.* at 64-75. Generally, "[t]he Anglo-American notion of a 'get-out-of-jail-free' immediate discharge was roundly rejected in Europe, at least in the 1990s." *Id*. at 11.

[130] UNCITRAL MODEL LAW, *supra* note 24, ¶ 159.

[131] *Id*.

to the fact that it would produce "clear results" and it could provide "certainty to all insolvency proceedings."[132] But, unfortunately, the Model Law makes no specific accommodation for timing when the debtor is an individual and the problems of the aforementioned winding COMI inquiry remain at the expense of ascertainability to third parties. This is despite the Model Law providing specific instructions for situations where the debtor no longer engages in business post-bankruptcy or where the debtor is replaced by a reorganized entity.[133] Nonetheless, the *Kemsley* approach is endorsed by the Model Law.

The split between *Ran* and *Kemsley* underscores a tension in the Model Law. On the one hand, recognition should be ascertainable to third parties, which for individuals is best served by timing the COMI inquiry at the time of the petition for recognition. On the other hand, the Model Law explicitly directs the COMI inquiry to be set at the time of the commencement of the foreign proceeding, compromising ascertainability as the *Ran* court explained. In short, *Ran* is a more workable solution and follows the spirit of the Model Law by providing a COMI that is readily identifiable. *Kemsley* provide a more cumbersome but proper COMI determination according to the letter of the Model Law.

2. Subjective Intent and Reprieve for the Honest-but-Unfortunate Debtors

A common thread in U.S. consumer bankruptcy is the notion that an honest-but-unfortunate debtor should be entitled to a fresh start.[134] Part of providing that fresh start is allowing the debtor to make choices for herself, making a debtor's intent highly relevant for a debtor's bankruptcy.[135] A debtor's intention is a component found throughout much of the Code. For instance, a Chapter 11 debtor may accept or reject executory contracts and design a plan. A Chapter 7 debtor has the option to abandon or reaffirm certain debts like car loans.[136] Thus, it stands to reason that a Chapter 15 debtor's intent should make some difference in the COMI analysis.

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[132] *Id*. However, as discussed above, the facts of *Kemsley* show how unclear the COMI determination may be for individuals when using the date of the commencement of the foreign proceeding. *In re* Kemsley, 489 B.R. 346, 363 (Bankr. S.D.N.Y. 2013).

[133] UNCITRAL MODEL LAW, *supra* note 24, ¶ 159.

[134] *See generally* John M. Czarnetzky, *The Individual And Failure: A Theory of The Bankruptcy Discharge*, 32 ARIZ. ST. L. J. 393, 461-63 (2000).

[135] Donald R. Korobkin, *Bankruptcy Law, Ritual, and Performance*, 103 COLUM. L. REV. 2124, 2153-54 (2003) (finding that personal choice is embedded in bankruptcy and that the process itself is performative with a normative function: "Bankruptcy decision-making . . . performs the role of supplying the reflective and deliberative capacity that those persons affected by the household's financial distress currently lack.").

[136] 11 U.S.C. § 365(a) (2005); 11 U.S.C. § 1121(a), (b) (providing a debtor in possession the exclusive right to file a plan for 120 days); 11 U.S.C. § 524(c).

However, the Model Law rejects the importance of subjective intent, albeit indirectly.[137] The only place the Guide to Enactment and Interpretation of the Model Law discusses subjective versus objective intent is in terms of non-main recognition.[138] Non-main recognition only requires an establishment in the country in which the petition for recognition is filed.[139] In the Guide to Enactment, the definition of establishment is construed to eliminate the import of subjective intent: "the decisive factor is how the activity appears externally, and not the intention of the debtor."[140] What can be gleaned is that the Model Law frowns upon the consideration of the debtor's subjective intent. A number of U.S. courts have also rejected subjective intent in the Chapter 15 context.[141] But, of the individual Chapter 15 COMI cases besides *Kemsley*, which went to great lengths to stress the problematic nature of subjective intent,[142] only *In re Chiang* mentioned the importance of objective factors.[143]

There are various rationales for rejecting subjective intent. The primary concern in *Kemsley* for rejecting subjective factors was the possibility of manipulation by the debtor. The court explained that a debtor should not be able to manipulate their COMI by introducing testimony about future decisions.[144] The *Kemsley* analysis squares well with Jay Westbrook's explanation of one of the values that should guide the COMI inquiry—predictability.[145]

Ran and *Kemsley* fall on opposite sides of the subjective intent spectrum. *Ran*, on one hand, allowed the debtor to testify that he had no intention of returning to Israel.[146] *Kemsley*, on the other hand, excluded consideration of the debtor's testimony to the effect that he had plans to return to the United Kingdom to be with his family.[147] But the *Kemsley* court did accept the debtor's testimony *not* relating to future intention.[148] Ultimately, the court's analysis turned on the debtor's testimony that the proximity to his children played a central role in his personal life.[149]

The *Kemsley* approach to intent ultimately is preferable to *Ran*. First, in light of the Model Law and other Chapter 15 cases, it seems that the subjective

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[137] *See* UNCITRAL MODEL LAW, *supra* note 24, ¶ 89.

[138] *Id*.

[139] 11 U.S.C. § 1502(5), (7); UNCITRAL MODEL LAW, *supra* note 24, at art. 2(c).

[140] UNCITRAL MODEL LAW, *supra* note 24, ¶ 89.

[141] *See In re* SPhinX, Ltd., 351 B.R. 103, 118 (Bankr. S.D.N.Y. 2006); *In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 389 B.R. 325, 333 (Bankr. S.D.N.Y. 2008); *In re* Kemsley, 489 B.R. 346, 360 (Bankr. S.D.N.Y. 2013).

[142] *Kemsley*, 489 B.R. at 360-61.

[143] *In re* Chiang, 437 B.R. 397, 403 (Bankr. C.D. Cal. 2010). *Chiang* is discussed at greater length at note 82, *supra*.

[144] *Kemsley*, 489 B.R. at 360-61.

[145] Jay Lawrence Westbrook*, Locating The Eye of The Financial Storm*, 32 BROOK. J. INT'L L. 1019, 1022-23 (2007).

[146] *In re* Ran, 607 F.3d 1017, 1023 (5th Cir. 2010).

[147] *Kemsley*, 489 B.R. at 354-55.

[148] *Id*. at 360-61.

[149] *Id*.

intent of a debtor is more of a vice than a virtue. Second, as other commentators have noted, the *Kemsley* approach does not completely prevent subjective intent from entering the picture.[150] Rather, it looks at "subjective intent as though largely objective actions."[151] Third, the *Kemsley* approach is less susceptible to manipulation than the *Ran* approach. Especially in the case of individual debtors, COMI manipulation is fairly simple: all a debtor would need to do according to the factors announced in *Ran* is purchase some new property in a different country, join some clubs and religious organizations, bring her family along, remain there for a period of time, and then testify as to her intention not to leave the desired COMI state.[152] Had the debtor from *Kemsley* been in the Fifth Circuit instead of the Southern District of New York, he may have gotten away with his transatlantic bankruptcy plot.[153]

3. COMI Migration and Reconciling *In re Kemsley* and *In re Ran*

The concern underlying the *Kemsley* decision to exclude subjective intent as a COMI factor and to allow a look-back for the COMI inquiry is the possibility that the debtor was able to structure his affairs and relocate his COMI to the detriment of his creditors abroad.[154] Although the Model Law provides discretion to individual nations for implementing their own bankruptcy laws for individual debtors,[155] it was not silent on the possibility of strategic moves by debtors to exploit differences between national bankruptcy schemes.[156]

Many debtors, particularly in the European Union, have been quick to exploit these differences. Bankruptcy tourism, a temporary migration from countries such as Wales and Ireland, where discharge takes over a decade, to countries like England, where discharge takes only a year, has become frequent in recent years.[157] One observer found that bankruptcy tourism from Ireland to the

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150 Edward E. Neiger & Marianna Udem, *supra* note 96, at 37.

151 *Id*.

152 *See infra* Part III.B.3, discussing COMI migration and the Model Law.

153 This is not to say that the *Ran* court reached the wrong decision. There were a number of weighty factors besides the debtor's subjective intent not to return to Israel weighing in favor of COMI recognition. For instance, he had lived in the COMI state for ten years, kept all of his finances there, his family was there, and he had employment there. *In re* Ran, 607 F.3d 1017, 1024 (5th Cir. 2010).

154 *See Kemsley*, 489 B.R. at 351-52.

155 UNCITRAL MODEL LAW, *supra* note 24, at art. 1(2), ¶ 61 (providing that nations without insolvency provisions for individuals may exclude the Model Law for natural persons residing in the enacting state).

156 *Id*. ¶¶ 148-49.

157 Henry McDonald, *Irish Dodge Debts Through UK 'Bankruptcy Tourism,'* THE GUARDIAN UK, May 27, 2012, http://www.theguardian.com/world/2012/may/27/irish-dodge-debts-uk-bankruptcy-tourism; Neil Hickling, *Interesting Bits And Trends In Personal Insolvency—The Rise Of Bankruptcy Tourism In Recent Years*, MONDAQ (Apr.,

UK alone resulted in discharge of over a billion euros worth of debt.[158] This process has become so routine that an attorney for www.irishbankruptyuk.com has created a seven-step process for moving to the UK, establishing a COMI, and discharging Irish debt thanks to the Model Law and the differences between insolvency regimes.[159] Further, in many courts, once a debtor has completed the seven-step process for migrating her COMI, main recognition becomes a mere "formality lasting up to 35 seconds in a rubber-stamping exercise."[160]

The Model Law instructs that when a move is made prior to the commencement of a foreign proceeding, the receiving court needs to review the COMI factors "more carefully and to take account of the debtor's circumstances more-broadly."[161] The Model Law justifies this rather self-evident bit of advice by explaining that ascertainability by creditors is more difficult where a move is made in close proximity to the foreign proceeding.[162] The Model Law also asserts that migration would be irrelevant because the COMI determination is made at the time of the commencement of the foreign proceeding, and manipulation is unlikely because many countries' insolvency laws prevent relocation after a bankruptcy.[163]

What the Model Law does not address is whether the debtor's move to a state with more lax bankruptcy laws should affect the COMI determination.[164] Nor does the Model Law answer whether a move that would thwart creditors should factor into the COMI analysis, even though this situation is cited as an example.[165] However, the Virgos-Schmit Report, which the Model Law uses in some places to explain certain concepts related to main recognition and the COMI determination,[166] does condemn COMI migration:

> Unlike contracts, insolvencies do not form an area of the law where private spontaneous cooperation can compensate for the lack of a common legal framework at the international level.

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11 2013), http://www.mondaq.com/x/232356/Insolvency+Bankruptcy/Interesting+Bits+And+Trends+In+Personal+Insolvency+The+Rise+Of+Bankruptcy+Tourism+In+Recent+Years; Charlie Thomas, *Bankruptcy Tourism: Why Foreign Companies and Individuals Are Choosing to Go Bankrupt In Britain*, HUFFINGTON POST UK (Nov., 24, 2012, 9:13 AM), http://www.huffingtonpost.co.uk/2012/11/23/bankruptcy-tourism-why-foreign-companies-and-individuals-are-choosing-to-go-bankrupt-in-britain_n_2177924.html.

158 McDonald, *supra* note 157.

159 *Id*. Interestingly, the procedure recommends creating a COMI by renting property, registering to vote, creating an address for utility bills, finding work, remaining in the UK for nine months, and then applying for a UK bankruptcy. *Id*.

160 *Id*.

161 *Accord* UNCITRAL MODEL LAW, *supra* note 24, ¶ 148. *See supra* note 60 for Model Law's COMI factors.

162 UNCITRAL MODEL LAW, *supra* note 24, ¶ 148.

163 *Id*. ¶ 149.

164 *See id*. ¶¶ 148-49.

165 *Id*. ¶ 148, n.33.

166 *Id.* ¶¶ 82, 84, 89.

> Institutional co-operation is needed to provide a certain legal order to avoid incentives for the parties to transfer disputes or goods from one country to another, seeking to obtain a more favourable legal position ('forum shopping'), or to realise their individual claims independently of the costs which this may entail for the creditors as a whole or to the going-concern value of the debtor's firm.[167]

But nowhere in the Model Law's discussion of movement of a debtor's COMI does it endorse the Virgos-Schmit Report.[168]

On the other hand, the Model Law does state that an abuse of process may be grounds to deny recognition:[169] "[i]f the applicant falsely claims the centre of main interests to be in a particular State, the receiving court may determine that there has been a deliberate abuse of process."[170] But still, this broad prohibition probably would not prevent bankruptcy tourism because in cases where debtors actually take steps to relocate their COMI, they have at least a plausible argument that they did not falsely state their COMI. Perhaps, as some commentators have found, the Model Law does not weigh in on COMI migration because in some cases "forum shopping should be actively encouraged."[171]

One might think that debtor migration could run contrary to comity and constitute a ground for non-recognition, but that line of reasoning would be incorrect. Two goals of the Model Law and Chapter 15 are comity and cooperation.[172] Further, Section 1508 bolsters the comity goal, explaining that Chapter 15 should be interpreted "to promote application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions."[173] U.S. courts have found that an inquiry into comity is not relevant for determining whether a foreign proceeding should be recognized as main or non-main.[174] Instead, comity comes into play for determining what means of post-recognition relief are appropriate.[175] Neither the *Kemsley* nor the *Ran* courts based their recognition analysis on comity-based factors. In *Kemsley*,

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[167] Miguel Virgos & Etienne Schmidt, *Rep. on the Convention on Insolvency Proceedings*, Doc. No. 6500/96, ¶ 7 (1996), http://aei.pitt.edu/952/1/insolvency_report_schmidt_1988.pdf.

[168] *See* UNCITRAL MODEL LAW, *supra* note 24, ¶¶ 148-49.

[169] *Id*. ¶ 161.

[170] *Id*. ¶ 162.

[171] Mark Arnold, *Truth or Illusion? COMI Migration and Forum Shopping under the EU Insolvency Regulation*, 14 No. 3 BUS. L. INT'L 245, 260 (2013) (forum shopping should be encouraged where "it is motivated by the debtor's wish to act in the interests of its creditors as well as itself").

[172] 11 U.S.C. § 1501(a)(1); UNCITRAL MODEL LAW, *supra* note 24, ¶ 215.

[173] 11 U.S.C. § 1508.

[174] *In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd. 389 B.R. 325, 333 (Bankr. S.D.N.Y. 2008).

[175] *Id*.

the court does not so much as mention comity, while *Ran* expressly rejects as meritless the debtor's argument for recognition based on comity.[176]

U.S. lawmakers did not share the Model Law's ambivalence regarding COMI manipulation. The House Report on Chapter 15 provides that Sections 1502(c)(2) and 109(e) are the proper tools to prevent strategic COMI manipulation.[177] The Report asserts that Sections 1501(c)(2) and 109(e) "ensure[] that residents of other countries will not be able to manipulate this exclusion to avoid recognition of foreign proceedings in their home countries or elsewhere."[178] Presumably, prohibiting legally-admitted lawful residents and U.S. citizens from using Chapter 15 prevents those individuals from sheltering their U.S. assets from the trustee of the foreign proceeding. What seems clear from the congressional history is that forum shopping and COMI migration is not something that should be encouraged.[179]

Ultimately, Section 1501(c)(2) is an ineffective way to prevent COMI migration and forum shopping generally. First, the possibility of a U.S. debtor migrating to a nation with more favorable bankruptcy laws for the purpose of returning and being granted recognition is a rather minor concern. As it stands, the United States has comparatively favorable consumer bankruptcy laws when compared with many European nations.[180] Consequently, it is unlikely that a U.S. debtor would go through multiple international moves just to get the benefit of another country's bankruptcy law.

Second, the 1501(c)(2) exclusion only prevents U.S. citizens or lawfully admitted aliens from migrating their COMI if they are not citizens or permanent residents of the alternate country. Section 1501(c)(2) would do nothing to prevent individual debtors from non-U.S. countries from strategically migrating their COMI. For instance, neither debtor in *Ran* or *Kemsley* was confronted with denial of recognition on the basis of 1501(c)(2) exclusion as a means of preventing COMI manipulation.[181] Finally, the 1501(c)(2) exclusion only prevents forum shopping as a means to protect assets in the United States. Section 1501(c)(2) does not prevent forum shopping for the purposes of avoiding creditors abroad or exploiting the automatic stay, as the court in *Kemsley* accused the debtor of doing.[182] In other words, where debtors are seeking recognition, 1501(c)(2) is ineffective.

The *Kemsley* solution to the issue is similar to that expressed by the Model Law. Namely, it prevents manipulation of the COMI analysis by setting the timeframe for the COMI inquiry as of the commencement of the foreign

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[176] *Compare In re* Kemsley, 489 B.R. 346, 360-363 (Bankr. S.D.N.Y. 2013), *with In re* Ran, 607 F.3d 1017, 1026 (5th Cir. 2010).

[177] *See* Part II.C, discussing the Section 1502(c)(2) exclusion.

[178] H.R. REP. 109-31(I), *supra* note 46.

[179] *See id*.

[180] *See* KILBORN, *supra* note 129, at 11.

[181] *See Kemsley*, 489 B.R. at 346; *Ran*, 607 F.3d at 1017.

[182] *Kemsley*, 489 B.R. at 351-52.

proceeding.[183] As a result, any moves after the commencement of the foreign proceeding to influence the COMI determination are excluded from the main-recognition analysis.[184] The *Ran* approach is more susceptible to manipulation than the *Kemsley* approach on its face. There, the court showed little concern over the possibility of COMI manipulation given the length of the debtor's residence, activities, and relationships in the COMI state.[185]

On the other hand, dicta in *Ran* may provide a sound basis for preventing COMI migration for individuals. After rejecting arguments for a look-back period and based on comity, the court explained:

> Lastly, we note that this case does not involve a recent change of domicile by the party in question. 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.[186]

Although extraneous to the holding of the case, the court preserved the possibility of implementing a look-back period where the debtor may have moved for the purpose of exploiting different national bankruptcy laws.[187] Also of note, the look-back period in cases of abuse is likely only applicable to individual debtors because, in the case of entity debtors, incorporation and dissolution would be determined under the laws of a particular country.[188]

The *Ran* dicta is one plausible solution to preventing COMI migration, but it does have some drawbacks. One of the strong points of basing the COMI determination at the time of the petition for recognition is that it would be highly predictable to third parties.[189] Creating a look-back in some circumstances where the court thinks there might be foul play would re-introduce an element of uncertainty into the COMI analysis. Future courts would need to determine what constitutes a "recent change in circumstances" and whether the debtor made a move too quickly, justifying a look-back period. Nevertheless, the *Ran* dicta provides a reasonable middle ground that might prevent some forum shopping at the expense of predictability in certain cases.

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183 *Id.* at 361-62.

184 *See id*.

185 *See Ran*, 607 F.3d at 1022-26.

186 *Id*. at 1026.

187 *See id*.

188 Lightner, *supra* note 115, at 61 ("In any event, the Fifth Circuit's *dicta* should be viewed with caution in the context of entity debtors, however, because individual debtors are not organized or dissolved under the laws of any country"); *But see In re* Fairfield Sentry Ltd., 440 B.R. 60, 65-66 (Bankr. S.D.N.Y. 2010); *In re* Fairfield Sentry Ltd., 2011 WL 4357421, *6 (Bankr. S.D.N.Y. 2011) (both considering *Ran* dicta in context of corporate debtors).

189 *See* discussion *supra* Part III.B.3.

The *Ran* dicta is significant for another reason as well. It is one possible way to reconcile the split between the Southern District of New York and the Fifth Circuit for individual debtors and the COMI determination. The court in *Kemsley* was expressly concerned that the debtor was attempting to migrate his COMI at the expense of one of his creditors, Barclays.[190] The court also struggled with a multitude of possibilities for the debtor's COMI and even considered the possibility of multiple COMIs.[191] One way to view the two cases in harmony is that the *Kemsley* court analyzed the debtor's COMI at the time of the commencement of the foreign proceeding because of the recent change in the debtor's domicile, effectively employing a bad faith look-back. The problem with this explanation is that the *Kemsley* court considers and rejects the *Ran* timing analysis.[192] Though, the *Kemsley* court makes no mention of the *Ran* dicta or a possible bad faith look-back.[193]

C. Reviewing the Options and the Goldilocks Solution: Statutory Look-Back

So far this text has primarily analyzed two opposing viewpoints on the COMI determination for individuals, namely the approach described by the courts in *Ran* and *Kemsley*.[194] The virtues of one approach are the vices of the other. However in between the two extremes of *Kemsley* and *Ran* there are a number of alternatives: (1) the *Ran* dicta, (2) the ALI Reports solution,[195] and (3) a statutory look-back period.[196]

1. The *In Re Ran* Dicta

As discussed above,[197] dicta in *Ran* presents an intermediate solution between the harshness of *Kemsley* and the manipulation potential of *Ran*. The

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[190] *In re* Kemsley, 489 B.R. 346, 350-51 (Bankr. S.D.N.Y. 2013) ("This financial support may indicate that the trustee's petition for recognition is an aspect of a coordinated trans-Atlantic litigation strategy orchestrated by Mr. Kemsley and his advisers to shield Debtor's assets from enforcement actions by Barclays (notably his Florida real estate)."). *See* explanation *supra* notes 101-106.

[191] *Kemsley*, 489 B.R. at 355-56.

[192] *Id*. at 353-55.

[193] *Id*.

[194] *See supra* Part III.

[195] AM. L. INST. & INT'L INSOLVENCY INST., *Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases: A Report to ALI* (March 30, 2012), http://www.iiiglobal.org/sites/default/files/alireportmarch_0.pdf. [hereinafter "ALI Principles"].

[196] The foregoing analysis puts aside the issue of subjective intent. In light of the fact that most nations, the ALI, the Model Law, and a number of U.S. courts have rejected the idea of subjective intent as affecting the COMI determination, the intermediate solutions do not consider the issue of subjective intent.

[197] *See supra* notes 189-93.

Ran dicta would adjust the timing of the COMI determination in cases where a debtor had recently migrated from a different nation. This middle ground that this solution provides comes at the cost of predictability since determining whether a COMI migration was in bad faith would turn on judicial interpretation. For instance, judges would need to determine what constitutes bad faith for the COMI determination, and how recent a move was to trigger the bad faith look-back.

2. The ALI Approach

ALI principles check forum shopping in two different manners. First, ALI Principle 13.4 provides that once a debtor files a petition for main recognition a court must make a positive determination of the debtor's COMI.[198] The rationale is that this prevents jurisdiction from being "undermined by the otherwise practical concession to the concept of mobility of the COMI."[199]

The second way the ALI prevents COMI migration is explained in ALI Principle 13.5:

> [T]he international jurisdiction of the Prior State should not be displaced unless either (i) at the time of the alleged relocation of the center of main interests, the debtor was able to pay all debts and liabilities incurred prior to that time or (ii) the debtor has fully paid or concluded a composition or compromise in respect of its obligations incurred before the relocation of its center of main interests . . . [or] if there is no undue prejudice to creditors.[200]

The comments to the ALI Principles explain that by implication 13.5 requires the timing of the COMI to be determined as soon as the debtor files the main petition for recognition.[201] Consequently, the ALI approach is closely related to that of *Kemsley* and the Model Law, except that it requires a court to make the determination even if no one raises the issue.

To prevent the harsh results of setting the COMI determination as of the date of the commencement of the foreign proceeding, the ALI approach permits a COMI under three circumstances: where the debtor could have paid all of its debts, where the debtor did pay all of its debts or had arrangements to do so, or where the creditors would not be prejudiced.[202] Presumably, the reasoning behind this suggestion is that a debtor who could have paid all of her debts or arranged to

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198 ALI Principles, *supra* note 195, at 25, 13.4; *see also* comments to ALI Principles at 107, lines 31-36.

199 ALI Principles, *supra* note 195, at 108, lines 4-12.

200 *Id.* at 25, 13.5.

201 *Id.* at 107, lines 39-41.

202 *Id.* at 25, 13.5.

do so would not have the same motivation to move to another state for the purposes of exploiting differing bankruptcy laws.[203] The ALI approach also accounts for the possibility of harsh outcomes by providing that if creditors would not be harmed, a migration in COMI would be permissible because a debtor would have no means of payment.[204] "It would be counterproductive to allow the impossibility of payment of and by itself, to furnish a ground on which such 'out of the money' creditors could block a COMI migration."[205] In other words, where a COMI migration would not hurt the creditors, it is permissible.

There are a few disadvantages to the ALI approach. First, the ALI approach sacrifices ascertainability to third parties. It seems somewhat unrealistic that a creditor would know whether a debtor was solvent when she made arrangements to migrate to another country. Instead, a determination of the debtor's financial well-being would likely be determined in a bankruptcy court. Second, ALI Principle 13.4 cuts against the policy of the presumption in favor a debtor's stated COMI. Model Law Article 16 and 11 U.S.C. § 1516 provide a rebuttable presumption that an individual debtor's COMI is her habitual residence. The policy behind the presumption is to prevent "time-consuming legalization or other processes and provide certainty with respect to the decision to recognize."[206] The ALI Principle 13.4 would essentially weaken the COMI presumption embedded in 11 U.S.C. §1516 and Article 16 of the Model Law with a requirement that a court make an affirmative finding regarding a debtor's COMI.[207]

3. Statutory Look-Back

The next and most preferable solution, to which the *Ran* court alludes, is to create a statutory look-back period for an individual COMI determination. The United States should consider adopting an approach that creates a two-year statutory look-back period for the COMI determination for individuals. The look-back period should permit a bankruptcy court faced with the issue of determining main recognition to consider relevant facts from the two years prior to the petition for recognition to the date of the petition for recognition.[208]

Spain and Italy have adopted legislation providing for a similar look-back period. They require a debtor to reside in the country for six months, in

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[203] See *id*. at 108, lines 41-50, 109, lines 1-3.

[204] ALI Principles*, supra* note 195, at 108.

[205] *Id*.

[206] UNCITRAL MODEL LAW, *supra* note 24, at ¶ 29.

[207] ALI Principles*, supra* note 195, at 107, lines 31-36 ("Global Principle 13.4 . . . makes it a positive requirement that where proceeding are opened on the basis of Global Principle 13.1(i) [main interest] . . . there must be a positive determination by the court to confirm that this is in fact the case.").

[208] Although the exact length for determining a COMI look-back is arbitrary, it is an exercise in line-drawing.

Spain, or a year and a day, in Italy, to prevail on a petition for recognition.[209] Their approach differs from a typical look-back period in that it does not establish a timeframe to determine a COMI.[210] Rather, it is a prerequisite necessary for main recognition.[211]

Unfortunately, other features of Spain's and Italy's insolvency laws make them less-than-perfect test cases for determining the effectiveness of a COMI look-back. For instance, in Spain there is no discharge procedure—debts may only be reduced or the time for payment extended—and in Italy personal bankruptcy is only available for traders.[212] But, this author was unable to find any instances where individual debtor's moved to Italy or Spain to take advantage of more lax bankruptcy laws.[213] The fact that there has been little COMI migration to Spain or Italy for forum shopping purposes corroborates the proposition that a minimum timeframe effectively limits abuse of international insolvency law.

There are a number of benefits to implementing a statutory look-back scheme for COMI determination. First, it is a workable solution. Other provisions of the Code implement statutory look-backs and treat individuals differently from corporate entities. For instance, in the area of exemptions, Congress has imposed look-back requirements for certain property exemptions.[214] Similarly, Section 548 of the Code imposes a two-year look-back period to determine whether a debtor may avoid a fraudulent transfer.[215] Because look-back periods have been successfully implemented elsewhere in the Code, there is little reason to think that a look-back for individual COMI determinations would be unduly burdensome for attorneys or judges. Additionally, treating individuals separate from corporations is common throughout the Code. For example, Chapter 13 is only available for individuals, individuals in Chapter 11 have special restrictions, and individuals in Chapter 7 must comply with the Means Test.[216] Therefore, imposing a look-back specifically for individuals fits the general structure of the Code.

Second, creating a statutory look-back would provide a middle ground between the potential manipulation of the *Ran* approach and the harsh results of *Kemsley*. First, a statutory look-back would not create an unreasonable impediment for third parties to determine an individual's COMI.[217] Unlike the

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[209] Mark Arnold, *supra* note 171, at 250.

[210] *See id*.

[211] *See id*.

[212] MARIA GERHARDT, CONSUMER BANKRUPTCY REGIMES AND CREDIT DEFAULT IN THE US AND EUROPE 11-12, 20-21, (Working Paper No. 318) (July 2009), http://aei.pitt.edu/11336/1/1887.pdf.

[213] *Id*. It is likely, however, that the converse will prove true and Italian and Spanish citizens will migrate elsewhere to exploit more consumer-friendly bankruptcy regimes.

[214] 11 U.S.C. § 522(b)(3)(A).

[215] 11 U.S.C. § 548(a)(1).

[216] 11 U.S.C. §§ 109(e), 1123(a)(8), 1123(c), 707(b)(2).

[217] For discussion of *Ran* and *Kemsley* regarding the goal of ascertainability to third parties *see supra* Part III.B.1.

Kemsley approach, a statutory look-back would provide a narrow time frame instead of the time ranging since commencement of the foreign proceeding, making it easier for creditors to determine where a debtor's COMI was located over that period. Although, admittedly a statutory look-back would not be as ascertainable as the *Ran* approach.

Third, fixing the look-back period would not prohibit a court from considering a debtor's subjective intent through objective actions. A court would still be able to consider a debtor's testimony regarding future intent gauged through objective actions while mitigating the harsh results under *Kemsley*.[218] Under a statutory look-back scheme, a court would have a greater frame of reference to consider the truthfulness of a debtor's intent to remain in the United States, but it would not be the never-ending-inquiry that the *Ran* court feared and the *Kemsley* court employed.

Fourth, for a debtor to effectively migrate his COMI with a statutory look-back, she would need to remain in the desired country for two years instead of a mere six months, as courts found sufficient in England.[219] As a result, forum shopping would be limited to individuals who have committed a serious relocation and who would probably have legitimately relocated their COMI.

Fifth, a statutory look-back period is superior to the dicta in *Ran*. The *Ran* dicta allows a look-back in instances of bad faith, but that approach introduces an element of uncertainty as to what constitutes bad faith and how long the look-back should be. A statutory look-back would create a fixed length of time for courts to examine and would apply to all individual requests for main recognition.

Last, the look-back scheme is preferable to the ALI Approach. Unlike the ALI approach, a statutory look-back scheme would not require a debtor to prove her COMI if uncontested, saving money and judicial resources. Moreover, a look-back scheme provides the same flexibility as the ALI approach without the added cost of litigating a debtor's COMI even if uncontested. Moreover, the ALI's exceptions permitting COMI migration apply only where the creditor would not be harmed.[220] But a look-back scheme would not undo the current presumption in favor of a debtor's COMI. So, if a creditor would not be harmed in a COMI migration, they would have no reason to contest a debtor's COMI. Ultimately, a statutory look-back period for the COMI determination would provide a goldilocks solution to the *Kemsley* and *Ran* dilemma.

IV. CONCLUSION

Chapter 15 provides an interesting tool for corporations and individuals alike. But, like other tools in bankruptcy, Chapter 15 allows for possible

[218] For a discussion of potential manipulation resulting from introduction of subjective intent *see supra* Part III.B.2.

[219] McDonald, *supra* note 157.

[220] *See supra* note 204 and accompanying text.

exploitation by crafty globetrotter-debtors manipulating the COMI determination. U.S. courts have disagreed regarding the treatment of individuals in Chapter 15. On the one hand, the Southern District of New York has taken a firm stance against preventing COMI manipulation by setting the COMI determination as of the time of the commencement of the foreign proceeding and disallowing the testimony of a debtor's future intent. On the other hand, the Fifth Circuit has provided a more generous route for individuals allowing testimony of subjective intent and basing the COMI determination as of the date of the petition for recognition. Between these two extremes is a host of intermediate solutions. The solution that offers the best of both worlds is to create a statutory look-back period for the COMI determination, and to allow subjective intent to enter the COMI inquiry only by examining the objective actions of the debtor because it is more forgiving than the *Kemsley* approach but not subject to the likelihood of manipulation present in the *Ran* approach.