



## Timing and Location of COMI Determined at the Timing of Filing Chapter 15 Petition

Priya Suresh, J.D. Candidate 2022

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### Introduction

A debtor's center of main interest ("COMI") is not defined under title of 11 of the United States Code (the "Bankruptcy Code"). As a result, bankruptcy courts have taken a number of different approaches to determining a debtor's COMI. The starting place for determining COMI is the statutory rebuttable presumption that a debtor's registered office, or habitual residence is the debtor's COMI.<sup>1</sup> If the presumption is rebutted, the party seeking recognition as a foreign main proceeding must prove by a preponderance of the evidence that the debtor's COMI is in the jurisdiction where the proceeding is pending.<sup>2</sup> Under chapter 15 of the Bankruptcy Code, there are two types of foreign proceedings: (i) a foreign main proceeding which is defined as a proceeding pending in the country where the debtor has its COMI, and (ii) a foreign nonmain proceeding which is defined as proceeding in a country where the debtor has an establishment.<sup>3</sup>

Before a court will determine the location of COMI, the court must first determine the point at which COMI is considered.<sup>4</sup> Most courts have found that the point in time for

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<sup>1</sup> See 11 U.S.C §1516(c) (2018).

<sup>2</sup> See *In re Gerova Fin. Grp., Ltd.*, 482 B.R. 86, 90–91 (Bankr. S.D.N.Y. 2012).

<sup>3</sup> See 11 U.S.C §1502 (2018).

<sup>4</sup> See *Morning Mist Holding Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 134 (2d Cir. 2013).

determining when to look at COMI is the chapter 15 petition date, not the filing date for the foreign bankruptcy proceeding, with a possible look back period to thwart manipulation.<sup>5</sup> However, not every court follows this approach. After, the court will determine the location of COMI under various non-exhaustive factors.

This memorandum examines the different aspects of COMI in a twofold approach. Part I discusses the implications of the timing of when COMI is determined. Part II discusses the various factors courts may examine when determining where COMI is located.

## **I. Timing of When to Determine COMI**

### ***A. A Court Determines COMI at the Time of Chapter 15 Filing***

The Second Circuit held that COMI should be determined at the time of the chapter 15 petition filing.<sup>6</sup> In making this determination, the *Fairfield Sentry* court considered the following elements: (1) the statutory text of chapter 15 and (2) Congress’s intent.<sup>7</sup>

Under the first element, the court analyzed the statutory text of chapter 15 and decided it would not look at the debtor’s entire operational history.<sup>8</sup> The court noted that the text of the statute is drafted in the present tense, suggesting that it should analyze a debtor’s COMI at the time the chapter 15 petition is filed, relying heavily on the choice of verb tense to determine a statute’s temporal reach.<sup>9</sup> The focus is on the words “pending” and “has” in section 1517 which states a foreign proceeding is one where it “is pending in the country where the debtor has the center of its main interests.”<sup>10</sup> The court defined pending to mean only after a foreign proceeding has commenced. Under that definition, reasoned that timing would mean the filing date of the

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<sup>5</sup> *See id.* at 139.

<sup>6</sup> *See In re Fairfield Sentry Ltd.*, 714 F.3d at 130.

<sup>7</sup> *See id.* at 133–134.

<sup>8</sup> *Id.* at 133.

<sup>9</sup> *Id.* at 133–134.

<sup>10</sup> 11 U.S.C. § 1517(b)(1) (2018).

chapter 15 petition rather than the initiation of the foreign proceeding.<sup>11</sup> Congress would have created a look back period in the Bankruptcy Code if it intended courts to view COMI through a lookback period or specific date, but they did not.<sup>12</sup> A majority of courts that have addressed this question have determined that COMI should be considered at the time the chapter 15 petition is filed.<sup>13</sup> Among the other circuit courts, only the Fifth Circuit has decided this question and is in accord with the holding in *Fairfield Sentry Ltd.*<sup>14</sup>

Under the second element, Congress's intent, the court places a heavy emphasis on Congress's verb usage following a strict reading of the statute.<sup>15</sup> The Second Circuit aligns itself with the Fifth Circuit's rationale on denying the examination of a company's full operational history.<sup>16</sup> It observed Congress's intent on harmonizing insolvency proceedings and that "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 . . . ."<sup>17</sup> A debtor may have conducted past activities in a country much earlier than when the petition for recognition was filed, and as a result, could confuse the COMI analysis.<sup>18</sup> However, not every court follows this reasoning. As demonstrated in *In re Millennium Global Emerging Credit Master Fund Ltd.*, a

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<sup>11</sup> See *In re Fairfield Sentry Ltd.*, 714 F.3d at 134.

<sup>12</sup> See 11 U.S.C. §522(b)(3)(A) (2018) (Congress created a look back provision for property exemptions. If they intended a lookback provision when viewing COMI, they would have done the same thing. Compare 11 U.S.C. §522(b)(3)(A) (2018) with 11 U.S.C. §1517(b)(1)) (2018); see also *In re Ran*, 607 F.3d 1017, 1025 (5th Cir. 2010).

<sup>13</sup> *In re Fairfield Sentry Ltd.*, 714 F.3d at 134.

<sup>14</sup> See *id.*

<sup>15</sup> See *id.*

<sup>16</sup> See *id.*

<sup>17</sup> *Id.* (citing *In re Ran*, 607 F.3d at 1025).

<sup>18</sup> See *In re Fairfield Sentry Ltd.*, 714 F.3d at 134.

New York bankruptcy court concluded that COMI should be determined at the date of the commencement of the foreign proceeding.<sup>19</sup>

### ***B. Considering COMI at the Time of Chapter 15 Filing may lead to COMI Manipulation***

A court may be allowed a look back period in certain situations when there is bad faith on behalf of the debtor who manipulated their COMI.<sup>20</sup> Courts have considered that there could be forum shopping and illegitimate COMI shifting from the time period of when the foreign proceeding commenced to when the petition for recognition was filed. “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.”<sup>21</sup> Consequently, a court is allowed a look back period. The U.S. approach to determining COMI is at odds with how courts in other countries determine COMI and raises concerns including prejudice to creditors and insider exploitation.<sup>22</sup> However, just because a debtor shifts their COMI does not mean they do not have legitimate reasons for doing so. Some valid reasons include maximizing value for their creditors and preserving their assets.<sup>23</sup>

## **II. Deciding the Location of COMI**

### ***A. Courts Will Examine Various Non-Exhaustive Factors When Determining the Location of COMI***

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<sup>19</sup> See *In re* Millennium Global Emerging Credit Master Fund Ltd., 474 B.R. 88, 92 (S.D.N.Y. 2012).

<sup>20</sup> See *In re* Fairfield Sentry Ltd., 714 F.3d at 137.

<sup>21</sup> *Id.*

<sup>22</sup> See *id.* at 136; see also *In re* Ocean Rig UDW Inc., 570 B.R. 687, 707 (Bankr. S.D.N.Y. 2017).

<sup>23</sup> See *In re* Ocean Rig UDW Inc., 570 B.R. at 707.

Unlike the timing of COMI, which courts have definitive guidance for considering it as of the chapter 15 filing date, the location of COMI is open-ended and fact specific to each case.

Some of the factors courts will examine when determining the location of COMI are:

[1] the location of the debtor's headquarters; [2] the location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company); [3] the location of the debtor's primary assets; [4] the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; [5] and/or the jurisdiction whose law would apply to most disputes.<sup>24</sup>

"While each of these factors is a 'helpful guide' in determining a debtor's COMI, the factors are not exclusive, and none of the factors is required nor dispositive."<sup>25</sup>

### ***B. Courts Have Flexibility in the Application of these Factors***

There are multiple factors that courts can apply due to the absence of a statutory definition of COMI.<sup>26</sup> In *In re Ascot Fund Ltd.*, a New York bankruptcy court analyzed COMI through various factors after an investor argued that COMI was in New York rather than the presumed registered office in Cayman Islands.<sup>27</sup> Every court will examine factors differently, some may even combine two factors into one during its analysis.<sup>28</sup> Under the factor of "location of headquarters and management," a court may consider whether the debtor's actions were ministerial or not.<sup>29</sup> The *Ascot Fund* court found the debtor's activities to not be purely ministerial, boosting the argument that COMI was in Cayman Islands.<sup>30</sup> Additionally, under this factor a court may consider where the directors reside, where the debtor actively manages, and

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<sup>24</sup> *In re Olinda Star Ltd.*, 614 B.R. 28, 41 (Bankr. S.D.N.Y. 2020).

<sup>25</sup> *In re Ocean Rig UDW Inc.*, 570 B.R. at 703.

<sup>26</sup> *See In re Olinda Star Ltd.*, 614 B.R. at 41.

<sup>27</sup> *See In re Ascot Fund Ltd.*, 603 B.R. 271, 281 (Bankr. S.D.N.Y. 2019).

<sup>28</sup> *See id.*

<sup>29</sup> *See id.*

<sup>30</sup> *See id.*

where the board of directors conduct meetings.<sup>31</sup> Courts recognize the need to be flexible to reflect the realities of a particular business, so it may consider liquidators in its analysis as well, especially since they play a major role in the restructuring process.<sup>32</sup> Another factor considered is “location of primary assets.” However, this factor can sometimes be unclear due to the type of business being conducted, such as business on the high seas.<sup>33</sup> Instead, courts have analyzed other various activities of the debtor to supplement this factor such as incorporation, meeting with creditors, and management of business.<sup>34</sup> This demonstrates the flexibility a court possesses when one factor may be blurred or unclear. Rather than just deeming a factor neutral, which courts have done, it can combine aspects of one factor into another.<sup>35</sup>

Under the next factor of “governing law, appropriate forum and creditor’s expectations,” a court may analyze a debtor’s COMI from an investor's point of view.<sup>36</sup> In *In re Ascot Fund Ltd.*, the court found that most documents such as the articles agreement and shareholder subscription agreement were governed by Cayman law and the company itself was a Cayman company governed by Cayman law.<sup>37</sup> Through these documents, it was understood by third parties and creditors that disputes would be decided under Cayman law.<sup>38</sup> The court found the “location of creditors” factor to be neutral because creditors were scattered throughout the world due to the global nature of the company.<sup>39</sup> If there were many creditors found in one place, then

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<sup>31</sup> *See id.*

<sup>32</sup> *See In re Olinda Star Ltd.*, 614 B.R. at 42.

<sup>33</sup> *See id.* at 43.

<sup>34</sup> *See id.*

<sup>35</sup> *See id.*; *see also In re Ascot Fund Ltd.*, 603 B.R. at 285.

<sup>36</sup> *See In re Ascot Fund Ltd.*, 603 B.R. at 283.

<sup>37</sup> *Id.* at 284.

<sup>38</sup> *See id.*

<sup>39</sup> *Id.* at 285.

that would boost an argument for COMI in that country, but this is hard to examine when many companies are conducted to reach a global audience leaving creditors across the world.

Another factor courts may analyze is the expectation of creditors and their support. The court will consider whether there is any objective evidence that could provide interested parties with notice that a debtor's COMI was in a particular jurisdiction other than the place of its registered office.<sup>40</sup> A court will take into account whether creditors were put on notice through means such as the appointments of joint provisional liquidators being advertised, and disclosure in debt documents which would provide creditors with evidence of COMI in a certain location.<sup>41</sup> Evidence of creditor support is important because their compliance is indicative of approving of the proposed COMI, especially since it is their money at stake.<sup>42</sup> Evidence of this might be how much of a percentage of them approved of the plan and whether any of them opposed recognition of the proceeding.<sup>43</sup>

It is evident that courts may examine the factors in more broad categories, but not all courts follow this method.<sup>44</sup> Some courts may decide to analyze COMI in smaller, more detailed categories such as board of director meetings, company officer's location, notice to third parties of relocation, location of operations, location of assets, and location of bank accounts.<sup>45</sup> Ultimately, most courts usually analyze all the factors, it is the way it separates and organizes them that differ.

### ***C. Subsidiaries' COMI is not Presumed to be the Same as Their Parent Company***

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<sup>40</sup> See *In re Olinda Star Ltd.*, 614 B.R. at 44.

<sup>41</sup> See *id.*

<sup>42</sup> See *id.*

<sup>43</sup> See *id.* at 44–45.

<sup>44</sup> See *In re Ocean Rig UDW Inc.*, 570 B.R. at 696.

<sup>45</sup> See *id.* at 696–698.

Another issue arises when COMI must be determined for a debtor who is a part of a group of companies.<sup>46</sup> When there is a parent company with multiple subsidiaries, the COMI of the parent should not be dispositive on the COMI of the subsidiaries, rather each member of the group must be examined individually.<sup>47</sup> This is important to analyze because it is possible for the COMI of the parent to be different than the COMI of the subsidiary, so it is not reasonable for the court to lump the two together.<sup>48</sup> The same set of non-exhaustive factors listed above are used to determine a subsidiary's COMI.<sup>49</sup>

## **Conclusion**

Although the Second Circuit has given definitive guidance on when to consider COMI, there is still an open question as to the exact analysis courts will implement when determining the location of COMI.<sup>50</sup> Additionally, the timing may implicate certain issues, such as illegitimate COMI shifting by the debtor.<sup>51</sup> Due to that concern, courts have allowed a possible examination of the debtor's operational history.<sup>52</sup> As demonstrated above, when determining the location of COMI, courts use discretion when deciding how to analyze a factor. This is because it is understood that COMI is a flexible determination and not a rigid application of factors.<sup>53</sup> COMI will ultimately be decided based on the court's application of the factors to the specific facts of each case.

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<sup>46</sup> *See In re Serviços de Petróleo de Constellation S.A.*, 600 B.R. 237, 279 (Bankr. S.D.N.Y. 2019).

<sup>47</sup> *See id.* at 280

<sup>48</sup> *See id.*

<sup>49</sup> *See id.* at 289.

<sup>50</sup> *See In re Fairfield Sentry Ltd.*, 714 F.3d at 130.

<sup>51</sup> *See id.* at 137.

<sup>52</sup> *Id.* at 139.

<sup>53</sup> *See In re Serviços de Petróleo de Constellation S.A.*, 600 B.R. 237 at 278.