NATIONAL BANKRUPTCY CONFERENCE
A Voluntary Organization Composed of Persons Interested in the Improvement of the Bankruptcy Code and Its Administration

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March 15, 2022

Re: Revisions to Chapter 15 of the Bankruptcy Code

Dear Reps. Cicilline and Buck and Sens. Durbin and Grassley:

The National Bankruptcy Conference ("NBC") is a voluntary, non-partisan, not-for-profit organization composed of about 60 of the nation's leading bankruptcy judges, professors and practitioners. It has provided advice to Congress on bankruptcy legislation for nearly 80 years. I enclose a Fact Sheet which provides further information about the NBC. This letter updates a January 27, 2016 letter by adding more current information and authorities.

Chapter 15, Ancillary and Other Cross-Border Cases, was added to the Bankruptcy Code by section 801 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.[1] Chapter 15 is the United States embodiment and enactment of the Model Law on Cross-Border Insolvency ("Model Law") promulgated by the United Nations Commission on International Trade Law

[1]House Report No. 109-31, Pt. 1, 109th Cong., 1st Sess. 105, *et seq* (2005) ("H. R. Rep.").

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("UNCITRAL"). The United States and forty four countries (plus two overseas territories of the United Kingdom) have adopted the Model Law.[2] NBC

Conferees were actively involved in the development and drafting of the Model Law as members (International Insolvency Institute) and heads (United States and the International Bar Association) of delegations to UNCITRAL and then assisted Congress in drafting chapter 15.[3] As experience has developed in cases under chapter 15, the NBC has identified a number of revisions that are necessary or desirable for chapter 15 to fulfill its purposes, as set forth in section 1501(a), and to function and be interpreted in light of its international origin and consistently with the application of similar statutes adopted by foreign jurisdictions, as set forth in section 1508.

In 2019, we submitted a letter to Congress containing eleven proposed revisions. At the suggestion of then legislative staff, we circulated that letter to individuals and organizations with interest and expertise in cross-border insolvency. Three of the proposed revisions were opposed by one or more of the reviewers and the NBC decided to proceed with only the unopposed revisions discussed below. A chart of the comments from the reviewing parties is attached.

Amendments to clarify the applicability of sections of the Bankruptcy Code to chapter 15 cases

1. 11 U.S.C. § 103(a)

The rigid, ostensibly "plain meaning" interpretational approach taken by the Second Circuit in the *Barnet* decision discussed below raises the possibility that section 103 might be interpreted to prevent the application of several Bankruptcy Code sections that either apply by their terms in chapter 15 or are referenced in chapter 15 but are not specified in section 103(a). Section 103(a) provides:

11 U.S.C. § 103 Applicability of chapters

(a) Except as provided in section 1161 of this title, chapters 1, 3, and 5 of this title apply in a case under chapter 7, 11, 12, or 13 of this title, and this chapter, sections 307, 362(o), 555 through 557, and 559 through 562 apply in a case under chapter 15.

Sections 305 and 306, as they now exist and as they would be amended by changes recommended below, apply to chapter 15 by their terms. They should be added to section 103(a).

Additional sections of the Bankruptcy Code apply in cases under chapter 15 because they are specifically referenced in chapter 15. Section 1502(c) refers to sections 109(b) and (e) to exclude entities identified in those sections from the scope of chapter 15. Section 1520 applies (with

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[2] *See* http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html.

[3] Conferee Professor Jay L. Westbrook was a head of the United States delegation to UNCITRAL Working Group V (Insolvency) while Conferee Daniel M. Glosband was the IBA's lead delegate. They also led a consulting group organized by the United States Department of State in drafting the legislation that was enacted by Congress as chapter 15.

limitations) sections 361, 362, 363, 549 and 552.[4] We recommend the following revisions to address this problem:

11 U.S.C. § 103. Applicability of chapters

(a) Except as provided in section 1161 of this title, chapters 1, 3, and 5 of this title apply in a case under chapter 7, 11, 12, or 13 of this ~~t~~itle, ~~and this~~**. This** chapter**,** sections **305, 306,** 307, 362(o), 555, **556,** ~~through~~ 557, ~~and~~ 559**, 560, 561, and** ~~through~~ 562 of this title, **and any section of this title specifically made applicable by a section of chapter 15** apply in a case under chapter 15.

2. 11 U.S.C. § 103(k)

Section 103(k) identifies sections of chapter 15 that apply (a) in all cases under title 11 and (b) in situations when no case under title 11 is pending. It was intended to identify sections of chapter 15 that would apply even if there were no chapter 15 case but, in retrospect, it was not sufficiently comprehensive. Section 103(k) currently states:

11 U.S.C. § 103 - Applicability of chapters

(k) Chapter 15 applies only in a case under such chapter, except that—
(1) sections 1505, 1513, and 1514 apply in all cases under this title; and
(2) section 1509 applies whether or not a case under this title is pending.

The sections currently specified in section 103(k)(1) deal with authorization of a trustee or other entity to act in a foreign country (§ 1505), the rights of foreign creditors to participate in a case under title 11 (§ 1513) and notifications to foreign creditors concerning a case under title 11 (§ 1514). The section currently specified in section 103(k)(2) deals with access to courts in the United States by foreign representatives (§ 1509).

In addition to sections 1505, 1513 and 1514, sections 1511, 1523, 1531 and 1532 should apply to all cases under title 11 while section 1510 should apply generally, regardless of whether there is a case pending under title 11. These sections would appear to apply beyond chapter 15 based on their language and function, but they are not referenced in 11 U.S.C. § 103(k).

Section 1510, Limited jurisdiction, provides: "The sole fact that a foreign representative files a petition under section 1515 does not subject the foreign representative to the jurisdiction of any court in the United States for any other purpose." The provision was intended to protect against an extension of jurisdiction "beyond the boundaries of the case and any related actions the foreign representative may take …."[5]

Section 1511, Commencement of case under section 301, 302 or 303, empowers a foreign representative, upon recognition, to commence a case under other chapters of title 11. It must necessarily apply to the case commencement procedures for those chapters. For example, section

[4] While section 1523 gives a foreign representative the power to initiate avoidance actions in a case concerning the debtor under another chapter of the Bankruptcy Code and references sections 522, 544, 545, 547, 548, 550, 553 and 724(a), those sections only apply in cases under chapters other than chapter 15. Consequently, while mentioned in chapter 15, they do not need to be added to the list of sections that apply in a chapter 15 case.

[5] H.R. Rep. at 111.

301 refers to a voluntary case under a chapter being commenced by an entity that may be a debtor under that chapter and makes no reference to the foreign representative of a recognized foreign main proceeding who may file such a petition by virtue of section 1511.[6]

Section 1531, Presumption of insolvency based on recognition of a foreign main proceeding, literally creates this presumption for the purposes of an involuntary petition filed under section 303 and must apply in such a case.

Section 1532, Rule of payment in concurrent proceedings, replaced former section 508(a) and was intended to apply generally, regardless of whether there is a chapter 15 proceeding.[7] The language follows the Model Law and is designed "to avoid situations in which a creditor might obtain more favorable treatment than the other creditors of the same class by obtaining payment of the same claim in different jurisdictions."[8]

While the applicability of these sections to other chapters of title 11 (or beyond, in the case of section 1510) may appear self-evident, in light of decisions in cases that apply the language of chapter 15 and related provisions more narrowly and literally than contemplated by section 1508, clarifying the statutory language to avoid potential misunderstanding would be prudent. The NBC recommends the following revisions:

> **(k)** Chapter 15 applies only in a case under such chapter, except that—
> (1) sections 1505, **1511,** 1513, ~~and~~ 1514**, 1523, 1531, and 1532** apply in all cases under this title; and
> (2) ~~section~~**sections** 1509 ~~applies~~**and 1510 apply** whether or not a case under this title is pending.

Amendment related to eligibility of a foreign proceeding for recognition under chapter 15

3. 11 U.S.C. § 109(a)

In an appeal certified directly from the bankruptcy court in *Drawbridge Special Opportunities Fund, LP v. Barnet (In re Barnet)*, 737 F. 3d 238 (2d Cir. 2013), the Second Circuit ruled that section 109(a) applied to a petition for recognition of a foreign proceeding and remanded the case to the bankruptcy court because the foreign representatives had not proved that the debtor satisfied the requirements of section 109(a). In the court's view:

> Section 103(a) makes all of Chapter 1 applicable to Chapter 15. Section 109(a)—within Chapter 1—creates a requirement that must be met by any debtor. Chapter 15 governs the recognition of foreign proceedings, which are defined as proceedings in which "the assets and affairs of the debtor are subject to control or supervision by a foreign court." 11

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[6] *Id.*

[7] 11 U.S.C. § 1532: "Without prejudice to secured claims or rights in rem, a creditor who has received payment with respect to its claim in a foreign proceeding pursuant to a law relating to insolvency may not receive a payment for the same claim in a case under any other chapter of this title regarding the debtor, so long as the payment to other creditors of the same class is proportionately less than the payment the creditor has already received."

[8] Guide to Enactment and Interpretation of the UNCITRAL Model Law, ¶ 239, available at http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html.

U.S.C. § 101(23). The debtor that is the subject of the foreign proceeding, therefore, must meet the requirements of Section 109(a) before a bankruptcy court may grant recognition of the foreign proceeding.[9]

Section 109(a) provides:

> **11 U.S.C. § 109 - Who may be a debtor**
>
> (a) Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title.

After the *Barnet* decision, the section 109(a) requirement has been regularly satisfied by the transfer of a small amount of the foreign debtor's property to the United States, usually the establishment of a funded retainer account, as an incidental step in the commencement of a chapter 15 case.[10] On a second petition for recognition of the Australian liquidation of Octaviar Administration Pty Ltd., filed by Ms. Barnet after the remand, the bankruptcy court granted recognition to the foreign proceeding, finding that causes of action asserted by the foreign representatives and $50,000 held by their U.S. counsel in a retainer account each constituted "property in the United States" for purposes of section 109(a).[11] Bankruptcy Judges in Delaware and Florida rejected the Second Circuit's *Barnet* ruling and the Delaware judge predicted that the Third Circuit would also reject it.[12] A California bankruptcy judge applied section 109(a) to a

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[9] See Section 1, above, for the text of § 103(a).

[10] *See*, e.g., *In re* The Cash Store Financial Services Inc., Case No. 15-12813, Docket No. 1-1, ¶ 4 (Bankr. S.D.N.Y. October 16, 2015). ("CSF is eligible to be a debtor under chapter 15 pursuant to sections 109(a) and 1501(b) of the Bankruptcy Code. CSF has a USD 50,000 retainer held in the United States by Conway Mackenzie, Inc. since 2014, and a retainer held in the United States by Rothschild Inc. since 2014, the balance of which is USD 21,532.09."); *see also In re* Berau Capital Resources Pte Ltd, 2015 WL 6507871 (Bankr. S.D.N.Y. 2015) (holding that each of funds in a retainer account and contract rights under a New York law-governed indenture constitute property sufficient to satisfy § 109(a)); In re B.C.I. Finance Pty Limited, 583 B.R. 288 (Bankr. S.D.N.Y. 2018) (finding that $1,250 in a retainer account suffices to satisfy § 109(a)).

[11] *In re* Octaviar Administration Pty Ltd (Debtor in a Foreign Proceeding), 511 B.R. 361 at 372-373 (Bankr. S.D.N.Y. June 19, 2014), citing *In re* Cenargo Int'l PLC, 294 B.R. 571, 603 (Bankr. S.D.N.Y. 2003); *In re* Yukos Oil Co., 321 B.R. 396, 401-403 (Bankr. S.D. Tex. 2005); *In re* Global Ocean Carriers Ltd., 251 B.R. 31, 39 (Bankr. D. Del 2000). *See also In re* Suntech Power Holdings Co., Ltd., 520 B.R. 399 (Bankr. S.D.N.Y. Nov. 17, 2014). A number of subsequent cases have found a retainer account to be sufficient to satisfy the §109(a) requirement including *In re* B.C.I. Finances Pty Limited, 583 B.R. 288 (Bankr. S.D.N.Y 2018) where the court ruled that each o $1,250 retainer account and causes of action (for breach of fiduciary duty) satisfied § 109(a).

[12] *In re* Bemarmara Consulting A.S., Case No. 13-13037 (Bankr. D. Del. Dec. 17, 2013); *In re* Al Zawawi, 634 B.R. 11 (Bankr. M.D. Fla. 2021 ("this Court believes the Eleventh Circuit would likely disagree with the *Barnet* holding"); *In re* MMX Sudeste Mineracao S.A. (Bankr. D.D. Fla. Nov. 1, 2017 ("I reject the holding of the Second Circuit in drawbridge Special Opportunities Fund vs. Barnet…and agree with the majority view of commentators and courts that find that

recognition petition and then found that a retainer account was not sufficient to satisfy the section 109(a) property requirement. On appeal, the District Court, affirmed the applicability of section 109(a) but suggested that the retainer account should satisfy it.[13]Nevertheless, the contrived property transfer solely to satisfy section 109(a) exposes the recognition petition to a challenge that it was not filed in good faith or was "manifestly contrary to public policy". Conversely, by creating an artificial but permeable obstacle to recognition, the ruling inadvertently invites venue shopping based on the newly-minted "principal assets."[14]

Barnet is wrong; only the requirements specified in section 1517 (Order granting recognition) must be satisfied for recognition. Two Conferees who were actively involved in drafting both the Model Law and chapter 15 wrote a long article explaining in detail why *Barnet* is wrong.[15] In sum, section 1517 focuses on eligibility of the foreign proceeding and foreign representative, not the debtor, and contains no debtor-eligibility requirements.

The Second Circuit essentially invited Congress to revisit the drafting of section 109(a) in the last sentence of the *Barnet* opinion: "We direct the Clerk of Court to forward copies of this opinion to Congress following the specified protocol adopted by the Judicial Conference."[16] Amending the statute to reverse *Barnet* and preclude other courts from making the same mistake should be relatively easy.

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109 does not apply to a Chapter." Transcript of 11/1/17 Hearing, p.5, Lines 21-24); appeal dismissed for lack of jurisdiction, U.S.D.C.S.D. Fla., No. 17-24308-Civ-Scola, Apr. 3, 2018).

[13] *In re* Forge Group Power Pty Ltd., Case No. 17-300008 (Bankr. N.D. Cal. Mar. 22, 2017); 2018 WL 827913 (N.D. Cal. Feb. 12, 2018).

[14] *See* 28 U.S.C. § 1410(a). The *Suntech* case, supra, is an exemplar of all that is bad about the *Barnet* ruling. ("Focusing on venue rather than eligibility, Solyndra nevertheless contends that the JPLs opened the BONY account to manipulate the placement of the case in this Court rather than in the Northern District of California where the Debtor allegedly had its principal place of business in the United States at the time the JPLs filed the chapter 15 petition …. Solyndra argues that the JPLs' conduct was somehow improper, but I disagree. Interpreting the Bankruptcy Code to prevent an ineligible foreign debtor from establishing eligibility to support needed chapter 15 relief will contravene the purposes of the statute to provide legal certainty, maximize value, protect creditors and other parties in interests and rescue financially troubled businesses. *See* 11 U.S.C. § 1501(a).") 520 B.R. at *412-*413.

[15] **Chapter 15 Recognition in the United States: Is a Debtor "Presence" Required**?, Int. Insolv. Rev., Vol. 24:28-56 (2015). Among other things, the *Barnet* opinion completely ignores section 1508, which dictates that courts shall take an international perspective in interpreting chapter 15 and look to the UNCITRAL Guide to Enactment for guidance. The Guide makes clear that there are no debtor-eligibility requirements for recognition ("In principle, the Model Law was formulated to apply to any proceeding that meets the requirements of article 2, subparagraph *(a)*, independently of the nature of the debtor or its particular status under national law."). UNCITRAL Model Law on Cross-Border Insolvency, Guide to Enactment and Interpretation, 55.

[16] *Barnet*, supra, 737 F.3d at *251.

We propose the following revision to section 103(a) in addition to the revisions to that section proposed in Part 1 of this letter: **11 U.S.C. § 103. Applicability of chapters**

(a) Except as provided in section 1161 of this title, chapters 1, 3, and 5 of this title apply in a case under chapter 7, 11, 12, or 13 of this ~~t~~itle, ~~and this~~**. This** chapter, **except for section 109(a) which does not apply in a case under chapter 15,** sections **305, 306,** 307, 362(o), 5555, **556,** ~~through~~ 557, ~~and~~ 559**, 560, 561, and** ~~through~~ 562 of this title, **and any section of this title specifically made applicable by a section of chapter 15** apply in a case under chapter 15.

Amendment to repeal a provision made redundant by enactment of a similar provision in chapter 15

4. 11 U.S.C. § 303

Prior to BAPCPA, section 303(b)(4) granted authority to a foreign representative to file an involuntary petition:

11 U.S.C. § 303 - Involuntary cases

(b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title—…
(4) by a foreign representative of the estate in a foreign proceeding concerning such person.

Section 303(b)(4) was not amended by BAPCPA despite the enactment of section 1511, which provides as follows:

11 U.S.C. § 1511 - Commencement of case under section 301, 302, or 303

(a) Upon recognition, a foreign representative may commence—
(1) an involuntary case under section 303; or
(2) a voluntary case under section 301 or 302, if the foreign proceeding is a foreign main proceeding.

Consequently, the "upon recognition" pre-condition to the filing of an involuntary petition by a foreign representative was not interpolated into section 303, creating an internal inconsistency in the statute. This inconsistency was noted by the late Judge Lifland in his decision in the *Bear Stearns* case, where he denied recognition to foreign proceedings of hedge funds that had neither their COMI nor an establishment in the country of the foreign proceeding. *In re Bear Stearns High–Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122 (Bankr. S.D.N.Y. 2007); *aff'd* 389 B.R. 325 (S.D.N.Y. 2008). Judge Lifland noted:

> Nonrecognition of the Foreign Proceedings, however, does not leave the Petitioners without the ability to obtain relief from U.S. courts…. While section 304 of the Bankruptcy Code was repealed upon the enactment of chapter 15, section 303 was not repealed. Section 303(b)(4) of the Bankruptcy Code specifically provides that an involuntary case may be commenced under chapter 7 or 11 of the Bankruptcy Code by a foreign representative of the estate in a foreign proceeding so that a foreign representative is not left remediless upon nonrecognition.

FN15. 11 U.S.C. § 303(b)(4)…. Section 303(b)(4) does not require that the foreign proceeding be recognized. This flexibility leaves open the potential coordination of a case filed here under Title 11 with the Foreign Proceeding. *See* 11 U.S.C. § 1529 (implicating cooperation and coordination among proceedings under sections 1525, 1526 and 1527 of the Bankruptcy Code, i.e., section 1527(5), concurrent proceedings involving the same debtor).

FN15. It would appear that the failure to repeal section 303(b)(4) along with section 304 may be a drafting error in view of the newly enacted section 1511(b) which likewise addresses the commencement of a case under sections 301 and 303. The inconsistencies of the two statutes have not been conformed.

The NBC agrees that the failure to repeal section 303(b) was a drafting error and should be corrected, as follows:

11 U.S.C. § 303. Involuntary cases

(b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title.

~~(4) by a foreign representative of the estate in a foreign proceeding concerning such person if the debtor is the subject of a foreign proceeding that has been recognized under section 1517.~~

Amendment to add missing cross-references

5. 11 U.S.C. § 306

As discussed in Part 2, above, section 1511 provides that a foreign representative of a foreign main proceeding, upon recognition, may commence a voluntary case under section 301 or 302. Prior to the enactment of chapter 15, a foreign representative could appear under section 304, commence an involuntary case under section 303 or request abstention or dismissal of a case under section 305. Section 306 permitted those appearances without exposing the foreign representative to jurisdiction of any other court in the United States.[17] While section 1510 provides for such limited jurisdiction upon filing a petition for recognition under chapter 15, and the reference to section 304 was deleted from section 306, section 306 was not modified by BAPCPA to reflect the additional authority to file petitions under sections 301 and 302, and it should have been. As currently written, section 306 applies to petitions or requests under section 303 or 305:

11 U.S.C. § 306. Limited appearance

An appearance in a bankruptcy court by a foreign representative in connection with a petition or request under section 303 or 305 of this title does not submit such foreign representative to the jurisdiction of any court in the United States for any other purpose, but the bankruptcy court may condition any order under section 303 or 305 of this title on compliance by such foreign representative with the orders of such bankruptcy court.

Section 306 should be amended to add references to sections 301 and 302, as follows:

[17] H.R. Rep. at 325-326.

11 U.S.C. § 306. Limited appearance

An appearance in a bankruptcy court by a foreign representative in connection with a petition or **a** request under section **301, 302,** 303**,** or 305 of this title does not submit such foreign representative to the jurisdiction of any court in the United States for any other purpose, but the bankruptcy court may condition any order under section **301, 302,** 303**,** or 305 of this title on compliance by such foreign representative with the orders of such bankruptcy court.

Amendment to clarify intended scope of abstention provisions

6. 28 U.S.C. § 1334(c) and section 103(a)

A bankruptcy court decision involving the foreign nonmain proceedings of British American Insurance Company Limited ("BAICO"), a Bahamian insurance company in insolvency proceedings in St. Vincent and the Grenadines ("SVG"), held that section 305 is not applicable in a chapter 15 case and that 28 U.S.C. § 1334(c)(1) prohibits the bankruptcy court from abstaining from proceedings arising under title 11 or arising in or related to a case under title 11.[18] Subsequent circuit and bankruptcy court decisions agreed with the conclusion but discussed only 28 U.S.C. § 1334 and did not mention section 305.[19]

28 U.S.C. § 1334. Bankruptcy cases and proceedings provides as follows:

(c)(1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

There is no discussion of the amendment to 28 U.S.C. § 1334(c) in the legislative history of chapter 15. The recollection of the Conferees who assisted with drafting chapter 15 (Jay Westbrook and Dan Glosband) was that the chapter 15 exception was added to section 1334 to assure that a chapter 15 petition would be considered on the new, objective standards for recognition adopted by the Model Law and chapter 15 and not on the subjective "interests of justice" standard of section 1334(c). The subjective standards of former section 304 were being replaced and no alternative, back-door approach to subjective evaluation of a chapter 15 petition for recognition was to be allowed.

In the *BAICO* case, branch operations of BAICO in SVG were placed under judicial management under the SVG insurance law, and a Judicial Manager was appointed with full authority to liquidate BAICO in SVG. The Judicial Manager sought (in November 2009) and obtained (in March 2010) recognition under chapter 15 of the SVG liquidation as a foreign nonmain proceeding. Through the Judicial Manager, BAICO sued its former directors for breach of fiduciary duty. Two of the directors moved to dismiss for lack of jurisdiction on various

[18] *In re* British American Insurance Company Limited, 488 B.R. 205 (S.D. Fla. 2013).

[19] Firefighters' Retirement Sys. v. Citco Group Ltd., 796 F. 3d 520 (5th Cir. 2015); *In re* Hellas Telecommunications (Luxembourg) II SCA, 535 B.R. 543 (Bankr. S.D.N.Y. 2015). Both of these decisions refer to dicta to the same effect in the case of *In re* Fairfield Sentry Ltd., 452 B.R. 64, 83 (Bankr. S.D.N.Y. 2011), rev'd on other grounds, 458 B.R. 665 (S.D.N.Y. 2011).

theories and, in the alternative, argued that the court should abstain from the litigation under the permissive abstention provisions of 28 U.S.C. § 1334(c)(1).

The court ruled that it had jurisdiction and that 28 U.S.C. § 1334(c)(1) does not permit the court to abstain from (a) either a full chapter 15 case or (b) a matter arising under chapter 15 or arising in a chapter 15 case. The first half of this ruling is consistent with the purpose of the chapter 15 exception to 28 U.S.C. § 1334(c)(1) but the second half goes beyond that purpose. The court discusses the issue as follows:

> Section 305 is the sole statutory authority for abstention from a title 11 case.
>
> However, section 305 is not applicable in a case under chapter 15. 11 U.S.C. § 103(a). There is no provision in federal law allowing a federal court to abstain from an entire chapter 15 case. Nor is there any provision in federal law permitting abstention from matters arising under chapter 15 or arising in a chapter 15 case. To the contrary, chapter 15 and section 1334 ensure that the decision whether to recognize a foreign proceeding, and control over further relief under chapter 15, rests with a single court. Congress reinforced this by eliminating the possibility of abstention from the entire chapter 15 case and from matters arising under chapter 15 or arising in a chapter 15 case. The Court's interpretation of section 1334(c)(1) is consistent with the intent of Congress. (footnotes omitted). [*British American*, supra, at 239-240.]

Reliance on 28 U.S.C. § 1334 for abstention from a full chapter 15 case is not necessary since an equivalent result is available under chapter 15 itself: (a) unlike the filing of a voluntary petition under other chapters of the Bankruptcy Code, which constitutes an order for relief, a chapter 15 petition is an application for recognition, and recognition can be denied if the criteria of section 1517 are not satisfied; (b) after recognition, recognition can be terminated or modified under §1517(d).[20]

The *British American* court reached its conclusion based on a plausible but unintended reading of 28 U.S.C. § 1334(c)(1):

> The opposing interpretation of the opening phrase of section 1334(c)(1) [that abstention from arising under/arising in cases is permitted] takes into consideration the remaining text of that subsection. In general, subsection (c)(1) permits abstention from proceedings arising under title 11 or arising in or related to a case under title 11. That is, it permits a court to abstain from matters other than the title 11 case itself. Because subsection (c)(1) is aimed at abstention from proceedings arising in, arising under and related to a title 11 case, the words "[e]xcept with respect to a case under chapter 15 of title 11" must refer to matters arising under, arising in or related to a case under chapter 15, and not the chapter 15 case itself. Under this view, section 1334(c)(1) could not be used to abstain from any proceeding arising under a provision of chapter 15, arising in a chapter 15 case, or related to a chapter 15 case. Count I here is related to a chapter 15 case, and so section 1334(c)(1) could not be used to abstain from hearing Count I. Because this view of section 1334(c)(1) interprets the exclusionary provision in light of the entire text of the

[20] 11 U.S.C. § 1517(d): "The provisions of this subchapter do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist, but in considering such action the court shall give due weight to possible prejudice to parties that have relied upon the order granting recognition. A case under this chapter may be closed in the manner prescribed under section 350."

subsection, the Court believes this view of section 1334(c)(1) to be correct. The Court may not abstain from Count I under section 1334(c)(1). (footnote omitted.)

The reference in 28 U.S.C. §1334(c)(1) to a "case" under chapter 15 was intended to echo the phrase "cases under title 11" in 28 U.S.C. § 1334(a) and 28 U.S.C. § 157(a) and was not intended to be expanded to prevent abstention from proceedings arising in/arising under cases.

Notwithstanding the intent of the drafters, the interpretation of the *British American* judge is a plausible one based on the current wording.

Two subsequent decisions followed the *British American* interpretation. In *Firefighters' Retirement System v. Citco Group Limited*, the Fifth Circuit reversed the district court's remand to Louisiana state court of an action by three pension funds against persons and entities related to a Cayman Islands leveraged feeder fund ("Leveraged Fund") and a larger fund (the "Arbitrage Fund" and together with the Leveraged Fund, the "Offshore Funds") through which it invested.[21] The Offshore Funds were part of a master fund entity which filed a chapter 11 case in the Southern District of New York. The litigation was originally filed in state court and then removed to federal district court based on the related chapter 11 case. The court read 28 U.S.C. § 1334(c)(1) to prevent abstention from a proceeding that was related to a chapter 15 case, as opposed to preventing abstention from considering the chapter 15 case itself.[22]

A decision of the Bankruptcy Court for the Southern District of New York agreed with the *British American* and *Firefighters'* analysis.[23]

The following revision will limit section 28 U.S.C. §1334(c)(1) to its original narrowly- intended purpose of assuring that chapter 15 petitions, as applications for recognition, must be heard and granted or denied:

> **28 U.S.C. § 1334. Bankruptcy cases and proceedings**
>
> (c)(1) ~~Except with respect to a case under chapter 15 of title 11,~~ **N**othing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11~~.~~, **except a proceeding for recognition of a foreign proceeding.**

Amendment to conform language to defined term

7. 11 U.S.C. § 1517(a)

Section 1517 is entitled **Order granting recognition**, and it contains the requirements for entry of an order recognizing a foreign proceeding. While "it closely tracks article 17 of the

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[21] Firefighters' Retirement Sys. v. Citco Group Ltd., 796 F. 3d 520 (5th Cir. 2015).

[22] Id. at *527.

[23] *In re* Hellas Telecommunications (Luxembourg) II SCA, 535 B.R. 543 (Bankr. S.D.N.Y. 2015).

Model Law",[24] it inadvertently omitted a phrase. The pertinent part of Article 17 of the Model Law reads as follows:

> *Article 17. Decision to recognize a foreign proceeding*
>
> (1) Subject to article 6, a foreign proceeding shall be recognized if:
> (a) The foreign proceeding is a proceeding within the meaning of subparagraph (a) of article 2;
> (b) The foreign representative applying for recognition is a person or body **within the meaning of subparagraph *(d)* of article 2;** (emphasis added)

In contrast, the pertinent part of section 1517 reads:

> **11 U.S.C. § 1517 - Order granting recognition**
>
> (a) Subject to section 1506, after notice and a hearing, an order recognizing a foreign proceeding shall be entered if—
> (1) such foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502;
> (2) the foreign representative applying for recognition is a person or body;

The NBC recommends that section 1517 be conformed to Article 17 of the Model Law to avoid confusion over the unintended difference, as follows:

> **11 U.S.C. § 1517(a) - Order granting recognition**
>
> (a) Subject to section 1506, after notice and a hearing, an order recognizing a foreign proceeding shall be entered if—
> (1) such foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502;
> (2) the ~~foreign representative~~**person or body** applying for recognition is a ~~person or body~~**foreign representative**; and

8. Amendments related to avoidance of transfers and recovery of property

a. 11 U.S.C. §§ 1520, 1521 and 101(24)

Article 20 of the Model Law on Cross Border Insolvency provides as follows (with emphasis added in bold):

> 1. Upon recognition of a foreign proceeding that is a foreign main proceeding,
> (a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;
> (b) Execution against the debtor's assets is stayed; and
> **(c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended**.
> 2. The scope, and the modification or termination, of the stay and suspension referred to in paragraph 1 of this article are subject to [*refer to any provisions of law of the enacting State relating to insolvency that apply to exceptions, limitations, modifications or*

[24] H.R. Rep. at p. 113.

termination in respect of the stay and suspension referred to in paragraph 1 of this article].

The U.S. enactment of Article 20, in section 1520, made modifications and adjustments, the intention of which was to integrate the Model Law into our existing bankruptcy scheme, while altering the original intention of Article 20 as little as possible. Thus, for example, section 1520, rather than imposing a generalized moratorium upon actions in the enacting state, as does the Model Law, instead takes our pre-existing generic moratorium, section 362, and *restricts* it to property within the territorial jurisdiction of the U.S., thereby approximating the scope of the Article 20 moratorium by pruning back the extraterritorial aspect of section 362 in the chapter 15 context.

The drafters of the U.S. enactment attempted to achieve a similar end with respect to the provision in Article 20 that imposes a moratorium on the debtor's ability to transfer property (a moratorium on *debtor's* actions, if you will). Again, they enacted this provision by reference to pre-existing provisions of the U.S. Bankruptcy Code. Section 1520 says that section 549, "Postpetition transactions," applies with respect to property of the debtor within the territorial jurisdiction of the U.S., paralleling the mechanism that was used for the moratorium on creditor actions.[25] Section 549 does not *automatically* proscribe postpetition transfers of the debtor's property in the way that the moratorium on such transfers was drafted in Article 20 of the Model Law; instead it empowers a trustee to avoid those transfers.[26] It thus falls short of achieving the intended purpose of Article 20.

The reference to section 549 creates two additional problems: first, there is no trustee in a chapter 15 ancillary proceeding, but only a trustee may "avoid a transfer of property …" (courts might interpret section 1520(a)(2) such that "trustee" means "foreign representative" in the context of 1520(a)(2) but it should not be left to doubt); second, section 549 is not self-executing, and the remedial mechanism to recover avoided transfers, section 550, is not available in chapter 15.[27] Section 1521(a)(7), which prohibits use of most Bankruptcy Code avoidance powers in a

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[25] Section 1520, Effects of recognition of a foreign main proceeding, provides in pertinent part:

(a) Upon recognition of a foreign proceeding that is a foreign main proceeding—
(1) sections 361 and 362 apply with respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States;
(2) sections 363, 549, and 552 apply to a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States to the same extent that the sections would apply to property of an estate;
(3) unless the court orders otherwise, the foreign representative may operate the debtor's business and may exercise the rights and powers of a trustee under and to the extent provided by sections 363 and 552; and
(4) section 552 applies to property of the debtor that is within the territorial jurisdiction of the United States.

[26] Section 549 provides as follows:

(a) Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate—
(1) that occurs after the commencement of the case; and
(2)(A) that is authorized only under section 303 (f) or 542 (c) of this title; or
(B) that is not authorized under this title or by the court.

[27] Section 550, Liability of transferee of avoided transfer, provides in pertinent part: "…to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property…"

chapter 15 case, includes a prohibition of section 550.[28] The omission of the section 550 remedy also affects one other avoidance provision that is not excluded from chapter 15 use, section 553 dealing with the reduction in insufficiency of a setoff within 90 days pre-petition.[29]

Repairing these problems requires amendments to sections 1520, 1521 and 101(24) (the definition of foreign representative) as follows:

11 U.S. Code § 1520 - Effects of recognition of a foreign main proceeding

(a) Upon recognition of a foreign proceeding that is a foreign main proceeding—

(1) sections 361 ~~**and,**~~ 362 **and 552** apply **within the territorial jurisdiction of the United States** with respect to the debtor and the property of the debtor ~~**that is;**~~

(2) the debtor may not transfer, encumber, or otherwise dispose of any property within the territorial jurisdiction of the United States;

(~~2~~3) ~~sections 363,~~section 549 ~~**, and 552 apply**~~ **applies** to a transfer **by the debtor** of an interest ~~**of the debtor**~~ in property that is within the territorial jurisdiction of the United States ~~to the same extent that the **sections** would apply to property of an estate~~;

(~~3~~4) unless the court orders otherwise, the foreign representative may operate the debtor's business and may exercise the rights and powers of a trustee under and to the extent provided by sections 363 and ~~**552**~~**553**; and

(4~~5~~) section ~~**552**~~**363** applies to ~~**property**~~**a transfer by the foreign representative of an interest** of the debtor **in property** that is within the territorial jurisdiction of the United States to the same extent that the **section** would apply to property of an estate.

11 U.S.C. § 1521. Relief that may be granted upon recognition

(a) Upon recognition of a foreign proceeding, whether main or nonmain, where necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including—

(7) granting any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a).**; and**

(8) notwithstanding subsection (a)(7) of this section, granting relief under section 550 for the purpose of permitting the foreign representative to enforce the provisions of sections 549 and 553.

11 U.S. Code § 1502 - Definitions

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[28]Section 1521, Relief that may be granted upon recognition, provides in pertinent part: "(a) Upon recognition of a

foreign proceeding, whether main or nonmain, where necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including— (7) granting any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, **550**, and 724(a). (emphasis added).

[29]The section 553/550 issue was discussed in Awal Bank, BSC v. HSBC Bank USA (*In re* Awal Bank, BSC), 455

B.R. 73, 82 (Bankr. S.D.N.Y. 2011).

For the purposes of this chapter, the term—:

(6) "trustee" includes a trustee, a debtor in possession in a case under any chapter of this title, or a debtor under chapter 9 of this title**; the term "trustee," when used in a section that is made applicable in a case under this chapter means foreign representative.**

Chapter 15 should also be amended to provide explicitly that the look-back period for avoidance proceedings brought under U.S. law by or on behalf of a foreign representative should be measured from the date of the filing of the foreign proceeding. Under section 1523(a) of chapter 15 a foreign representative can bring an avoidance proceeding based on U.S. substantive law only in a plenary U.S. case under chapter 7 or chapter 11.[30] Although section 1523(a) affords the foreign representative standing to bring such a proceeding, it does not explicitly provide that the look-back period should be measured from the date of the commencement of the foreign case rather than the date of commencement of case in the United States. If we measure the look-back period from the date of the opening of U.S. case, the delay inherent in the need for the foreign representative to file proceedings in the United States would make it unlikely that a foreign representative would ever be able to bring a proceeding under U.S. law to avoid a preference, as the look-back period under section 547 of the Bankruptcy Code is ordinarily only 90 days from the filing of the "petition," (i.e., the petition under chapter 15 or the petition under chapter 7 or 11). Proceedings to avoid a fraudulent conveyance under section 548 of the Bankruptcy Code have a longer look-back period of two years from the filing of the "petition," but some avoidable conveyances would doubtless fall outside this look-back period if the period is measured from the commencement of U.S. case rather than the commencement of the foreign proceeding.

There is authority under present law that the applicable look-back period can be measured from the date of the filing of the chapter 15 petition for recognition rather than the date of the opening of a plenary proceeding. *See In re Awal Bank, BSC*, 455 B.R. 73, 88-91(Bankr. S.D.N.Y. 2011). The same result might be obtainable by virtue of the tolling provisions of section 108 of the Bankruptcy Code, which apply in a chapter 15 case.

However, it is more consonant with the cooperation principles of chapter 15 for the look-back period to date from the opening of the foreign proceeding. There should be no unfairness in assisting the foreign representative in this manner because a court will be required to determine whether it is appropriate to apply avoidance law under the facts and circumstances of the case.

For example, if a German liquidator brought an avoidance proceeding in a U.S. plenary case after chapter 15 recognition, and it was determined that it was appropriate to apply U.S. avoidance law under the principles of *Maxwell Communication Corp. v. Societe Generale (In re Maxwell Communication Corp.*, 93 F.3d 1036 (2d Cir. 1996)), or other applicable law, the

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[30] Section 1523, Actions to avoid acts detrimental to creditors, provides:

"(a) Upon recognition of a foreign proceeding, the foreign representative has standing in a case concerning the debtor pending under another chapter of this title to initiate actions under sections 522, 544, 545, 547, 548, 550, 553, and 724(a).

(b) When a foreign proceeding is a foreign nonmain proceeding, the court must be satisfied that an action under subsection (a) relates to assets that, under United States law, should be administered in the foreign nonmain proceeding."

German liquidator would be able to use the avoidance look-back period under U.S. law measured from the date of the filing of the original petition in Germany.[31]

The English version of the Model Law includes this type of provision at Article 23, sections 3 and 4 of the Cross-Border Insolvency Regulations 2006.

The statutory change can be accomplished by adding a new subsection (c) to section 1523[32]:

11 U.S.C. § 1523. Actions to avoid acts detrimental to creditors

(a) Upon recognition of a foreign proceeding, the foreign representative has standing in a case concerning the debtor pending under another chapter of this title to initiate actions under sections 522, 544, 545, 547, 548, 550, 553, and 724(a).
(b) When a foreign proceeding is a foreign nonmain proceeding, the court must be satisfied that an action under subsection (a) relates to assets that, under United States law, should be administered in the foreign nonmain proceeding.
(c) For purposes of any applicable section governing an action initiated by the foreign representative under subsection (a), the term "commencement of the case" and the term "order for relief" mean the opening of the foreign proceeding, and the phrase "date of the filing of the petition" means the date of the filing of an application or the taking of other action that resulted in the opening of the foreign proceeding. The date of the opening of the foreign proceeding shall be determined in accordance with the law of the country in which the foreign proceeding is pending.

We would welcome an opportunity to discuss these amendments with you or your staffs. We believe they would substantially improve the operation of chapter 15 by reducing litigation and more closely conforming it to the purposes of the Model Law.

Sincerely,

/s/ Douglas G. Baird
Douglas G. Baird, Chair
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[31] The same measurement date should apply to foreign avoidance law that may be applied in a chapter 15 case. *See* Fogerty v. Petroquest Res. (*In re* Condor Ins. Ltd., 601 F. 3d 319, 326 (5th Cir. 2010); *Hellas Telecommunications*, supra, 535 B.R. 543 at 586-587.

[32] Section 1523, Actions to avoid acts detrimental to creditors, currently provides:

(a) Upon recognition of a foreign proceeding, the foreign representative has standing in a case concerning the debtor pending under another chapter of this title to initiate actions under sections 522, 544, 545, 547, 548, 550, 553, and 724(a).

(b) When a foreign proceeding is a foreign nonmain proceeding, the court must be satisfied that an action under subsection (a) relates to assets that, under United States law, should be administered in the foreign nonmain proceeding.

COMMENTS ON NATIONAL BANKRUPTCY CONFERENCE PROPOSED REVISIONS TO CHAPTER 15 OF THE BANKRUPTCY CODE, 11 U.S.C § 1501, et seq

PROPOSED REVISION	COMMENTS
1. **11 U.S.C. § 103(a). Applicability of chapters** (a) Except as provided in section 1161 of this title, chapters 1, 3, and 5 of this title apply in a case under chapter 7, 11, 12, or 13 of this title~~, and this~~**. This** chapter**,** sections **305, 306,** 307, 362(o), 555, **556,** ~~through~~ 557, and 559**, 560, 561, and** ~~through~~ 562 of this title, **and any section of this title specifically made applicable by a section of chapter 15** apply in a case under chapter 15.	**American College of Bankruptcy, International Committee ("ACB"):** The committee endorses this revision as clarifying, not controversial, and more accurately integrating chapter 15 into the Bankruptcy Code.
2. **11 U.S.C. § 103(k) [NB On 8/23/19, §103(k) became §103(l)]** **(k)** Chapter 15 applies only in a case under such chapter, except that— (1) sections 1505, **1511,** 1513, ~~and~~ 1514**, 1523, 1531, and 1532** apply in all cases under this title; and (2) ~~section~~**sections** 1509 ~~applies~~**and 1510 apply** whether or not a case under this title is pending.	**ACB**: The committee endorses this revision as clarifying, not controversial, and more accurately integrating chapter 15 into the Bankruptcy Code.
3. **11 U.S.C. § 109. Who may be a debtor** (a) Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title. **This subsection does not apply in a case under chapter 15**.	**ACB**: The committee endorses the proposed the proposed amendment as not controversial and as consistent with the overall architecture of § 109 and filling in a gaping pothole in the road to chapter 15's implementation of the UNCITRAL Model Law on Cross-Border Insolvency.

4. **11 U.S.C. § 303. Involuntary cases** (b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title— (4) by a foreign representative ~~of the estate in a foreign proceeding concerning such person~~ **if the debtor is the subject of a foreign proceeding that has been recognized under section 1517.**	**ACB**: The committee endorses the NBC proposal as correcting a 2005 drafting error and not controversial.
5. **11 U.S.C. § 305. Abstention** **(a)** The court, after notice and a hearing, may dismiss a case under this title, or may suspend ~~all proceedings~~**a proceeding** in a case under this title, at any time if— (1) the interests of creditors and the debtor would be better served by such dismissal or suspension; ~~or~~ (2)(A) a petition under section 1515 for recognition of a foreign proceeding has been granted; and (B) the purposes of chapter 15 of this title would be best served by such dismissal or suspension.; or **(C) the debtor's center of main interests is not the United States and the court cannot exercise effective control over either the debtor or the debtor's material assets.** **(b)** A foreign representative may seek dismissal or suspension under subsection (a)(2) of this section. **(c)** An order under subsection (a) of this section dismissing a case or suspending ~~all proceedings~~**a proceeding** in a case, or a decision not so to dismiss	**International Women's Insolvency & Restructuring Confederation** I'm concerned that the specific extension of 305 to chapter 15 may result in the dismissal of a chapter 15 case where there's a bankruptcy pending overseas and there are some assets here but perhaps not material assets. As we moved forward with the current work before UNCITRAL I can definitely see a situation where a case is filed overseas and there's some nonmaterial assets here in the US to which the foreign administrator cannot gain access because the US bankruptcy court is abstaining based on the revised provisions. Did we mean to do this? Perhaps the result will be to compel the foreign administrator to bring a regular state or federal court action to recover assets. How will this effective the new Enterprise Groups section though since that contemplates cooperation by US entities though it may not warrant the opening of a case. I just want to be sure we've thought about these issues. I'm sure we'll be recommending more changes as time goes on and we see how the courts are interpreting these sections. **International Subcommittee of the Business**

or suspend, is not reviewable by appeal or otherwise by the court of appeals under section 158 (d), 1291, or 1292 of title 28 or by the Supreme Court of the United States under section 1254 of title 28.	**Bankruptcy Committee of the Business Law Section of the ABA** **<u>The Baha Mar Amendment</u>** The proposed amendment to section 305 appears to reflect the decision reached in the Baha Mar case, a decision which we believe was well reasoned. The amendment seems motivated to serve as a counterbalance to the presumption in bankruptcy that courts ought to exercise their jurisdiction. We appreciate the judicial concerns that may have initiated the proposed amendments, but we have concerns that it might cause more confusion that promote rational solution. We start with the proposition that Chapter 11 is not tied to any "center of main interest" analysis. Indeed the court's control over creditors is often a key factor in choosing to commence a chapter 11 in the United States. We also observe that with the advent of the group proposal and the move away from COMI on an entity by entity basis, suggesting that the US should move in a different direction has the potential to be confusing and detrimental to modified universalism. In addition, as the proposal would also apply to a chapter 15 case, the proposal seems inconsistent with the capital market reality of debt governed by New York Law, which would often cause commencement of a chapter 15 in the United States. We believe the current case by case analysis is preferable. See In re Northshore Mainland Servs., Inc., 537 B.R. 192 (Bankr. D. Del. 2015). **Members of the International Committee of the American Bankruptcy Institute** … a number of participants commented on the NBC's recommended amendment to section 305 of the Bankruptcy Code, which would permit Bankruptcy Courts to abstain from chapter 7 or chapter 11 cases where the debtor's COMI is outside of the U.S. and the

	Bankruptcy Court cannot exercise effective control over the debtor or its assets. Certain participants expressed concern that such an amendment would make it harder for entities, that otherwise qualify to be a debtor under section 109 of the Bankruptcy Code, to file for chapter 7 or chapter 11. **ACB:** The proposed amendment to § 305(a) has been criticized by ACB members at the several sessions at which it was aired, as confusing, unnecessary, and perhaps unwise. …the committee is persuaded that the NBC proposal to amend § 305 is controversial, not necessary, and of dubious benefit. Hence, the proposed amendment of § 305 is not endorsed.
6. 11 U.S.C. § 306. Limited appearance An appearance in a bankruptcy court by a foreign representative in connection with a petition or **a** request under section **301, 302,** 303**,** or 305 of this title does not submit such foreign representative to the jurisdiction of any court in the United States for any other purpose, but the bankruptcy court may condition any order under section **301, 302,** 303**,** or 305 of this title on compliance by such foreign representative with the orders of such bankruptcy court.	**ACB:** The committee endorses this revision as clarifying, not controversial, and more accurately integrating chapter 15 into the Bankruptcy Code.
7. 11 U.S.C. § § 1502(4) and (5) and 1517(b): Clarification of the time at which the center of main interests ("COMI") of a debtor is determined by adopting the UNCITRAL formulation of the date of the commencement of the foreign proceeding. **11 U.S.C. § 1502. Definitions** (4) "foreign main proceeding" means a foreign	**International Subcommittee of the Business Bankruptcy Committee of the Business Law Section of the ABA** **The Timing Amendments** Our comments take into account recent case law developments which have moved substantially away from the initial decisions involving Bear Sterns, as well as the progress being made by UNCITRAL in the proposal for

proceeding ~~pending~~ in the country where the debtor ~~has the~~ had its center of its main interests when the foreign proceeding was commenced; (5) "foreign nonmain proceeding" means a foreign proceeding, other than a foreign main proceeding, ~~pending~~ in a country where the debtor ~~has~~ had an establishment when the foreign proceeding was commenced; 11 U.S.C. § 1517. Order granting recognition (b) Such foreign proceeding shall be recognized— (1) as a foreign main proceeding if ~~it is pending in the country where~~**, when the foreign proceeding was commenced,** the debtor ~~has~~**had** the center of its main interests **in the foreign country where the proceeding was commenced**; or (2) as a foreign nonmain proceeding if**, when the foreign proceeding was commenced,** the debtor ~~has~~**had** an establishment within the meaning of section 1502 in the foreign country where the proceeding ~~is pending~~**was commenced**.	cross border groups. The obvious difficulty with the amendments to section 1502(4)(5) and 1517(b) (the "Timing Amendments") is the impact such proposed amendments may have on multinational groups and cases commenced in the former British Commonwealth jurisdictions, including, among others Singapore. The increasing trend that we observe is that parties are focusing on jurisdictions that enable a rescue and restructuring, have a strong independent judiciary and thus may choose a forum such as Singapore which may not be the center of main interests at initiation of the proceeding and the debtor nevertheless may seek recognition here. Similarly an initial selection of Hong Kong, the Cayman Islands or the BVI should not be impeded by an independent center of main interest review, when post filing the debtor, supported by its creditors comes to the United State for recognition to address debt governed by NY law. We understand the UNCITRAL group proposal to permit selection of a forum that would not necessarily be the corporate nerve center or operational Headquarters of the group, but is a forum which the parties favor to pursue rescue. We also understand that the direction of case precedent under the Insolvency Regulation is heavily dependent upon a presumption supporting the domicile for the debtor. We note that has not been the direction of case law here. We are not convinced that it will assure consistency with other jurisdictions. We do not believe such an amendment is necessary given the development in cases here See, e.g., In re: Suntech Power Holdings Co., Ltd., 520 B.R. 399 (Bankr. S.D.N.Y. 2014); In re Ocean Rig UDW Inc., 570 B.R. 687 (Bankr. S.D.N.Y. 2017) . **Members of the International Committee of the American Bankruptcy Institute** No recommendation garnered more attention than the proposed amendments to sections

	1502(a)(4) and (5) and 1517(b) of the Bankruptcy Code concerning the time at which COMI of a debtor is determined. Several participants expressed concern that the NBCs recommendation that COMI be determined as of the date of the commencement of the foreign proceeding (as opposed to the commencement of the chapter 15 proceeding) would have a detrimental impact on the practice of foreign provisional liquidators and would impede the ability of practitioners to effectuate appropriate "COMI shifting" in furtherance of value maximizing restructurings. **Howard Seife, Norton Rose Fulbright LLP** **(excerpts from attached letter)** While we are generally supportive of the NBC's proposed changes to Chapter 15, we take exception to the proposed change to the date of determining a foreign debtor's center of main interests ("COMI"). A change in the timing of the COMI determination would limit, if not foreclose, the ability of U.S. bankruptcy courts to aid foreign restructurings and liquidations pending in offshore jurisdictions. This would run counter to the stated goals of Chapter 15, which includes facilitating cooperation between courts in the U.S. and foreign courts overseeing cross-border insolvency proceedings and maximizing asset value for the benefit of a debtor's creditors. Consistent with the position that COMI should be determined as of the date of the Chapter 15 filing, we propose the following revision to sections 1502 and 1517 of the Bankruptcy Code to ensure uniformity among the U.S. courts as to the timing of the COMI determination: **11 U.S.C. § 1502. Definitions** (4) "foreign main proceeding" means a foreign proceeding pending in the country where the

	debtor has the center of its main interests **as of the date the Chapter 15 petition is filed**; (5) "foreign nonmain proceeding" means a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment **as of the date the Chapter 15 petition is filed**; **11 U.S.C. § 1517. Order granting recognition** (b) Such foreign proceeding shall be recognized-- (1) as a foreign main proceeding if it is pending in the country where the debtor has the center of its main interests **as of the date the Chapter 15 petition is filed** (2) as a foreign nonmain proceeding if the debtor has an establishment within the meaning of section 1502 in the foreign proceeding in the foreign country where the proceeding is pending **as of the date the Chapter 15 petition is filed**. **Gregory Grossman, Sequor Law** From my review, the changes proposed to those sections in Chapter 15 along with the striking of the section of 303 suggests that a company incorporated in an offshore jurisdiction could have its offshore liquidation case barred from any relief. For example, a Cayman Island company whose decisions are made by human beings outside of Cayman (perhaps in places less than ideal for their own bankruptcies) would not qualify for foreign main treatment as their place of incorporation would be rebutted by the location of the deciders and the activities of the Cayman liquidators would be disregarded because they occurred post-offshore insolvency case, would not qualify for foreign non-main

	treatment as they had no establishment in Cayman, and also could not file an involuntary petition because that subsection is being stricken. **ACB:** In lieu of amending §§ 1502(4) and (5) and 1517, a new § 1516(d) could suffice: § 1516. Presumptions concerning recognition. ... (d) (new) In the absence of evidence to the contrary, it is presumed that the center of the debtor's main interests and the presence of an establishment should be determined as of the date of the commencement of the foreign proceeding. In short, the committee regards the NBC proposal to amend §§ 1502(4)-(5) and 1517(b) as unnecessarily restrictive and controversial. The proposal invites the same type of rigidity in interpretation that is deplored by critics of Fairfield Sentry, albeit at the opposite end of the spectrum, in an environment in which some flexibility is desirable. The committee recommends that consideration be given to the alternative of establishing a statutory presumption favoring, but not requiring, reliance on the status of the debtor at the commencement of the foreign proceeding.
8. 11 U.S.C. § 1511 and 28 U.S.C. § 1408 **28 U.S.C. § 1408. Venue of cases under title 11** **(a)** Except as provided in **subsection (b) of this section or in** section 1410 of this title, a case under title 11 may be commenced in the district court for the district— (1) in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case	**International Subcommittee of the Business Bankruptcy Committee of the Business Law Section of the ABA** **The Venue Amendment** There is some concern that any amendment to section 1408 will cause delay and disruption to the success of the remainder of the proposal. We prefer that the proposal drop any amendment to section 1408.

have been located for the one hundred and eighty days immediately preceding such commencement, or for a longer portion of such one- hundred-and-eighty-day period than the domicile, residence, or principal place of business, in the United States, or principal assets in the United States, of such person were located in any other district; or (2) in which there is pending a case under title 11 concerning such person's affiliate, general partner, or partnership. **(b) If an order granting recognition of a foreign proceeding under chapter 15 of title 11 has been entered, a case concerning the debtor in the foreign proceeding may be commenced under section 301, 302, or 303 of title 11 only in the district court for the district in which the order granting recognition has been entered.** Section 1511(a) would be redesignated as section 1511: **11 U.S.C. § 1511. Commencement of case under section 301, 302, or 303** ~~(a)~~ Upon recognition, a foreign representative may commence— (1) an involuntary case under section 303; or (2) a voluntary case under section 301 or 302, if the foreign proceeding is a foreign main proceeding. ~~(b) The petition commencing a case under subsection (a) must be accompanied by a certified copy of an order granting recognition. The court where the petition for recognition has been filed must be advised of the foreign representative's intent to commence a case under subsection (a) prior to such commencement.~~	**ACB:** The NBC proposal has two facets. First, it would delete § 1511(b), eliminating the requirements that a petition commencing a case under §§ 301-303 be accompanied by a certified copy of the order granting recognition and that the recognizing court be "advised" of the foreign representative's intent to commence a case. Second, it would amend 28 U.S.C. § 1408 (Venue of cases under title 11) to add a requirement that all cases filed by a foreign representative be filed in the same district as the recognizing court. The committee agrees that the first facet — deletion of §1511(b) — is not controversial. Nevertheless, the need to delete that section may be questioned as that provision heretofore has been of negligible consequence and as existing venue transfer rules appear to be adequate to the task. The committee believes that second facet — amending the bankruptcy venue statute, 28 U.S.C. § 1408, to require all cases commenced by a foreign representative be filed in the recognizing court — is not necessary and likely to provoke controversy. A fact of life in Congress is that bankruptcy venue is a lightening rod for controversy for reasons not related to the merits of the NBC proposal. The amendment does not appear to be necessary to accomplish the purposes of chapter 15.

9. 28 U.S.C. § 1334(c) and section 103(a) **28 U.S.C. § 1334. Bankruptcy cases and proceedings** (c)(1) Except with respect to a **determination of an application for recognition of a foreign proceeding in a** case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.	**ACB:** This, in tandem with amending § 103(a) to make § 305 applicable in chapter 15 cases, will clarify that § 1334(c)(1) permits abstention from particular proceedings arising under, arising in, or related to a case under title 11. The committee endorses this revision as clarifying, not controversial, and consistent with the intent of the UNCITRAL Model Law.
10. 11 U.S.C. § 1517(a) **11 U.S.C. § 1517(a) - Order granting recognition** (a) Subject to section 1506, after notice and a hearing, an order recognizing a foreign proceeding shall be entered if— (1) such foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502; (2) the ~~foreign representative~~ **person or body** applying for recognition is a ~~person or body~~ **foreign representative**; and	**ACB:** The committee endorses this revision as clarifying, not controversial, and consistent with the intent of the UNCITRAL Model Law.
11. Amendments related to avoidance of transfers and recovery of property **a. 11 U.S.C. §§ 1520, 1521 and 101(24)** **11 U.S. Code § 1520 - Effects of recognition of a foreign main proceeding**	**ACB:** The committee endorses these revisions as clarifying, correcting a structural mistake regarding post-recognition mischief, not controversial, and consistent with the intent of the UNCITRAL Model Law.

(a) Upon recognition of a foreign proceeding that is a foreign main proceeding— **(1)** sections 361 ~~**and,**~~ 362 **and 552** apply with respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States; **(2) the debtor may not transfer, encumber, or otherwise dispose of any assets within the territorial jurisdiction of the United States**; **(~~2~~3)** ~~sections 363,~~**section 363** ~~549, and 552 apply~~ **applies** to a transfer **by a foreign representative** of an interest of the debtor in property that is within the territorial jurisdiction of the United States to the same extent that the ~~sections~~ **section** would apply to property of an estate; **and** **(~~3~~4)** unless the court orders otherwise, the foreign representative may operate the debtor's business and may exercise the rights and powers of a trustee under and to the extent provided by sections 363 and **~~552~~553**; and **11 U.S.C. § 1521. Relief that may be granted upon recognition** (a) Upon recognition of a foreign proceeding, whether main or nonmain, where necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including— (7) granting any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a).**; and** (8) notwithstanding subsection (a)(7) of this section, granting relief under section 550 for the purpose of permitting the foreign representative to enforce the provisions of sections 549 and 553.	

11 U.S.C. § 101. Definitions In this title the following definitions shall apply: **(24)** The term "foreign representative" means a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding **and means trustee when the foreign representative acts under the sections of this title that are referred to in sections 1520(a) or 1521(a)(8)**. **b. 11 U.S.C. § 1523** **11 U.S.C. § 1523. Actions to avoid acts detrimental to creditors** (a) Upon recognition of a foreign proceeding, the foreign representative has standing in a case concerning the debtor pending under another chapter of this title to initiate actions under sections 522, 544, 545, 547, 548, 550, 553, and 724(a). (b) When a foreign proceeding is a foreign nonmain proceeding, the court must be satisfied that an action under subsection (a) relates to assets that, under United States law, should be administered in the foreign nonmain proceeding. (c) For purposes of any applicable section governing an action initiated by the foreign representative under subsection (a), the term "commencement of the case" and the term "order for relief" mean the opening of the foreign proceeding, and the phrase "date of the filing of the petition" means the date of the filing of an application or the taking of other action that resulted in the opening of the foreign proceeding. The date of the opening of the foreign proceeding shall be determined in accordance with the law of the country in	**ACB:** The committee endorses this revision as clarifying, not controversial, and consistent with the intent of the UNCITRAL Model Law.

which the foreign proceeding is pending.	

National Bankruptcy Conference

A non-profit, non-partisan, self-supporting organization of approximately sixty lawyers, law professors and bankruptcy judges who are leading scholars and practitioners in the field of bankruptcy law. Its primary purpose is to advise Congress on the operation of bankruptcy and related laws and any proposed changes to those laws.

History. The National Bankruptcy Conference (NBC) was formed from a nucleus of the nation's leading bankruptcy scholars and practitioners, who gathered informally in the 1930's at the request of Congress to assist in the drafting of major Depression-era bankruptcy law amendments, ultimately resulting in the Chandler Act of 1938. The NBC was formalized in the 1940's and has been a resource to Congress on every significant piece of bankruptcy legislation since that time. Members of the NBC formed the core of the Commission on the Bankruptcy Laws of the United States, which in 1973 proposed the overhaul of our bankruptcy laws that led to enactment of the Bankruptcy Code in 1978, and were heavily involved in the work of the National Bankruptcy Review Commission (NBRC), whose 1997 report initiated the process that led to significant amendments to the Bankruptcy Code in 2005. Most recently, the Conference played a leading role in developing the Small Business Reorganization Act of 2019, Pub. L. 116-54.

Current Members. Membership in the NBC is by invitation only. Among the NBC's 60 active members are leading bankruptcy scholars at major law schools, as well as current and former judges from eleven different judicial districts and practitioners from leading law firms throughout the country who have been involved in most of the major corporate reorganization cases of the last three decades. The NBC includes leading consumer bankruptcy experts and experts on commercial, employment, pension, mass tort, and tax-related bankruptcy issues. It also includes former members of the congressional staff who participated in drafting the Bankruptcy Code as originally passed in 1978 and former members and staff of the NBRC. The current members of the NBC and their affiliations are set forth on the second page of this fact sheet.

Policy Positions. The Conference regularly takes substantive positions on issues implicating bankruptcy law and policy. It does not, however, take positions on behalf of any organization or interest group. Instead, the NBC seeks to reach a consensus of its members - who represent a broad spectrum of political and economic perspectives - based on their knowledge and experience as practitioners, judges, and scholars. The Conference's positions are considered in light of the stated goals of our bankruptcy system: debtor rehabilitation, equal treatment of similarly situated creditors, preservation of jobs, prevention of fraud and abuse, and economical insolvency administration. Conferees are always mindful of their mutual pledge to "leave their clients at the door" when they participate in the deliberations of the Conference.

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