

Hedge Funds and
Chapter 15 of the Bankruptcy Code:
SPhinX and Bear Stearns High-Grade¹

Rhett G. Campbell
Thompson & Knight, LLP

¹ The author retains the copyright to this material to the maximum extent possible, consistent with having granted the right of publication to the Futures and Derivatives Law Report. The opinions stated herein are those of the author and not the author's clients or the law firm of Thompson & Knight, LLP.

I. INTRODUCTION

Two recent cases in bankruptcy court have created uncertainty with respect to when and under what conditions the U.S. bankruptcy courts will recognize a foreign insolvency proceeding as a “main” or “nonmain” proceeding under chapter 15 of the Bankruptcy Code.² This, in turn, has led to much uncertainty as to where to file reorganization or liquidation proceedings for investment funds in financial distress. The decisions are *In re SPhinX, Ltd.*³ and *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*⁴ Each case involves exempt companies⁵ under the Companies Law of the Cayman Islands,⁶ each appears to have all or substantially all of its business relationships and contacts in New York and, other than registration, each has limited contact with the Cayman Islands. In each case, liquidators appointed by a court in the Cayman Islands requested recognition as a foreign main proceeding under chapter 15, a status that, according to the statute, is permitted if the center of main interests (“COMI”) of the debtor is in the Cayman Islands. In the *SPhinX* case, Bankruptcy Judge Drain found that the COMI of SPhinX Funds was not in the Cayman Islands but explained that, nonetheless, normally he would have granted foreign main recognition for reasons of pragmatism, i.e., it was a liquidation as opposed to a reorganization and no one objected. However, because the proceeding was filed for an improper purpose (to interfere with a settlement in the *Refco*⁷ case and prevent it from becoming effective), he declined to grant foreign main proceeding recognition and instead granted nonmain recognition only. Judge Drain’s nonmain recognition is especially troubling because the statutory language seems to allow nonmain recognition only if the debtor carries out nontransitory economic activity in the subject jurisdiction (the court found that SPhinX did not), as opposed to a punishment for improper use of chapter 15. The decision was affirmed on appeal to the district court⁸ but has been criticized by two of the authors of chapter 15 as failing to honor both the spirit and the

² 11 U.S.C. § 1501 et seq. (hereafter “chapter 15”).

³ 351 B.R. 103 (Bankr. S.D.N.Y. 2006), *aff’d sub nom. Kryv v. Official Creditors Comm. of Unsecured Creditors of Refco Inc. (In re SPhinX, Ltd.)*, 371 B.R. 10 (S.D.N.Y. 2007) (in the bankruptcy court, hereafter “*SPhinX*”).

⁴ 374 B.R. 122 (Bankr. S.D.N.Y. 2007), *appeal docketed*, Case No. 07-8730 (RWS), (S.D.N.Y. Oct. 10, 2007) (hereafter “*Bear Stearns*”). A third case remains pending, *In re Basis Yield Alpha Fund (Master)*, No. 07-12762 (REG) (Bankr. S.D.N.Y. Aug. 29, 2007) (“*Basis Yield*”). The funds in *Basis Yield* are also exempt companies but claim to have substantial contacts and business relationships with the Cayman Islands. The issue of recognition in *Basis Yield* is set for hearing on summary judgment on January 15, 2008. No opposition to recognition has been filed.

⁵ *SPhinX*, 351 B.R. at 107 n. 2; *Bear Stearns High-Grade* at 124.

⁶ Companies Law of the Cayman Islands § 182 et seq. (2004 Revision), <http://www.investcayman.ky/laws/companieslaw.pdf> (last viewed December 1, 2007).

⁷ Stipulation and Order of Settlement, No. 2168, *In re Refco Inc.*, Case No. 05-60006 (Bankr. S.D.N.Y. Oct. 17, 2005) (hereafter *Refco*).

⁸ *Kryv v. Official Comm. of Unsecured Creditors of Refco Inc. (In re SPhinX, Ltd.)*, 371 B.R. 10 (S.D.N.Y. 2007).

plain language of the statute.⁹ In *Bear Stearns*, Bankruptcy Judge Lifland ignored the absence of objections, undertook an independent analysis of the facts, analogized the debtors to “letter-box” companies having no meaningful relationships with the Cayman Islands, and declined to grant either foreign main or nonmain recognition, which ruling is currently on appeal. The *Bear Stearns* appeal has generated significant interest because Judge Lifland disagrees with substantial portions of the *SPhinX* decision, notwithstanding its affirmance by the district court, and the two authors critical of Judge Drain’s decision (Jay Westbrook and Daniel Glosband) have filed an *amici curiae* brief in support of Judge Lifland’s order of nonrecognition.¹⁰ In sum, these cases have created much uncertainty with respect to the outcome of a chapter 15 recognition proceeding.

II. THE ORIGIN AND BACKGROUND OF CHAPTER 15

Prior to 2005, § 304 of the Bankruptcy Code provided a mechanism for a bankruptcy court to grant ancillary relief in connection with foreign proceedings.¹¹ In deciding whether to grant relief, the court was instructed to be guided by a list of 6 factors, one of which was comity.¹² In 2005, the Bankruptcy Code amendments¹³ included a new chapter 15, essentially adopting the Model Law on Cross-Border Insolvency drafted by the United Nations Commission on International Trade Law (“UNCITRAL”)¹⁴ as organic law in the United

⁹Jay Lawrence Westbrook, “*Locating the Eye of the Financial Storm*,” 32 BROOK. J. INT’L L. 1019 (2007) (hereafter “Westbrook, *Eye of the Financial Storm*,”); Daniel M. Glosband, “*SPhinX Chapter 15 Opinion Misses the Mark*,” 25 AM. BANKR. INST.J. 44 (2006) (hereafter “Glosband, *SPhinX Misses the Mark*”).

¹⁰ Brief of Amici Curiae, No. 7, *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, No. 07-8730 (RWS) (S.D.N.Y. Nov. 29, 2007).

¹¹ “Congress expressly granted ancillary jurisdiction to bankruptcy courts to act as local auxiliaries to a foreign bankruptcy proceeding to honor requests from foreign representatives for the turnover of assets, injunctions and other such requested relief.” *Hoffman v. Bullmore (In re National Warranty Ins. Risk Retention Group)*, 384 F.3d 959, 962 (8th Cir. 2004).

¹² 11 U.S.C. § 304 (repealed 2005). The factors were (i) just treatment of all holders of claim or interests; (ii) protection of claim holders in the U.S. against prejudice and inconvenience; (iii) prevention of preferential or fraudulent dispositions of property; (iv) distribution of proceeds substantially in accordance with Title 11; (v) comity; and (vi) if appropriate, the provision of an opportunity for a fresh start.

¹³ Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”), Pub. L. No. 109-8, 119 Stat. 23.

¹⁴ Model Law on Cross-Border Insolvency, <http://www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf> (last viewed on Dec. 2, 2007) (the “Model Law”). See H.R. Rep. No. 109-31, pt. 1, at 105-07 (2005) (hereafter “H. Rep. No. 109-31”).

States.¹⁵ The language of chapter 15 tracks the Model Law “with adaptations designed to mesh with United States law.”¹⁶ The purpose of the statute is stated in § 1501(a):

(a) The purpose of this chapter is to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency with the objectives of –

(1) cooperation between –

(A) courts of the United States, United States trustees, trustees, examiners, debtors, and debtors in possession; and

(B) the courts and other competent authorities of foreign countries involved in cross-border insolvency cases;

(2) greater legal certainty for trade and investment;

(3) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor;

(4) protection and maximization of the value of the debtor’s assets; and

(5) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.¹⁷

The legislative history explains that “comity” is a central consideration, being moved from “one of six factors in subsection (c) of section 304” to the “introductory language to make clear that it is the central concept to be addressed.”¹⁸ In addition, “[c]hapter 15 substituted a simple, objective standard for recognition in place of the subjective requirements of former § 304, . . .”¹⁹

¹⁵ “The purpose of this chapter is to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency” 11 U.S.C. § 1501(a). *See also* H. Rep. No. 109-31 at 105-07; Jay Lawrence Westbrook, *Chapter 15 at Last*, 79 AM. BANKR. L.J. 713, 719-20 (2005).

¹⁶ *In re Tri-Continental Exch. Ltd.*, 349 B.R. 627, 632 (Bankr. E.D. Cal. 2006) (hereafter “*In re Tri-Continental Exch.*”).

¹⁷ 11 U.S.C. § 1501(a).

¹⁸ H. Rep. No. 109-31 at 109: “Although the case law construing section 304 makes it clear that comity is the central consideration, its physical placement as one of six factors in subsection (c) of section 304 is misleading, since those factors are essentially elements for the grounds for granting comity. Therefore, in subsection (2) of this section, comity is raised to the introductory language to make it clear that it is the central concept to be addressed.”

¹⁹ Glosband, *SPhinX Misses the Mark* at 45.

The decision to grant recognition is not dependent on any findings about the nature of the foreign proceedings of the sort previously mandated by § 304 The requirements of this section, which incorporates the definitions in § 1502 and §§ 101(23) and (24) are all that must be fulfilled to attain recognition.²⁰

Thus comity²¹ and international cooperation are centerpieces of chapter 15.²²

Chapter 15 also contains a statutory instruction to the court to seek guidance from foreign jurisdictions.

In interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions.²³

The principles thus embraced are not new to U.S. jurisprudence²⁴ though chapter 15 seems to place more emphasis on the integration of U.S. courts into the international commercial insolvency regime than in the past.²⁵

III. THE STATUTORY SCHEME FOR RECOGNITION OF A FOREIGN PROCEEDING IN CHAPTER 15

A. How chapter 15 works.

The Bankruptcy Code contemplates domestic proceedings (chapters 7, 11, 12 and 13) and ancillary proceedings in U.S. courts in aid of foreign proceedings (chapter 15). If a multinational entity files a chapter 7 or chapter 11 in the United States, chapter 15 is not implicated

²⁰ H. Rep. 109-31 at 114.

²¹ The Supreme Court has defined “comity” as “the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.” *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

²² See 11 U.S.C. § 1507(b) (stating that any determination of a request for assistance under chapter 15 must be “consistent with principles of comity” and § 1509(b)(3) (once recognition of a foreign proceeding is granted, the “court in the United States shall grant comity or cooperation to the foreign representative”).

²³ 11 U.S.C. § 1508. *In re SPhinX, Ltd.*, 351 B.R. at 118.

²⁴ *Finanz AG Zurich v. Banco Economico S.A.*, 192 F.3d 240, 247 (2d Cir. 1999) (recognizing the “particular need to extend comity to bankruptcy proceedings” quoting *Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713 (2d Cir. 1987)); *Maxwell Comm’n Corp. v. Societe Generale (In re Maxwell Comm’n Corp.)*, 93 F.3d 1036, 1048 (2d Cir. 1996) (“comity is especially important in the context of the Bankruptcy Code . . . [because] deference to foreign insolvency proceedings will, in many cases, facilitate ‘equitable, orderly and systematic’ distribution of the debtor’s assets” quoting *Cunard S.S. Co. v. Salen Reefer Servs. AB*, 773 F.2d 452, 458 (2d Cir. 1985)); *Allstate Life Ins. Co. v. Linter Group, Ltd.*, 994 F.2d 996, 999 (2d Cir. 1993).

²⁵ Some argue that chapter 15 is an incremental and improvident step towards a universalist regime of international insolvency law and a partial surrender of sovereignty. E.g., John J. Chung, “The New Chapter 15 of the Bankruptcy Code: A Step Toward Erosion of National Sovereignty,” 27 *Nw.J. INT’L L. & BUS.* 89, 101 (2006-07).

because there is no foreign proceeding to be recognized. If a multi-national entity files a proceeding in another jurisdiction and seeks to utilize U.S. courts in aid of its jurisdiction (e.g., to enforce orders within the U.S. borders or to seize assets located within U.S. borders) it may (but is not necessarily required to²⁶) file a chapter 15 proceeding and seek recognition.²⁷ “Recognition” in chapter 15 means “entry of an order granting recognition of a foreign main proceeding or foreign nonmain proceeding under this chapter; . . .”²⁸ In order to have a proceeding ancillary to and in aid of a foreign proceeding, the foreign proceeding must be “recognized” by a U.S. bankruptcy court.²⁹

Recognition of a foreign proceeding is the key event, the centerpiece of chapter 15’s other provisions. Without recognition, there is no chapter 15 proceeding although, in theory, a foreign representative would still be free to seek the aid of U.S. courts but without the broad and generous statutory grants of comity and enticements to cooperation found in chapter 15. For example,

- (b) If the court grants recognition . . . –
 - (1) the foreign representative has the capacity to sue and be sued in a court in the United States;
 - (2) the foreign representative may apply directly to a court in the United States for appropriate relief in that court; and
 - (3) a court in the United States shall grant comity or cooperation to the foreign representative.³⁰

Further, in the case of a chapter 15 proceeding, for example, foreign creditors have equal access to and the right to participate in a case the same as domestic creditors,³¹ and whenever notice is given to creditors generally, such notice shall also include all known creditors, including foreign creditors.³²

²⁶ See 11 U.S.C. § 1509(a) (“A foreign representative *may* commence a case under section 1504. . . .”) (emphasis added). *But see United States v. J.A. Jones Constr. Group, LLC*, 333 B.R. 637, 639 (E.D.N.Y. 2005) (“In the absence of recognition under chapter 15, this Court has no authority to consider Mr. Breton’s request for a stay.”).

²⁷ 11 U.S.C. §1504 (“A case under this chapter is commenced by the filing of a petition for recognition of a foreign proceeding under section 1515.”)

²⁸ 11 U.S.C. §1502(7).

²⁹ *United States v. J.A. Jones Constr. Group, LLC*, 333 B.R. at 639.

³⁰ 11 U.S.C. § 1509(b).

³¹ 11 U.S.C. § 1513(a).

³² 11 U.S.C. § 1514(a).

Chapter 15 does not apply to an *informal* or out-of-court liquidation, restructuring or a winding-up of a foreign company. In order to be a debtor in a chapter 15 proceeding, the debtor must be “the subject of a foreign proceeding.”³³ A “foreign proceeding” means

a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.³⁴

“Foreign court” means “a judicial or other authority competent to control or supervise a foreign proceeding; . . .”³⁵ Thus, chapter 15 contemplates only formal proceedings “subject to control or supervision by a foreign court.”³⁶ Further, chapter 15 recognition can only be sought by a foreign representative duly appointed by the foreign court. The statute provides that a “foreign representative” is

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.³⁷

The mechanism for obtaining recognition is for the foreign representative to file a “petition for recognition.”³⁸ Section 1515 states that the petition shall contain or be accompanied by (1) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative,³⁹ (2) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative,⁴⁰ and (3) any other evidence acceptable to the court of the existence of such foreign proceeding and of the appointment of the foreign representative.⁴¹ The petition shall also identify all known foreign proceedings with respect to the debtor.⁴²

³³ 11 U.S.C. § 1502(1).

³⁴ 11 U.S.C. § 101(23).

³⁵ 11 U.S.C. § 1502(3).

³⁶ 11 U.S.C. § 101(23).

³⁷ 11 U.S.C. § 101(24).

³⁸ 11 U.S.C. § 1515(a).

³⁹ 11 U.S.C. § 1515(b)(1).

⁴⁰ 11 U.S.C. § 1515(b)(2).

⁴¹ 11 U.S.C. § 1515(b)(3).

⁴² 11 U.S.C. § 1515(c).

Section 1517 of the Code is the key provision with regard to recognition and provides in pertinent part:

- (a) Subject to section 1506 [public policy exception], . . . an order recognizing a foreign proceeding shall be entered if –
- (1) such foreign proceeding . . . is a foreign main proceeding or foreign nonmain proceeding . . .
 - (2) the foreign representative applying for recognition is a person or body; and
 - (3) the petition meets the requirements of section 1515 [certified copies and certificates].⁴³

Section 1517 goes on to address the central criteria for recognition as a foreign main proceeding versus a foreign nonmain proceeding:

- (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*; or
 - (2) as a foreign nonmain proceeding if the debtor has an *establishment* within the meaning of section 1502 in the foreign country where the proceeding is pending.⁴⁴

An “establishment” is defined as “any place of operations where the debtor carries out a *nontransitory economic activity*.”⁴⁵ Significantly, the “center of main interests” or “COMI” is not defined and therein lies much of the problem. In summary, the chapter 15 world of recognition is divided into two separate classes of proceedings: foreign main and foreign nonmain. Recognition as a “foreign main proceeding” focuses on “where the debtor has the center of its main interests;”⁴⁶ and a foreign nonmain proceeding is reserved for those debtors where the proceeding is not in its COMI but is pending in the “country where the debtor has an establishment,”⁴⁷ meaning a nontransitory economic activity.

⁴³ 11 U.S.C. § 1517(a).

⁴⁴ 11 U.S.C. § 1517(b) (emphasis added).

⁴⁵ 11 U.S.C. § 1502(2) (emphasis added).

⁴⁶ 11 U.S.C. § 1502(4).

⁴⁷ 11 U.S.C. § 1502(5).

B. The impact and effect of “recognition.”

Aside from the broad provisions intended to foster comity and cooperation between cases pending in multiple jurisdictions,⁴⁸ chapter 15 provides automatic benefits to the grant of recognition as a foreign main proceeding (and many discretionary benefits as well). Numerous provisions of the Bankruptcy Code are incorporated and made automatically applicable to the chapter 15 foreign main proceeding,⁴⁹ including the adequate protection and automatic stay provisions of §§ 361-62 that apply to the debtor and property of the debtor that is within the territorial jurisdiction of the United States.⁵⁰ Other provisions that are incorporated or directed to apply in foreign main proceeding to property of the foreign debtor located within the United States include §§ 363 (lease, sale and/or use of property of the debtor), 549 (avoidance of unauthorized postpetition transfers), and 552 (postpetition effects of a security interest).⁵¹ Chapter 15 recognition carries with it authority for the foreign representative to operate the debtor’s business within the United States, including the “rights and powers” of a trustee under §§ 363 and 552;⁵² and it provides that § 552 applies to property of the debtor that is within the territorial jurisdiction of the United States.⁵³ Although the statute does not contain an express grant of authority, it makes clear that chapter 15 does not affect the right of a foreign representative to commence an action or proceeding in a foreign country to the extent necessary,⁵⁴ and likewise does not affect the foreign representative’s right to file a petition commencing a case under Title 11.⁵⁵

There are other discretionary benefits to recognition. 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 interest of the creditors, the court may,

grant any appropriate relief, including: staying the commencement or continuation of an . . . action . . . concerning the debtor’s assets, rights, obligations or liabilities . . . ; staying execution against the debtor’s assets . . . ;

⁴⁸ E.g., 11 U.S.C. § 1525 directs the U.S. court to “cooperate to the maximum extent possible with a foreign court or a foreign representative, either directly or through the trustee” and authorizes the court “to communicate directly with, or to request information or assistance directly from, a foreign court or a foreign representative, . . .”

⁴⁹ *In re SPhinX*, 351 B.R. at 115.

⁵⁰ 11 U.S.C. § 1520(a)(1).

⁵¹ 11 U.S.C. § 1520(a)(2).

⁵² 11 U.S.C. § 1520(a)(3). Under § 552(a), property acquired by the debtor after the commencement of the case is not subject to any lien or security agreement entered into prior to the commencement of the case.

⁵³ 11 U.S.C. § 1520(a)(4). Under § 552(b), prepetition liens continue to attach to proceeds, products, offspring, or profits acquired by the estate after the commencement of the case to the extent provided by nonbankruptcy law, except as the court may order otherwise.

⁵⁴ 11 U.S.C. § 1520(b).

⁵⁵ 11 U.S.C. § 1520(c).

suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor . . . ; providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor’s assets, affairs, rights, obligations or liabilities; entrusting the administration . . . of the debtor’s assets within the territorial jurisdiction of the United States to the foreign representative . . . ; and granting any additional relief that may be available to a trustee [with certain exceptions].⁵⁶

There are, of course, the traditional carve-outs for police and regulatory actions⁵⁷ as well as public policy.⁵⁸ And although the statute does not expressly say so, it seems inherent that the court would also have the authority to lift, terminate, annul, modify or condition the continuation of the automatic stay, grant adequate protection, or authorize use of cash collateral as required and provided in §§ 361, 362(d) and 363(e).

Interestingly, aside from the automatic stay being “automatic” in case of foreign main recognition and only discretionary in foreign nonmain recognition, there is little difference between the two forms of recognition. In the case of foreign main recognition, the imposition of the § 362 stay is automatic and the court has the discretion to lift the automatic stay or allow its continuation upon conditions the court deems appropriate, whereas in the case of foreign nonmain recognition, the court has the discretion to do the same by order. The *SPhinX* court concluded that there are a “surprisingly small” number of distinctions between main and nonmain.⁵⁹ Recognition as main or nonmain has

limited specified consequences under chapter 15 (particularly since the chapter gives the bankruptcy court the ability to grant substantially the same types of relief in assistance of foreign nonmain proceedings as main proceedings and to condition the foreign representative’s ability to operate the business and dispose of the debtor’s assets under section 1520(a)(3)),⁶⁰

⁵⁶ 11 U.S.C. § 1521(a).

⁵⁷ 11 U.S.C. § 1521(d) (“The court may not enjoin a police or regulatory act of a governmental unit, including a criminal action or proceeding, . . .”).

⁵⁸ 11 U.S.C. § 1506 (“Nothing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States.”).

⁵⁹ *In re SPhinX*, 351 B.R. at 115. The *amici curiae* in the *Bear Stearns* appeal disagree, urging that there are a “host of important consequences[,]” though it seems to come down to the imposition of the § 362 stay being automatic (main proceeding) or discretionary (nonmain proceeding). Brief of Amici Curiae, No. 7 at 15 and n. 38, *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, No. 07-8730 (RWS) (S.D.N.Y. Nov. 29, 2007).

⁶⁰ *Id.* at 116.

Also, it seems clear that recognition of a foreign main proceeding would not “necessarily be binding on choice of law determination.”⁶¹

C. The Center of Main Interests (“COMI”)

A foreign representative applies for recognition of the foreign proceeding by filing a petition⁶² accompanied by certified copies of documents evidencing the foreign court proceeding and the representative’s appointment by the foreign court.⁶³ The documents are presumed to be authentic in the absence of contrary evidence.⁶⁴ After notice and a hearing, the court shall enter an order recognizing the foreign proceeding if the documents are in order, the representative is a “person or body,” and it is a foreign main or nonmain proceeding.⁶⁵ Both §§ 1502 and 1517(b) state that a foreign main proceeding is one pending in the country where the debtor has the “center of its main interests,” while a foreign nonmain proceeding is one pending in a foreign country where the debtor has an establishment.⁶⁶

Significantly, chapter 15 has no definition of center of main interests but contains a presumption that, in the absence of evidence to the contrary, the debtor’s registered office is its COMI:

In the absence of evidence to the contrary, the debtor’s registered office, or habitual residence in the case of an individual, is presumed to be the center of the debtor’s main interests.⁶⁷

Much of the controversy over whether to grant recognition of foreign main proceedings centers on the effect to be given this presumption, especially in the absence of any objection by any interested party.⁶⁸

⁶¹ *Id.* But see Case C-341/04, *Bondi v. Bank of America N.A. (In re Eurofood IRSC Ltd.)*, 2006 E.C.R. I-3813, 2006 WL 1142304 ¶ 33 (E.C.J. May 2, 2006) (hereafter “*In re Eurofood*”) (“That legal certainty and that foreseeability are all the more important in that . . . determination of the court with jurisdiction entails the determination of the law which is to apply”).

⁶² 11 U.S.C. § 1515(a).

⁶³ 11 U.S.C. § 1515(b).

⁶⁴ 11 U.S.C. § 1516(b).

⁶⁵ 11 U.S.C. § 1517(a).

⁶⁶ 11 U.S.C. § 1502(5).

⁶⁷ 11 U.S.C. § 1516(c).

⁶⁸ Compare *In re SPhinX*, 351 B.R. at 121 (“ . . . normally the Court would recognize the Cayman Islands proceedings as main proceeding.”) with *In re Bear Stearns*, 374 B.R. 126 (“This Court must make an independent determination as to whether the foreign proceeding meets the definitional requirements”); see also *In re Tri-Continental Exch.*, 349 B.R. at 635 (“the burden of proof of ‘center of main interests’ is on the foreign representative”)

As noted above, § 1508 directs the bankruptcy court to interpret chapter 15 by considering “its international origin, and the need to promote an application . . . that is consistent with the application of similar statutes adopted by foreign jurisdictions.”⁶⁹ The Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency⁷⁰ was adopted in connection with the Model Law, and, according to the legislative history of BAPCPA, “should be consulted for guidance as to the meaning and purpose of its provisions.”⁷¹ The Guide recites that the concept of COMI is found in the European Union Convention on Insolvency Proceedings,⁷² where it is defined as “the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.”⁷³ This “generally equates with the concept of a ‘principal place of business’ in United States law.”⁷⁴

As noted by the European Court of Justice, the COMI presumption may be overcome “particular[ly] in the case of a ‘letterbox’ company not carrying out any business in the territory of the Member State in which its registered office is situated.”⁷⁵

In attempting to locate a definition of “center of main interests,” commentators have focused on European decisions establishing that “the presumption can be rebutted by showing that the ‘head office’ functions were carried out in a jurisdiction other than where the registered office was located.”⁷⁶

IV. The *SPhinX* decision

The business of the *SPhinX* funds “consisted of buying and selling securities and commodities in a manner that tracked . . . certain S&P Hedge Fund Indexes.”⁷⁷ Each of the *SPhinX* funds was either a “limited liability company or a segregated portfolio company (‘SPC’) incorporated and registered in the Cayman Islands.”⁷⁸ The *SPhinX* funds “did not

⁶⁹ 11 U.S.C. § 1508.

⁷⁰ UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment (U.N. Publications Sales No. E.99.V.3 (1999) available at http://www.iiiglobal.org/organizations/uncitral/model_law.pdf (last viewed Dec. 1, 2007) (hereafter the “Model Law Guide”).

⁷¹ H. Rep. No. 109-31 at 106 n.101.

⁷² Model Law Guide ¶ 31 at 24; and ¶ 72 at 33.

⁷³ Council Reg. (EC) No. 1346/2000 (May 29, 2000), ¶ 13 at L160/2, available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2000/l_160/l_16020000630en00010018.pdf (last viewed December 1, 2007); *In re Bear Stearns* at 129.

⁷⁴ *In re Tri-Continental Exch.*, 349 B.R. at 633-34; *In re Bear Stearns* at 129.

⁷⁵ *In re Bear Stearns*, 374 B.R. at 129, quoting *In re Eurofood*, at ¶ 35; and citing *In re SPhinX*, 351 B.R. at 10.

⁷⁶ *E.g.*, Glosband, *SPhinX Misses the Mark* at 45 n.9, citing cases.

⁷⁷ *In re SPhinX*, 351 B.R. at 107.

⁷⁸ *Id.* at 106-07.

conduct a trade or business in the Cayman Islands, . . . had no employees and no physical offices in the Cayman Islands, . . . [and] apparently have no assets in the Cayman Islands.”⁷⁹ They were managed by PlusFunds, a Delaware corporation located in New York City,⁸⁰ also a chapter 11 debtor in the New York bankruptcy court.⁸¹ There was no trading in securities or commodities in the Cayman Islands, none of the directors of SPHinx funds resided in the Cayman Islands and no board meetings occurred there.⁸²

The *SPHinx* decision is inextricably tied to the *Refco* bankruptcy proceeding and the alleged \$312 million preference received by PlusFunds on behalf of SPHinx Funds on the eve of Refco’s bankruptcy.⁸³ As the *SPHinx* court explains in some detail, Refco and SPHinx entered into a settlement regarding the alleged preference that certain of the investors in SPHinx Funds apparently believed was too favorable to Refco. The investors “caused involuntary winding up proceedings under the Companies Law to be commenced in the Cayman Islands against two of the SPHinx funds.”⁸⁴ The Joint Provisional Liquidators (“JPLs”) appointed by the Cayman Islands court sought an adjournment of the settlement hearing, which was denied⁸⁵ and the bankruptcy court then approved the settlement. Certain of the SPHinx investors (though not the SPHinx funds) appealed the order approving the settlement agreement.⁸⁶ The disapproving investors then apparently took control of the SPHinx funds and caused voluntary liquidating proceedings to be instituted in the Cayman Islands. Although the SPHinx funds were not parties to the appeal of the settlement,⁸⁷ the JPLs filed a chapter 15 proceeding and asked the bankruptcy court for a temporary restraining order to enjoin further activity on the

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *In re PlusFunds Group, Inc.*, No. 06-10402 (Bankr. S.D.N.Y. Mar. 6, 2006). See discussion in *In re SPHinx* at 107.

⁸² *In re SPHinx*, 351 B.R. at 108.

⁸³ *Id.* at 109. The Official Committee of Unsecured Creditors of Refco Inc. filed an avoidance action on behalf of Refco Capital Markets, Ltd. (“RCM”) against SPHinx Managed Futures Fund SPC (“SPC Funds”, and others, seeking to recover payments totaling \$312,046,266.23 made just five days prior to RCM’s bankruptcy filing and one day prior to a self-imposed moratorium on withdrawals. *Official Committee of Unsecured Creditors of Refco Inc. v. SPHinx Managed Futures Fund SPC (In re Refco Inc.)*, No. 1, Adv. Pro. 05-3331 (Dec. 16, 2005, Bankr. S.D.N.Y.) RCM was a non-regulated subsidiary of Refco that held cash or near cash equivalent investments and paid a higher interest rate than other cash alternatives.

⁸⁴ *Id.*

⁸⁵ The court noted that it was considering the settlement from the perspective of Refco, the debtor in its court, and the creditors of the Refco estate. The “fairness” of the settlement from the perspective of SPHinx was not an issue that was relevant to the Rule 9019 settlement motion. *Id.* at 109-10.

⁸⁶ *Krys v. Official Comm. of Unsecured Creditors (In re Refco Inc.)*, 48 B.C.D. 254, 2007 U.S. App. LEXIS 23363, Oct. 5, 2007 (2d Cir.).

⁸⁷ See *Masonic Hall & Asylum Fund v. Official Comm. Of Unsecured Creditors (In re Refco Inc.)*, 2006 U.S. Dist. LEXIS 85691 (S.D.N.Y. Nov. 16, 2006), *aff’d sub nom. Krys v. Official Comm. of Unsecured Creditors (In re Refco Inc.)*, 48 B.C.D. 254, 2007 U.S. App. LEXIS 23363 (2d Cir. Oct. 5, 2007).

appeal.⁸⁸ The requested TRO was denied and the district court also denied a request for a stay of the appeal.⁸⁹ Thus, the procedural machinations of the SPhinX funds makes clear (and the bankruptcy court found) that the proceedings in the Cayman Islands and the chapter 15 proceeding in New York were all part of an effort by unhappy SPhinX funds investors to derail the settlement by which a substantial portion of the \$312 million would be repaid to Refco.

[A] primary basis for the [chapter 15] Petition . . . is improper: that is, it has the purpose of frustrating the RCM Settlement by obtaining a stay of the appeal upon the invocation of Bankruptcy Code section 362(a) that would go into effect under section 1520(a)(1) upon such recognition [as a foreign main case]. . . . [T]he strategy taints the JOLs' [Liquidators'] request . . . giving the clear appearance of improper forum shopping.⁹⁰

It is against this backdrop that the bankruptcy court took up the petition for recognition as a foreign main proceeding filed under chapter 15 by SPhinX. In considering whether to grant recognition, the court first described at length what it found to be the “maximum flexibility”⁹¹ found in § 304 and the concomitant “pervasive flexibility”⁹² now enhanced in chapter 15.⁹³ The court cited the §304 case of *In re Aerovias Nacionales de Colombia S.A.*⁹⁴ as suggesting “a thorough pragmatism” in determining what chapter 15 relief “would best suit” the needs of foreign debtors and protect the creditors.⁹⁵

The *SPhinX* court found the statute to allow the recognition decision to be separate from the concept of main versus nonmain. “Congress separated the concept of ‘recognition’ from the

⁸⁸ *Id.* at 111.

⁸⁹ *Id.* at 112.

⁹⁰ *Id.* at 121.

⁹¹ *Id.* at 112.

⁹² *Id.* at 114. The court cited *In re Aerovias Nacionales de Colombia S.A.*, 303 B.R. 1 (Bankr. S.D.N.Y. 2003) (non-chapter 15 case) as being instructive on the issue of how “pervasive flexibility” should assist the court in reaching the right result (“the flexibility that pervades” chapter 15, *id.* at 114). One is reminded of the cases in equity that turn on the “measure of the chancellor’s foot.”

[F]or law we have a measure, know what to trust to; Equity is according to the Conscience of him that is Chancellor; and as that is larger, or narrower, so is Equity. 'Tis all one as if they should make the Standard for the measure we call a Foot, a Chancellor's Foot; what an uncertain measure would be this. One Chancellor has a long Foot; another a short Foot; a Third an indifferent Foot. It is the same thing in the Chancellor's Conscience.

SELDEN'S TABLE TALK at 43-44 (1689).

⁹³ *Id.* at 112-14.

⁹⁴ 303 B.R. 1 (Bankr. S.D.N.Y. 2003).

⁹⁵ *In re SPhinX*, 351 B.R. at 114, quoting *Aerovias*, 303 B.R. at 15.

concept of ‘recognition as a foreign main (or nonmain) proceeding’ under section 1517(b).⁹⁶ This is a troubling notion that has engendered much criticism, discussed hereafter. Based on compliance with the statutory conditions, the court then concluded that

the Cayman Islands proceedings are entitled to recognition. . . . The real dispute concerns whether the Cayman Islands proceedings should be recognized as foreign main proceedings under Bankruptcy Code section 1517(b)(1), although, as noted above, the statutory and practical effects of this decision are not as important as the parties may believe.⁹⁷

The court next proceeded to address the issue of the center of main interests of SPhinX, recognizing the statutory presumption⁹⁸ that the Cayman Islands, as the place of registration of the funds, is the COMI. In considering the evidence that might be adduced to rebut the presumption, the court recognized that a number of factors could be considered, including (i) location of debtor’s headquarters; (ii) location of those who actually manage the debtor; (iii) location of debtor’s primary assets; (iv) location of majority of debtor’s creditors or majority of creditors who would be affected by the case; or (v) the jurisdiction whose law would apply to most disputes.⁹⁹ Of course, as we know from the facts recited above, virtually none of the five factors described by the court drive the COMI decision to the Cayman Islands. Rather, the only basis for foreign main recognition that can be elucidated is that the Cayman Islands are the jurisdiction of registration – and perhaps that the debtors asked for such recognition and that no creditor objected. Harkening back to “flexibility,” the court then opined

[T]he flexibility inherent in chapter 15 strongly suggests, however, that the Court should not apply such factors mechanically. . . . Instead they should be viewed in light of chapter 15’s emphasis on protecting the reasonable interests of parties in interest pursuant to fair procedures and the maximization of the debtor’s value.¹⁰⁰

Basically the court then deferred to the investors and creditors whose money is at risk.

Because their money is ultimately at stake, one generally should defer, therefore, to the creditors’ acquiescence in or support of a proposed COMI. It is reasonable to assume that the debtor and its creditors (and shareholders, if they have an economic stake in the proceeding), can . . . best determine how to

⁹⁶ *In re SPhinX*, 351 B.R. at 115.

⁹⁷ *Id.* at 117.

⁹⁸ 11 U.S.C. § 1516(c).

⁹⁹ *In re SPhinX*, 351 B.R. at 117.

¹⁰⁰ *Id.* at 117.

maximize the efficiency of a liquidation or reorganization and, ultimately, the value of the debtor,¹⁰¹

Having reached this point in the analysis, the court honored § 1508's directive to consider decisions from other jurisdictions. In the case of *Bondi v. Bank of America N.A. (In re Eurofood IRSC Ltd.)*,¹⁰² the European Court of Justice considered the center of main interests of Eurofood, a subsidiary of Parmalat. Eurofood was incorporated in Ireland and "was apparently a shell used by Bank of America in structuring financing transactions for the Parmalat Group, having no actual employees, business, or operations."¹⁰³ The issue addressed by the ECJ was whether the company's COMI was Ireland, its jurisdiction of incorporation, or Italy, its jurisdiction of administration. The ECJ concluded that under the EC Insolvency Regulation, "objective factors ascertainable by third parties" such as creditors dictated the COMI determination.¹⁰⁴

[I]n determining the centre of the main interest of a debtor company, the simple presumption laid down by the Community legislature in favour of the registered office of that company can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect. . . . That could be so in particular in the case of a 'letterbox' company not carrying out any business in the territory of the Member State in which its registered office is located.¹⁰⁵

In Eurofood, "[t]he court chose the jurisdiction of incorporation with a strong emphasis on the presumption in favor of that jurisdiction."¹⁰⁶ The *SPhinX* court concluded that the "COMI registered office presumption therefore was not rebutted" in Eurofood.¹⁰⁷

Whether using the *EuroFood* calculus as an analogy (though rejecting its outcome) or relying on the peculiar facts before it, the *SPhinX* court noted that "*important objective factors* point to the SPhinX COMI being located *outside* of the Cayman Islands."¹⁰⁸ The fund business was conducted elsewhere, as were back-office operations. The only business done in the Cayman Islands was that necessary to maintain good standing as registered Cayman Islands exempt companies and SPCs. There were no employees or managers in the Cayman Islands

¹⁰¹ *Id.* at 117.

¹⁰² Case C-341/04, 2006 E.C.R. I-3813, 2006 WL 1142304 (E.C.J. May 2, 2006).

¹⁰³ Westbrook, *The Eye of the Financial Storm* at 1028.

¹⁰⁴ Glosband, *SPhinX Misses the Mark* at 85.

¹⁰⁵ *In re Eurofood* at ¶¶ 34-35 (emphasis added).

¹⁰⁶ Westbrook, *The Eye of the Financial Storm* at 1028.

¹⁰⁷ *In re SPhinX*, 351 B.R. at 118.

¹⁰⁸ *Id.* at 119 (emphasis added).

and the boards, “which contained no Cayman Islands residents, never met in the Cayman Islands.”¹⁰⁹

The court recognized that strong pragmatic reasons existed for the COMI being elsewhere, including the lack of assets in the Cayman Islands, which meant that “the JOLs . . . would have to seek assistance from other courts . . . to realize on the SPhinX Funds’ assets”¹¹⁰ Also most, if not all, creditors and investors are outside the Cayman Islands so that, absent their consent, “the Cayman Court would have to rely on orders of other courts to bind them.”¹¹¹

The *SPhinX* court next addressed whether other considerations might drive the decision in favor of the Cayman Islands as the COMI, noting that no party in interest (aside from the Refco Committee and the RCM Trustee) had objected and that “*someone* needs to manage the Debtors’ winding up.”¹¹² Weighing all the factors discussed (other than improper purpose, discussed hereafter), the court concluded that because (i) the proceedings will apparently involve mostly investors who have not objected to the Cayman Islands and (ii) the proceedings are liquidations and not reorganizations, “normally the Court would recognize the Cayman Islands as main proceedings.”¹¹³ But for the improper purpose, the holding of the *SPhinX* decision, therefore, would be to grant recognition of a foreign main proceeding despite there being no objective relationships with the Cayman Islands (other than registration) for the sole reason that no one objected. However, the court found that the SPhinX Funds proceedings were filed for an improper purpose, a strategy that “taints the JOLs’ request and the investors’ consent to it, giving the clear appearance of improper forum shopping.”¹¹⁴

The court had previously concluded that “recognition” under §§ 1515 and 1517(a) is separate from recognition as main or nonmain¹¹⁵ and proceeded to consider whether the court should grant recognition and “deny or defer the . . . request to recognize the Cayman Islands proceedings as foreign main proceedings, . . .”¹¹⁶ In reaching its final conclusion, the court recognized the proceedings as foreign nonmain.

[W]here so many objective factors point to the Cayman Islands not being the Debtors’ COMI, and no negative consequences would appear to result from

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 120.

¹¹³ *Id.* at 121.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 115 and 122.

¹¹⁶ *Id.* at 122.

recognizing the Caymans Islands proceedings as nonmain proceedings, that is the better choice.¹¹⁷

The statute directs that recognition as a nonmain proceeding shall be granted only if the debtor has an establishment within the foreign country,¹¹⁸ and “establishment” for this purpose means a place of operations where the debtor carries out nontransitory economic activity.¹¹⁹ The *SPhinX* court did not analyze whether the funds carried out nontransitory economic activity in the Cayman Islands but, instead, granted nonmain recognition as a backup choice because the taint of improper purpose prevented the grant of main recognition.

The liquidators of the SPhinX Funds appealed the bankruptcy court’s denial of recognition as a foreign main proceeding on October 9, 2006. The only issues on appeal related to whether the bankruptcy court correctly denied foreign nonmain recognition.¹²⁰ The district court affirmed,¹²¹ expressly finding that (i) recognition was sought for an improper purpose and (ii) the objective facts ascertainable to third parties pointed to the SPhinX funds’ COMI “not being located within the Cayman Islands, thereby sufficiently rebutting the statutory presumption.”¹²²

V. The *Bear Stearns High-Grade* decision

The two Bear Stearns High-Grade funds were both “Cayman Islands exempted limited liability companies with registered offices in the Cayman Islands.”¹²³ Both entities were open-ended investment companies that invested in, *inter alia*, asset-backed securities (“ABSs”), mortgage-backed securities, derivatives, options, swaps, futures, equities, and currencies.¹²⁴ According to the verified petitions, PFPC Inc., a Massachusetts corporation, administered the funds and performed all back office functions, including accounting and clerical functions;¹²⁵ the books and records were maintained and stored in Delaware and Deloitte & Touche, Cayman Islands, performed the most recent audit,¹²⁶ the investment manager was Bear Stearns Asset

¹¹⁷ *Id.*

¹¹⁸ 11 U.S.C. § 1517(b)2).

¹¹⁹ 11 U.S.C. § 1502(2).

¹²⁰ Notice of Appeal and Amended Notice of Appeal, Nos. 51 and 55, *In re SPhinX Ltd.*, No. 06-11760 (S.D.N.Y. Oct. 9 and Oct. 17, 2006).

¹²¹ 371 B.R. 10 (S.D.N.Y. 2007).

¹²² *Id.* at 19.

¹²³ 374 B.R. at 124.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

Management Inc., a New York corporation (“BSAM”);¹²⁷ and the assets managed by BSAM were located in New York.¹²⁸ The investor registers are held in Dublin, Ireland by an affiliate of PFPC Inc.¹²⁹ Two of the three investors in one of the Funds are registered in the Cayman Islands, but “both are Bear Stearns entities which appear to have the same minimum Cayman Islands profile as do the Funds.”¹³⁰ Accounts receivable are located throughout Europe and the U.S., counterparties to master repurchase and swap agreements are based both inside and outside the U.S. but none are in the Cayman Islands.¹³¹ Apparently the only relationships that the Funds had with the Cayman Islands were (i) registration there; (ii) conducting the business associated with maintaining their standing as registered Cayman Islands companies;¹³² (iii) two of the directors resided there;¹³³ and (iv) as of the hearing date, bank accounts existed in the Cayman Islands, the funds having been transferred there after the filing of the petitions.¹³⁴ The court concluded that “the Funds closely approximate the ‘letterbox’ companies referred to in the *EuroFoods* decision.”¹³⁵

The decision recites that as a result of poor performance in the “sub-prime lending” market, both funds suffered from portfolio losses resulting in unmet margin calls, default notices, and resulting seizures and/or sales of assets pursuant to repurchase and collateral agreements.¹³⁶ Both funds filed petitions seeking to be wound up under the provisions of the Companies Law of the Cayman Islands, joint provisional liquidators (“JPLs”) were duly appointed, and the JPLs filed chapter 15 petitions in the New York bankruptcy court seeking foreign main or alternatively foreign nonmain recognition.¹³⁷

Faced with no serious objection¹³⁸ to the petition for recognition, the court nonetheless concluded that it must

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 125.

¹³⁰ *In re Bear Stearns*, 374 B.R. at 130.

¹³¹ *Id.*

¹³² *Id.* at 130 n.8.

¹³³ *Id.* at n.9.

¹³⁴ *Id.* at n.10.

¹³⁵ *Id.*

¹³⁶ *Id.* at 125.

¹³⁷ *Id.*

¹³⁸ *Id.* Merrill Lynch Capital Services filed “an ambiguous statement” requesting that no finding as to center of main interest “would control any choice of law determination.”

make an independent determination as to whether the foreign proceeding meets the definitional requirements of sections 1502 and 1517 of the Bankruptcy Code.¹³⁹

The *Bear Stearns* court initially faced head-on the “flexibility” analysis that was central to the *SPhinX* decision. The court noted that although flexibility is, in fact, an important component of chapter 15, such flexibility only comes into play after recognition is found proper as either main or nonmain, and that “flexibility” plays little or no role in the recognition calculus.

Chapter 15 accords the court substantial discretion and flexibility. However, the process of recognition of a foreign proceeding is a simple single step process incorporating the definitions in sections 1502 and 101(2) and (24) to determine recognition as either a main or a nonmain proceeding or nonrecognition.¹⁴⁰

The *Bear Stearns* court also disagreed with the *SPhinX* court’s belief that recognition could be divorced from the main or nonmain dichotomy, explaining later that chapter 15 imposes “a rigid procedural structure for recognition of foreign proceedings as either main or nonmain”¹⁴¹

The determination is a formulaic one. A simple recognition of a foreign proceeding without specifying more (i.e., nondeclaration as to either ‘main or nonmain’) is insufficient as there are substantial eligibility distinctions and consequences. In other words, the recognition must be coded as either main or nonmain.¹⁴²

Proceeding to consider whether the Bear Stearns High-Grade funds were entitled to main or nonmain recognition, the court first addressed the fact that both were registered in the Cayman Islands and that, absent evidence to the contrary, the country of registration is presumed to be the center of main interests.¹⁴³ The court noted that the legislative history indicates that “‘the presumption . . . is included for speed and convenience of proof where there is no serious controversy.’”¹⁴⁴ The court cited *Tri-Continental Exchange* for the proposition that

¹³⁹ *Id.* at 126.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 132.

¹⁴² *Id.* at 126-27. *But see* Order, Pursuant to 11 U.S.C. §§ 105(a), 1507, 1517, and 1521, Recognizing Company Voluntary Arrangement as Either Foreign Main Proceeding or Foreign Nonmain Proceeding, Enforcing Company Voluntary Arrangement in the United States and Granting other Appropriate Relief, *In re Schefenacker PLC*, No. 07-11482 (Bankr. S.D.N.Y. June 14, 2007) (granting recognition without distinguishing between main and nonmain).

¹⁴³ 11 U.S.C. § 1516(c). *See In re Tri-Continental Exch.*, 349 B.R. at 635.

¹⁴⁴ *Id.* at 127-28, citing H.R. Rep. No. 31, 109th Cong., 1st Sess. 1516 (2005).

If the foreign proceeding is in the country of the registered office, and if there is evidence that the center of main interests might be elsewhere, then the foreign representative must prove that the center of main interest is in the same country as the registered office.¹⁴⁵

The court then suggested the various factors that could rebut the presumption of the COMI being the debtor's place of registration, citing the same list as the *SPhinX* court.¹⁴⁶ Relying on the petitioners' pleadings and the testimony of the liquidators,¹⁴⁷ the court concluded that

The presumption that the COMI is the place of the Funds' registered offices has been rebutted by evidence to the contrary. As noted, each of the Funds' real seat and therefore their COMI is the United States, the place where the Funds conduct the administration of their interests on a regular basis and is therefore ascertainable by third parties, . . . and, . . . is located in this district where principal interests, assets and management are located.¹⁴⁸

The court specifically rejects the notion, advanced in the *SPhinX* decision, that

if the parties in interest had not objected to the Cayman Islands proceeding being recognized as main, recognition would have been granted under the sole grounds that no party objected and no other proceeding had been initiated anywhere else. . . . To the extent that non objection would make the recognition process a rubber stamp exercise, this Court disagrees with the dicta in the *SPhinX* decision.¹⁴⁹

Thus, the *Bear Stearns* court rejected foreign main recognition. Having resolved that the COMI of the Bear Stearns High-Grade funds was the United States and not the Cayman Islands (an analytical outcome identical to that of the *SPhinX* court, notwithstanding the different outcomes), the court next proceeded to consider whether to grant nonmain recognition, as the *SPhinX* court ultimately did. Of course, chapter 15 provides that nonmain recognition should flow from the existence of an "establishment" in the Cayman Islands "for the conduct of *nontransitory* economic activity, i.e., a local place of business."¹⁵⁰ Focusing on the status of the

¹⁴⁵ *Id.* at 128, citing *In re Tri-Continental Exch.*, 349 B.R. at 635.

¹⁴⁶ *In re SPhinX*, 351 B.R. at 117.

¹⁴⁷ *In re Bear Stearns*, 374 B.R. at 129-30.

¹⁴⁸ *Id.* at 130.

¹⁴⁹ *Id.* at 130-31. The *Bear Stearns* court acknowledged but distinguished two other cases in the Southern District of New York Bankruptcy Court in which recognition had been granted for Cayman Islands proceedings as foreign main proceedings. Order, No. 13, *In re Bancredit Cayman Limited (in liquidation)*, No. 06-11026 (Bankr. S.D.N.Y. June 16, 2006) (foreign bank that managed deposits, accounts, loans and provided other credit services for clients in the Dominican Republic); and Order, No. 7, *Amerindo Internet Growth Fund Ltd.*, Case No. 07-10327, (Bankr. S.D.N.Y. Mar. 7, 2007) (investment company with a Cayman Islands investment manager and a Cayman Islands administrator, with books and records in the Cayman Islands).

¹⁵⁰ *In re Bear Stearns*, 374 B.R. at 131.

funds as “exempted companies” under Cayman Islands law and the prohibition against “engaging in business in the Cayman Islands except in furtherance of their business otherwise carried on *outside* of the Cayman Islands”,¹⁵¹ the court concluded that “[h]ere the bar is rather high,”¹⁵²

As has been shown above, there is no (pertinent) nontransitory economic activity conducted locally in the Cayman Islands by the Funds; only those activities necessary to their offshore ‘business.’¹⁵³

The court was not impressed with the existence of over \$15 million of cash present in the Cayman Islands, observing that it “migrated there *after* the Cayman Islands proceedings were initiated.”¹⁵⁴ The court then concluded that the Funds did not maintain an establishment in the Cayman Islands for nontransitory economic activity and, therefore, nonmain recognition was also unavailable. The Bear Stearns High-Grade court recognized

[t]hat portions of this holding are at odds with the decisions in SPhinX, both the bankruptcy court’s decision and the district court’s affirmance. However, neither of those courts addressed the ‘establishment’ requirement. Instead, the district court explained that the bankruptcy court’s recognition of the foreign proceeding as a nonmain proceeding was a ‘pragmatic one’ as no other proceedings were pending and someone had to conduct the ‘winding up.’¹⁵⁵

In summary, the *Bear Stearns* court concentrated on the facts that existed on the date of filing (discounting postpetition asset movement and business activity), focused on business activities outside the Cayman Islands (and disregarded the business conducted in that jurisdiction largely limited to maintaining their exempt status), and emphasized the undeniably substantial relationships with the United States in order to overcome the presumption that the Funds’ COMI was their place of registration. In the end, the court denied both foreign main and nonmain recognition, forcing the liquidators to either file chapter 11 in the U.S. or alternatively to seek the aid of U.S. bankruptcy courts (when needed) without the benefit of chapter 15, a cumbersome and uncertain prospect. An appeal followed, which remains pending in the district court.¹⁵⁶ As

¹⁵¹ “An exempted company shall not trade in the Islands with any person, firm or corporation except in furtherance of the business of the exempted company carried on outside the islands: Provided that nothing in this section shall be construed so as to prevent the exempted company effecting and concluding contracts in the Islands and exercising in the Islands all of its powers necessary for the carrying on of its business outside of the Islands.” Companies Law of the Cayman Islands § 193 (2004 revision), *available at* <http://www.investcayman.Ky/laws/companieslaw.pdf> (last viewed December 1, 2007).

¹⁵² *Id.* at 131.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, No. 07-8730 (RWS) (S.D.N.Y. Oct. 10, 2007).

of this writing, an appellant’s brief has been filed¹⁵⁷ as well as two *amici curiae* briefs,¹⁵⁸ and oral argument has been scheduled for January 16, 2008.¹⁵⁹

VI. PROBLEMS WITH *SPHINX*

There are two basic problems with the *SPhinX* decision: (1) whether the statute allows recognition separate and apart from a determination of main or nonmain status; and (2) whether flexibility and subjective considerations are appropriately part of the recognition calculus?

A. Recognition as “separate” from main or nonmain determination.

An initial criticism¹⁶⁰ of *SPhinX* is the court’s assertion that recognition is a two step process and that “recognition” can occur independently of recognition as a main or nonmain proceeding.¹⁶¹ The legislative history, for example, explains

The drafters of the Model Law understood that only a main proceeding or a non-main proceeding . . . were entitled to recognition under this section. . . . A petition under § 1515 must show that proceeding is a main or a qualifying non-main proceeding in order to obtain recognition under this section.¹⁶²

The *SPhinX* court focused on flexibility as the central theme empowering the court to achieve a just and proper result.¹⁶³ Daniel Glosband suggests that flexibility is, indeed, one of the central tenets of chapter 15 but only *after* recognition, not in the recognition calculus itself. “Flexibility in granting, modifying or denying relief and in communicating and coordinating among multiple proceedings is a hallmark of chapter 15. All of the above . . . support flexibility in these areas, but none support a flexible approach to recognition.”¹⁶⁴ Indeed, it is difficult to find separation of recognition from either main or nonmain in light of the express wording of the statute: “[R]ecognition’ means the entry of an order granting recognition of a foreign main proceeding or foreign nonmain proceeding under this chapter; . . .”¹⁶⁵

¹⁵⁷ *Id.* No. 5 (S.D.N.Y. Nov. 7, 2007).

¹⁵⁸ *Id.* Nos. 7 & 12 (S.D.N.Y. Nov. 28 and Dec. 21, 2007).

¹⁵⁹ *Id.* No. 6 (S.D.N.Y. Nov. 9, 2007).

¹⁶⁰ Glosband, *SPhinX Misses the Mark* at 83.

¹⁶¹ *In re SPhinX*, 351 B.R. at 115 (“Congress separated the concept of ‘recognition’ from the concept of ‘recognition as a foreign main (or nonmain) proceeding’ under section 1517(b).”)

¹⁶² H. Rep. 109-31 at 114, quoted in Glosband, *SPhinX Misses the Mark* at 83-84.

¹⁶³ *In re SPhinX*, 351 B.R. at 13-15, 18, and 20.

¹⁶⁴ Glosband, *SPhinX Misses the Mark* at 84.

¹⁶⁵ 11 U.S.C. § 1502(7).

In the *Bear Stearns* decision, on the other hand, Judge Lifland rejected the notion of recognition without regard to main or nonmain.

A simple recognition of a foreign proceeding without specifying more (i.e., nondeclaration as to either “main or nonmain”) is insufficient as there are substantial eligibility distinctions and consequences. In other words, the recognition must be coded as either main or nonmain.¹⁶⁶

B. Flexibility and subjective considerations as part of recognition calculus.

The *SPhinX* court suggests that a determination of the debtor’s COMI should be guided by “the interests of the debtor’s estate, creditors and other parties, absent evidence that they support a ‘primary’ proceeding for an improper purpose.”¹⁶⁷ The court then recognizes the presumption in favor of the country of registration,¹⁶⁸ focuses on the objective factors that could rebut the presumption and finds all of them as driving the COMI away from the Cayman Islands.¹⁶⁹ But returning to “flexibility,” the *SPhinX* court concludes that the objective facts should be viewed

in light of chapter 15’s emphasis on protecting the reasonable interests of parties in interest pursuant to fair procedures and the maximization of the debtor’s value. Because their money is ultimately at stake, one generally should defer, therefore, to the creditors’ acquiescence in or support of a proposed COMI.¹⁷⁰

These factors, “protecting” the expectations of the parties in interest and deferring to the choice of COMI by those whose money is “at stake,” injects highly subjective factors into the COMI calculus and allows free rein to the discretion of the court, a procedure that, no matter how desirable, is neither endorsed nor permitted by chapter 15.

The objective facts found by the *SPhinX* court, other than place of registration, put *SPhinX* Funds’ COMI in the United States. The objective facts did not show any ‘establishment’ in the Cayman Islands. This should have ended the matter. The Cayman Islands proceeding, while a foreign proceeding, is not eligible for chapter 15 recognition at all.¹⁷¹

Of course, no harm, no foul. By granting nonmain recognition only, the court denied the only benefit the *SPhinX* investors apparently sought, i.e., the imposition of the automatic stay, since it

¹⁶⁶ *In re Bear Stearns*, 374 B.R. at 126-27.

¹⁶⁷ *In re SPhinX*, 351 B.R. at 116.

¹⁶⁸ *Id.* at 117.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Glosband, *SPhinX Misses the Mark* at 85.

is discretionary only in nonmain proceedings. “If recognition had been denied, as it should have been, the result would have been the same.”¹⁷² So other than providing a troubling precedent, the outcome does not seem to have made much difference.

VII. Conclusion

Can the decisions in *SPhinX* and *Bear Stearns* be reconciled? Can they both be right? *SPhinX* was affirmed by the district court and, no further appeal being taken, the decision became final. The *Bear Stearns* decision is on appeal to the same court with oral argument set for January. The relevant facts in both cases are strikingly similar: both sets of funds are exempt companies under Cayman Islands law¹⁷³ and carry on almost no business in the Cayman Islands other than that incidental to their registration. One wonders what a letter-box company¹⁷⁴ could be if not *SPhinX* and *Bear Stearns*? The *SPhinX* court concluded that the flexibility in the statute allows it wide ranging discretion so that it can fashion a remedy appropriate to the court’s perception of the needs of the case. The court found that the statute allows recognition without deciding whether such recognition should be main or nonmain, because it is a two step process, with the first step (recognition) not being hostage to the second step (whether to recognize the proceeding as main or nonmain). The *SPhinX* court reasoned that it would normally accommodate the debtors’ wishes for recognition as a foreign main proceeding largely on the basis of (i) registration in the Cayman Islands, (ii) the lack of objection, and (iii) the fact that someone has to do it and no one else has volunteered. The *Bear Stearns* court, on the other hand, found little flexibility in the statute with respect to recognition, though once recognition is granted, there is substantial flexibility thereafter to work justice in accordance with the needs of the parties. Admittedly the flexibility found by the *Bear Stearns* court is entirely *dicta* because the court never got past recognition, which it found to be a rather inflexible process. The court in *Bear Stearns* found the statute to require recognition as main or nonmain: otherwise there is no recognition. Thus to find recognition, the court reasoned, the statute requires finding (i) the foreign proceeding must be in the “center of main interests” of the debtor or (ii) there must be found an establishment for nontransitory economic activity. Otherwise, recognition is not permitted. The *Bear Stearns* court focused on the “letterbox” example¹⁷⁵ and had no hesitation in ruling that a company that uses a foreign jurisdiction as a “letterbox” for registration purposes cannot use that jurisdiction as a basis for either main or nonmain recognition.

Recognizing that the *SPhinX* decision denying nonmain recognition was affirmed by the district court,¹⁷⁶ it is possible that *Bear Stearns* can be affirmed without overturning the district court decision in *SPhinX*: the only issue determined by the district court in *SPhinX* was that

¹⁷² *Id.*

¹⁷³ *In re SPhinX*, 351 B.R. at 107 n. 2; *Bear Stearns* at 124.

¹⁷⁴ *EuroFood* ¶ 35 at 7.

¹⁷⁵ *In re Bear Stearns*, 374 B.R. at 129.

¹⁷⁶ 371 B.R. 10 (S.D.N.Y. 2007).

denying main recognition is appropriate when it is sought for improper purpose and the COMI is found to be elsewhere. The *SPhinX* court's determination of nonmain recognition was not an issue on appeal. Nonetheless, it seems remarkable that the bankruptcy court in *Bear Stearns* rejected the analysis of both the *SPhinX* bankruptcy court and the district court, preferring to adhere to its view of the statute. Clearly Judge Lifland, the author of the *Bear Stearns* decision and one of the authors of the new chapter 15, is hopeful that the district court or perhaps the Second Circuit will either reject the reasoning in *SPhinX* or perhaps distinguish it away to insignificance in order to put chapter 15 recognition jurisprudence back on what the *Bear Stearns* court believes is the correct path. Just as clearly, at least two other co-authors of chapter 15, along with Judge Lifland, Jay L. Westbrook and Daniel Glosband, share his view of the error of the *SPhinX* decision and the need to get chapter 15 back on track.¹⁷⁷

¹⁷⁷ See Brief of Amici Curiae, No. 7, *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, No. 07-8730 (RWS) (S.D.N.Y. Nov. 29, 2007).