

2018

COMI Comity: International Standardization of COMI Factors Needed to Avoid Inconsistent Application Within Cross-Border Insolvency Cases

Xenia Kler
American University Washington College of Law

Follow this and additional works at: <https://digitalcommons.wcl.american.edu/auilr>



Part of the [European Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Kler, Xenia (2018) "COMI Comity: International Standardization of COMI Factors Needed to Avoid Inconsistent Application Within Cross-Border Insolvency Cases," *American University International Law Review*. Vol. 34 : Iss. 2 , Article 5.

Available at: <https://digitalcommons.wcl.american.edu/auilr/vol34/iss2/5>

This Comment or Note is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University International Law Review by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.

COMI COMITY: INTERNATIONAL STANDARDIZATION OF COMI FACTORS NEEDED TO AVOID INCONSISTENT APPLICATION WITHIN CROSS-BORDER INSOLVENCY CASES

XENIA KLER*

I.	INTRODUCTION	430
II.	BACKGROUND	433
	A. COMI DEFINITION WITHIN THE UNCITRAL MODEL LAW AND EC REGULATION	433
	B. U.S. STATUTORY AND CASE LAW DEFINITIONS OF COMI	436
	1. Statutory Definition of COMI	436
	2. COMI Factors within U.S. Case Law	437
	a. Case Law Using Temporality Analysis to Determine COMI	438
	b. Case Law Relying on Flexibility of Chapter 15 to Give Courts More Autonomy	441
	C. EUROPEAN STATUTORY AND CASE LAW DEFINITIONS OF COMI	442
	1. Lack of Statutory Definition of COMI	442
	2. European Case Law Definition of COMI	444
	D. INCONSISTENT COMI DEFINITION ISSUES	447
III.	ANALYSIS	449
	A. EUROPEAN CASE LAW WILL BENEFIT FROM THE RECAST	

* Xenia Kler is a current 3L at American University Washington College of Law. She would like to thank Professor Kenneth Anderson for his insightful guidance and to Robert Marsters for providing a new area of law to discover. Special thanks to her family and her fiancé, Michael Harvey, for providing love and support through the arduous process and many thanks to the Editorial Board of American University International Law Review for all their hard work to make this comment publishable.

REGULATION TO REDUCE FORUM SHOPPING	449
1. The Recast Regulation Adds Weight to the Factor of Creditor Perception when Determining COMI and this Would Reduce Forum Shopping.....	450
2. The Recast Regulation's Specific Timeline for when to Consider a Debtor's COMI Helps Reduce Forum Shopping	451
B. ANALYZING U.S. CASE LAW USING THE RECAST REGULATION WOULD HELP STREAMLINE INSOLVENCY CASES.....	453
1. The Recast Regulation Codifies Third Party Acknowledgment and Creditor Perception which Does Not Exist in U.S. Statutory Law	454
2. U.S. Law Lacks the Recast Regulation's Ability to Reduce Forum Shopping without Codified Timelines	456
IV. RECOMMENDATIONS	461
A. THE UNCITRAL MODEL LAW NEEDS TO CONSOLIDATE GUIDELINES AND FOLLOW THE RECAST REGULATION..	461
B. THE UNCITRAL MODEL LAW NEEDS TO UPDATE ITS FACTORS TO INCLUDE SPECIFIC TIMELINES FOR ANALYZING COMI.....	463
C. INDIVIDUAL COUNTRIES SHOULD UPDATE THEIR LAWS TO CREATE A COMPREHENSIVE LIST OF COMI FACTORS ..	463
V. CONCLUSION	464

I. INTRODUCTION

With increasing globalization, companies continue to expand their businesses outside of their home states into foreign markets.¹ When businesses operating in these foreign locations become financially insolvent, cross-border insolvency laws must be used to regulate the insolvency process so the companies' assets and debts located in

1. See Constantine E. Passaris, *The Business of Globalization and the Globalization of Business*, 9 J. COMP. INT'L MGMT. 3, 6 (2006) (discussing globalization and the development of global corporations).

separate jurisdictions can be divided appropriately.² A company becomes insolvent, or unable to pay its debts, if “it either does not have enough assets to cover its debts (i.e. [the] value of [the company’s assets] is less than [the] amount of [its] liabilities), or if it is unable to pay its debts as they fall due.”³ When a debtor has assets or liabilities in more than one state, or if the debtor is generally subjected to the jurisdiction of courts from two or more states, cross-border insolvency occurs.⁴ Insolvency law is uniquely tasked with balancing interests of creditors with a company’s shareholders and customers, and the public economic interest of liquidating a potentially viable company.⁵ The insolvency practitioner ensures all creditors are treated fairly and equally, proportionate to their claims during the insolvency procedure.⁶

Currently, two frameworks exist to structure insolvency laws, creating guidelines for countries to follow when determining which country has the main insolvency proceeding in a cross-border insolvency case.⁷ These frameworks are the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency (UNCITRAL Model Law) and the European Council Regulation on Insolvency Proceedings (EC Regulation).⁸

The UNCITRAL Model Law was adopted on May 30, 1997, to

2. See Rafał Mańko, *Cross-border Insolvency Law in the EU*, LIBRARY EUR. PARLIAMENT 1, 1 (Feb. 21, 2013), http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130476/LDM_BRI%282013%29130476_REV1_EN.pdf (explaining that cross-border insolvency regulation is necessary when companies operating in multiple States become insolvent because their assets and debtors are located across jurisdictions).

3. *Understanding Insolvency*, R3 1, 3 (Oct. 2008), https://www.r3.org.uk/media/documents/publications/public/Understanding_insolvency_-_October_2008.pdf.

4. Mańko, *supra* note 2, at 1.

5. *Id.*

6. See *Understanding Insolvency*, *supra* note 3, at 3.

7. See generally U.N. COMM’N ON INT’L TRADE LAW, UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION, U.N. Sales No. E.14.V.2 (2014), <http://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf> [hereinafter UNCITRAL MODEL LAW]; Council Regulation 1346/2000, 2000 O.J. (L 160) 1 (EC) [hereinafter *EC Regulation*].

8. See UNCITRAL MODEL LAW, *supra* note 7, at 3; see generally *EC Regulation*, *supra* note 7.

provide mechanisms for states to effectively adjudicate cross-border insolvency cases.⁹ The objective of the UNCITRAL Model Law include providing cooperation between the courts of foreign states and creating greater legal certainty and protection for businesses.¹⁰ Currently, forty-three states have created legislation based upon the UNCITRAL Model Law, including significant economies and leaders of cross-border trade: the United States, United Kingdom, Japan, Australia, and Canada.¹¹

For the European Union, the EC Regulation, a separate guideline regarding insolvency proceedings among European Union Member States, was created on May 29, 2000, and came into effect on May 31, 2002.¹² Like the UNCITRAL Model Law, the EC Regulation focuses on creating a framework for insolvency proceedings, allowing cooperation between member states.¹³ Recently, a recast of the EC Regulation (Recast Regulation) was created on May 20, 2015, and came into effect on June 26, 2017, although there have not been cases that have used the Recast Regulation yet.¹⁴

The European Union created the Recast Regulation to fill in a gap where courts found the most contention: deciding where the foreign main insolvency proceeding would take place.¹⁵ Determining jurisdiction of a foreign main insolvency proceeding relies on the debtor's "center of main interest" (COMI), but the definition of COMI is not clearly defined in the UNCITRAL Model Law or the EC Regulation. This gap allows for a rebuttable presumption for the debtor's COMI.¹⁶

9. UNCITRAL MODEL LAW, *supra* note 7, at 3.

10. *Id.*

11. *Status—UNCITRAL Model Law on Cross-Border Insolvency (1997)*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997_Model_status.html (last visited Jan. 24, 2018).

12. *See EC Regulation*, *supra* note 7, at 1.

13. *See id.*

14. *See generally* Council Regulation 2015/848, 2015 O.J. (L 141) 19 (EU) [hereinafter *Recast Regulation*].

15. *See id.* (stating the regulation was already functioning well but that it was desirable to enhance certain provisions to effectively administer cross-border insolvency proceedings in the interest of clarity).

16. *Cf.* Jesse Hallock, Note, *Time Out: The Problematic Temporality of COMI Analysis in Chapter 15 Bankruptcy Cases in the Second Circuit*, 2015 COLUM. BUS. L. REV. 1074, 1075 (2015) (explaining how United States' courts recognize foreign

The lack of specificity in the COMI provisions of the UNCITRAL Model Law and EC Regulation leads courts to spend extra time resolving COMI disputes, while trying to apply insolvency law.¹⁷ This Comment argues that there needs to be a standardized interpretation of which factors are the most important to determine COMI to harmonize courts across the United States and Europe. A standardized COMI definition is necessary to increase efficiency within the courts, reduce forum shopping, and ensure consistent results in courts regardless of jurisdiction.

Part II of this Comment addresses the lack of uniformity and comprehensiveness of COMI factors used in U.S. and European statutory and case law. Part III of this Comment analyzes the new Recast Regulation in relation to older European and U.S.-based case law to demonstrate the need for updates to U.S. law. Part IV of this Comment proposes potential changes to the U.S. laws, the UNCITRAL Model Law, and other national laws, which follow the UNCITRAL Model Law to create a consolidation of COMI factors.

II. BACKGROUND

A. COMI DEFINITION WITHIN THE UNCITRAL MODEL LAW AND EC REGULATION

The UNCITRAL Model Law and EC Regulation serve as cross-border insolvency guidelines for countries to promote harmony within the court systems, but they do not provide a full definition of COMI in order to achieve their goals. The UNCITRAL Model Law was derived to provide cooperation between states and to create greater legal certainty for companies doing business in those countries.¹⁸ The UNCITRAL Model Law requires countries to codify a foreign main insolvency proceeding in order to make sure the insolvent company has a fair trial and to make sure the proceeding occurs in the country

insolvency proceedings as long as they are based on a debtor's COMI).

17. See *id.* at 1080 (stating that bankruptcy courts have trouble developing a universally accepted, workable definition of COMI because of limited guidance from the UNCITRAL Model Law and the United States Chapter 15 bankruptcy laws).

18. See UNCITRAL MODEL LAW, *supra* note 7, at 3.

that has proper jurisdiction.¹⁹ Although the UNCITRAL Model Law stresses the importance of COMI in order to ascertain jurisdiction of the foreign main insolvency proceeding, the only definition offered is “[i]n the absence of proof 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.”²⁰ Because “proof to the contrary” is not narrowly defined in the UNCITRAL Model Law nor in the EC Regulation, this definition of COMI leaves room for a rebuttable presumption and for inconsistent court interpretations and applications of the guidelines.²¹

European Union courts have a slightly more specific definition of COMI, but stay consistent with the UNCITRAL Model Law.²² With almost the exact same language as the UNCITRAL Model Law, a debtor’s COMI under the EC Regulation should be presumed to be the registered office, specifically stating “[i]n the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.”²³ The language then strays from the UNCITRAL Model Law since the EC Regulation stresses the importance of where the debtor conducts his business and whether third parties would assume that place would be a debtor’s COMI.²⁴

Although the addition of third party acknowledgement helped guide the courts, the European Council believed the definition of a debtor’s COMI needed further refinement in the form of the Recast Regulation.²⁵ In addition to the original registered office and third-

19. *Id.* at 4 (defining a foreign main insolvency proceeding as “a foreign proceeding taking place in the State where the debtor has the [center] of its main interests”).

20. *Id.* at 8.

21. *In re SPhinX, Ltd.*, 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006) (“The Bankruptcy Code does not state the type of evidence required to rebut the presumption that the COMI is the debtor’s place of registration or incorporation.”).

22. *See generally EC Regulation, supra* note 7, at 2, 5 (discussing which factors should be used to determine a debtor’s COMI before initiating insolvency proceedings).

23. *See id.* at 5.

24. *See id.* at 2 (stating that the COMI should correspond to the place “where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties”).

25. *See Insolvency Update: The Recast Insolvency Regulation*, NORTON ROSE

party acknowledgement in the EC Regulation,²⁶ the European Council asks courts to give special consideration to the insolvent business's creditors and their perception of where a debtor conducts their administrative business.²⁷ This addition codifies the importance of creditors' opinions because the outcome of a COMI determination affects the creditors' ability to recoup their losses.²⁸ The Recast Regulation also provides much needed timelines as to when in a company's life should COMI be determined by telling courts a business cannot have its COMI in a jurisdiction where it has only been present for less than three months.²⁹

However, these cross-border insolvency guidelines do not provide a full definition of COMI, which, in turn, has not incentivized countries to provide a stricter definition for COMI in their individual national laws.³⁰

FULBRIGHT 17, 17 (Nov. 2015), <http://www.nortonrosefulbright.com/files/banking-and-finance-disputes-review-issue-7-134009.pdf> [hereinafter *Insolvency Update*] (asserting the new Regulation contains a codification of how courts determine COMI).

26. *Recast Regulation*, *supra* note 14, at 22 (“With the same objective of preventing fraudulent or abusive forum shopping, the presumption that the centre of main interests is at the place of the registered office. . .”).

27. *See id.* at 22, 31 (requiring courts to either state the COMI is where creditors believe the debtor's COMI is, inform those creditors of the new COMI and make the debtor change its address in commercial correspondence or any other means of making the new location public).

28. *See, e.g.*, Michelle M. Harner & Jamie Marincic, *Committee Capture? An Empirical Analysis of the Role of Creditors' Committees in Business Reorganizations*, 64 VAND. L. REV. 749, 763–64 (2011) (providing an example of how United States courts took creditors' priorities into account when conducting bankruptcy proceedings).

29. *See Recast Regulation*, *supra* note 14, at 22 (stating that the location presumed to be the COMI must exist three months prior to the petition opening an insolvency proceeding to prevent abusive forum shopping).

30. *See id.* at 26 (providing that this regulation is not to prevent Member States from creating their own national rules in regard to insolvency law, as long as those rules do not impair the efficiency).

B. U.S. STATUTORY AND CASE LAW DEFINITIONS OF COMI

1. Statutory Definition of COMI

The United States relies on the UNCITRAL Model Law as a guideline for its own cross-border insolvency laws.³¹ Within Title 11 of the U.S. Code, which is the United States' bankruptcy law, Chapter 15 codifies cross-border insolvency.³² The purpose of the chapter was to incorporate the UNCITRAL Model Law and to provide cooperation between the courts of the United States and the courts of other foreign states.³³ Both the Model Law and Chapter 15 embrace the universalism approach to treat bankruptcy as a single process and proceeding in order for the insolvent company not to get taken advantage of and for the creditors to be satisfied.³⁴

In order to determine the foreign main insolvency proceeding, Chapter 15 does not give a more specific definition to help courts determine what a debtor's COMI is, but instead the language is identical to the UNCITRAL Model Law.³⁵ For instance, § 1516(c) states, "[I]n the absence of evidence to the contrary, the debtor's registered office, or habitual residence in the case of the individual, is presumed to be the center of the debtor's main interests."³⁶

31. See Hallock, *supra* note 16, at 1080.

32. See generally 11 U.S.C. §§ 1501–32 (2012).

33. See § 1501(a)(1)-(2).

34. See *In re ABC Learning Centres Ltd.*, 728 F.3d 301, 306 (3d Cir. 2013) (claiming the goal is to direct creditors and assets to the foreign main insolvency proceeding for the orderly and fair distribution of assets and to avoid the seizure of assets by creditors outside of the jurisdiction); see generally Kevin J. Beckering, *United States Cross-Border Corporate Insolvency: The Impact of Chapter 15 on Comity and the New Legal Environment*, 14 L. & BUS. REV. AM. 281, 284–89 (2008) (discussing universalism versus territorialism in the light of UNCITRAL Model Law and Chapter 15).

35. Compare 11 U.S.C. § 1516(c) (2012) ("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."), with UNCITRAL MODEL LAW, *supra* note 7, at 8 ("In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests.").

36. 11 U.S.C. § 1516(c).

2. COMI Factors within U.S. Case Law

Since Chapter 15 does not provide any new insight, the U.S. courts have begun to create their own list of factors to decide COMI.³⁷ U.S. courts usually rely on an abstract test based on a totality of various factors in order to determine a debtor's COMI.³⁸ There are a number of factors used by the U.S. federal and state court systems: the location of the debtor's headquarters; the location of those who manage the debtor, like a holding company's headquarters; the location of the debtor's primary assets; the location of the majority of the debtor's creditors; and the jurisdiction whose law would apply to most disputes.³⁹ Another factor found only in U.S. common law, rather than statutory law, is that COMI should be ascertainable by third parties.⁴⁰

Registration of a debtor's office in a location is not sufficient to prove that location is the debtor's COMI.⁴¹ For example, in *In re Bear Stearns*, the two funds were both limited liability companies with registered offices in the Cayman Islands.⁴² The Petitioners claimed the

37. *In re SPhinX, Ltd.*, 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006) (“The Bankruptcy Code does not state the type of evidence required to rebut the presumption that the COMI is the debtor’s place of registration or incorporation.”); see Hallock, *supra* note 16, at 1080 (claiming the limited guidance of Chapter 15, based on the UNCITRAL Model Law, has left implementation inconsistencies within the court system).

38. See Hallock, *supra* note 16, at 1085.

39. See *In re Millennium Glob. Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 76 (Bankr. S.D.N.Y. 2011); see also *In re Loy*, 380 B.R. 154, 162 (Bankr. E.D. Va. 2007); *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 127-28 (Bankr. S.D.N.Y. 2007); *In re SPhinX, Ltd.*, 351 B.R. at 117.

40. This was not written into either Chapter 15 or the UNCITRAL Model Law, but it is defined in EC Regulation and deemed important enough to be added as a COMI factor in United States’ common law. See, e.g., *In re Betcorp, Ltd.*, 400 B.R. 266, 291 (Bankr. D. Nev. 2009) (discussing the importance of a debtor’s COMI being ascertainable by third parties because COMI is affected not only by what a debtor does, but also what a debtor is perceived as doing).

41. See Hallock, *supra* note 16, at 1084 (stating a COMI analysis focusing on a company’s place of incorporation or registered office has tremendous potential to incentivize forum shopping because companies will register in the jurisdiction most favorable to them without having to conduct any operations in that particular country, so courts need to limit the significance of the debtor’s place of incorporation when weighed against other relevant factors in their COMI analysis).

42. *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. at 124.

COMI was in the Cayman Islands; however, the bankruptcy court found that there were no employees or managers in the Cayman Islands, the investment manager was in New York, the administrator that runs the back-office operations was in the United States, and the books and records were in the United States.⁴³ The court rejected that claim and found that the Cayman Islands was not the debtor's COMI because "[t]he only adhesive connection with the Cayman Islands that the funds have is the fact that they are registered there."⁴⁴ The court reasoned the presumption that the COMI was the registered office was rebutted because the administration of the Funds' business was in the United States, which was ascertainable by third parties.⁴⁵ Therefore, the Cayman Islands could not be the COMI, because no business was being carried out there.⁴⁶

a. Case Law Using Temporality Analysis to Determine COMI

Another issue lies in the temporality of analysis.⁴⁷ Neither Chapter 15 nor the UNCITRAL Model Law provides insight as to which point in a debtor's life should be used to determine COMI.⁴⁸ In *In re Millennium Global*, two funds were incorporated in Bermuda, had their registered office as Bermuda, and two of their three directors were residents of Bermuda.⁴⁹ Additional facts established include: the funds' manager was in London, the asset valuation agent was not in Bermuda, the funds' investors were not in Bermuda, all of the assets were invested outside of Bermuda, the director's meetings were held with one director phoning in from outside of Bermuda, and creditor

43. *See id.* at 130.

44. *See id.* at 129.

45. *See id.*

46. *See id.*

47. *See* Hallock, *supra* note 16, at 1087–88 (stating that U.S. courts have applied two contrasting approaches to temporality: the majority approach evaluates COMI based on a debtor's activities at the time the Chapter 15 petition is filed while the minority position examines relevant factors at the earlier date of foreign proceedings).

48. *See id.* at 1080 (claiming there is limited guidance from Chapter 15 and from its international source in the UNCITRAL Model Law, resulting in inconsistent tests for COMI).

49. *See In re Millennium Glob. Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 66 (Bankr. S.D.N.Y. 2011).

meetings were held in London.⁵⁰

The Objectant argued that the COMI should be the United Kingdom because of the location of the investment manager, creditors, and prime broker.⁵¹ The bankruptcy court decided to consider the appropriate date in its COMI analysis prior to applying the common law factors.⁵² The court looked to *In re Ran* where the analysis focused on the present tense of the Bankruptcy Code, so the COMI should be in the present, when the petition for recognition was filed.⁵³ Both courts were worried about looking too far into the debtor's past and finding the wrong country as the debtor's COMI.⁵⁴

Since the Chapter 15 filing occurred three years after the liquidation filing in Bermuda, the court found that the substantive date for the determination of COMI is at the date of the opening of the foreign proceeding.⁵⁵ The court felt that if it followed *In re Ran*, where the COMI factors were applied in such a way that hearings in the United States were denied, then the COMI dispute would end up being used as a shield against foreign creditors.⁵⁶ The court reasoned this would lead courts to go against the promotion of cooperation stressed in

50. *See id.* at 68.

51. *See id.*

52. *See id.* at 71 (determining that the substantive date for establishing the COMI is the date of the foreign proceeding's opening, and recognizing that the following factors are relevant to determine the COMI: the location of the fund's directors; the location of the fund's bank, custodian, and auditors; the location of the fund's day-to-day operations; the location of the fund's investors and creditors; and where the fund invested in property).

53. *See id.* (opining that while there is not a temporal framework articulated, the COMI determination is influenced by the present grammatical tense in which Chapter 15 was written, and thus should also be interpreted in the present).

54. *See id.*; *see also* *Lavie v. Ran (In re Ran)*, 607 F.3d 1017, 1025 (5th Cir. 2010) (“[A] meandering and never-ending inquiry into a debtor's past interests could lead to a denial of recognition in a country where a debtor's interests are truly centered, merely because he conducted past activities in a country at some point. . .”).

55. *In re Millennium Glob. Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 72 (Bankr. S.D.N.Y. 2011).

56. *But see id.* at 75 n.27 (discussing that the court in *In re Ran* based its COMI analysis on a habitual residence rather than a principal place of business standard, and by pinning the COMI inquiry to the date of the filing of the Chapter 15 petition the court found that the COMI was in Texas).

Chapter 15.⁵⁷ Another concern of the court was the possibility of forum shopping because the use of the Chapter 15 petition date gives recognition to a change of residence between the date of opening proceedings in the foreign nation and the Chapter 15 petition date.⁵⁸ After determining the date, the court found the COMI to be in Bermuda because that was when liquidation proceedings first commenced.⁵⁹

Choosing when in a company's life to determine COMI can affect where the insolvency proceedings take place. In *In re Fairfield Sentry*, the Objectors argued that the COMI should be in the United States because the timing should include the period prior to and leading up to the filing of the petition for insolvency proceedings.⁶⁰ The debtors stopped doing business over eighteen months in advance of their petition, and seven months before the liquidation proceedings began in the United States.⁶¹ The court was worried about "the potential for mischief and COMI manipulation," so they focused on the eleven-month period between the liquidator's appointment and the petition and determined the COMI to be the British Virgin Islands because there were no places of business, management, or assets in the United

57. See *id.* at 75 (explaining that the use of a COMI inquiry to avoid hearings in the United States with foreign creditors was not aligned with the Congressional intent behind § 1501 to enhance cooperation in cross-border insolvency cases between U.S. courts and the courts of foreign countries).

58. See *id.* (explaining that the method of forum shopping by way of changing the residence between the opening proceeding's date in the foreign nation and the Chapter 15 petition date is a byproduct of using the Chapter 15 petition date in the COMI inquiry).

59. See *id.* at 77–78 (finding that although the day to day operations of the funds were not based in Bermuda, none of the investors or creditors resided in Bermuda, and there were no property-investments in Bermuda, COMI was established in Bermuda because two of the three directors were located there, the control of those directors over those funds, investors were directed to send funds to an account in Bermuda, and the formation of the funds in Bermuda were memorialized in the Offering Memorandum).

60. See *In re Fairfield Sentry Ltd.*, 440 B.R. 60, 64–65 (Bankr. S.D.N.Y. 2010) (describing the Objector's argument for the COMI to be in New York if taking into consideration the business in New York before British Virgin Islands liquidation proceedings commenced).

61. See *id.* at 64 (finding that the debtors had ceased their U.S. business activities eighteen months before their petition and seven months before the proceedings in British Virgin Islands began, contributing to the determination that the COMI was in British Virgin Islands).

States.⁶² This changed the jurisdiction of the foreign main insolvency proceeding to be in the British Virgin Islands and not the United States.⁶³

b. Case Law Relying on Flexibility of Chapter 15 to Give Courts More Autonomy

Some courts welcome the lack of specificity in the U.S. Code, because it allows for “flexibility.”⁶⁴ For instance, in *In re SPhinX*, the SPhinX Funds were hedge funds that were established as offshore entities in the Cayman Islands to gain the island’s tax benefits.⁶⁵ In the Cayman Islands, there were no business or board meetings conducted, residing directors, nor physical offices or employees present.⁶⁶ The court believed that Chapter 15’s varying definition of COMI allowed the court the flexibility to minimize conflicts in the interests of debtors and their creditors.⁶⁷ The court determined the interests of the debtor’s estate, creditors, and other parties should “generally be a significant and perhaps a deciding factor.”⁶⁸ Whichever factors are used, they should be viewed in the light of Chapter 15’s emphasis on “protecting the reasonable interests of parties in interest pursuant to fair

62. *See id.* at 64–66 (considering a totality of circumstances approach when bearing in mind intentional manipulation, but here it was clear within the eleven month period that the debtors were no longer doing business in the United States and the COMI was not in the United States).

63. *See id.* at 64 (considering the extended period of time, the court found that the debtor’s COMI was in the British Virgin Islands).

64. *See generally In re SPhinX, Ltd.*, 351 B.R. 103, 112 (Bankr. S.D.N.Y. 2006) (explaining that the replacement of the previous bankruptcy code with Chapter 15 provided more flexibility, as evidenced by its policy statement and flexibility in modifying relief).

65. *Id.* at 107 (explaining that the SPhinX Funds, while regulated in the Cayman Islands, was managed under a fully discretionary investment management contract and created by a Delaware corporation located in New York).

66. *Id.* at 107–08 (describing the company’s limited physical and functional presence in the Cayman Islands and the holding of ninety percent of SPhinX Funds’ funds in United States accounts).

67. *See id.* at 114 (explaining that varied approaches to Chapter 15 maintain the goal of protecting the interests of the parties).

68. *See id.* (finding that the interests of the debtor’s estate, creditors, and other parties were significant factors so long as parties’ interests were not supporting an improper purpose).

procedures and the maximization of the debtor's value."⁶⁹

Since there were not many cases involving a COMI dispute in the United States,⁷⁰ the court used the principles from the European Union to analyze the case.⁷¹ The court looked to the European Court of Justice, which "left open whether the presumption may be rebutted in respect of a debtor that conducts some business in the location where it is registered."⁷² The court recognized that the European Court of Justice also indicated the "registered office" presumption would be rebutted if third parties objectively locate the administration of a debtor's interests somewhere else.⁷³ Therefore, the court found SPhinX's COMI was not in the Cayman Islands because there was no business performed there and all of the creditors and investors were located outside of the Cayman Islands.⁷⁴

C. EUROPEAN STATUTORY AND CASE LAW DEFINITIONS OF COMI

1. *Lack of Statutory Definition of COMI*

The United Kingdom provides a fair comparison for the United States because the United Kingdom is the current business center of Europe.⁷⁵ The United Kingdom's bankruptcy laws have recently been

69. See *id.* at 117 (reasoning that to avoid a mechanical application of the COMI factors, the analysis should consider the parties' interests including the consent for and support of the proposed COMI); see also 11 U.S.C. § 1522(a) (2012) ("The court may grant relief . . . only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected.").

70. See *In re SPhinX, Ltd.*, 351 B.R. at 118 (commenting that there appears to be no published cases regarding COMI disputes under Chapter 15).

71. See Samuel L. Bufford, *International Insolvency Case Venue in the European Union: The Parmalat and Daisytek Controversies*, 12 COLUM. J. EUR. L. 429, 433 (2006) (stating that the decisions under the EC Regulation are important for U.S. law because U.S. cases may be susceptible to similar international discord as the European Union).

72. *In re SPhinX, Ltd.*, 351 B.R. at 118–19.

73. *Id.*

74. See *id.* at 119 (finding the COMI was located outside of the Cayman Islands in light of the ECJ's principles).

75. See *London Futures: London Crowned Business Capital of Europe*, DELOITTE (Apr. 2014), <https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/uk-futures/london-futures-london-crowned-business-capital-of-europe.pdf> (analyzing the top 250 non-European companies and finding sixty percent of the non-European companies' regional headquarters to be in London).

updated in Insolvency Rules 2016, which took effect April 6, 2017.⁷⁶ These new laws have updated Insolvency Rules 1986, but have not changed or added the definition of COMI.⁷⁷ Instead, the United Kingdom directly applies the EC Regulation for Member States of the European Union and the UNCITRAL Model Law in countries that recognize the Model Law.⁷⁸ Although the Insolvency Rules 1986 does not specifically use the term COMI, it gives a more general timeline for deciding which court should handle the foreign main insolvency proceeding by restricting the jurisdiction to a district where the debtor had done business for more than six months before the initial petition.⁷⁹

Other European statutory laws do not provide additional insight into the definition requirements of COMI. Although the EC Regulation allows for Member States to narrowly define COMI, most countries have just relied on the original framework.⁸⁰ For instance, Germany relies on the EC Regulation for Member States.⁸¹ When dealing with

76. See The Insolvency (England and Wales) Rules 2016, Explanatory Memorandum ¶ 2.1 (Eng.) [hereinafter Explanatory Memorandum].

77. See *id.* ¶ 2.2 (stating that the 2016 Rules consolidated the Insolvency Rules 1986 with the amendments enacted since the 1986 Rules came into force, restructured the Rules and updated their gender language, and modernized the Rules in ways that do not affect COMI); see also Insolvency (England and Wales) Rules 2016, SI 2016/1024, c. 2 § 1.2(2) [hereinafter 2016 Rules] (“[C]entre of main interests has the same meaning as in the EC Regulation. . .”).

78. See 2016 Rules, *supra* note 77, c. 3, § 1.7 (stating main insolvency proceedings will take place under the EC Regulation based on a debtor’s COMI); *Kemsley v. Barclays Bank* [2013] EWHC (Ch) 1274, [37]-[38] (Eng.) (conducting an analysis using the UNCITRAL Model Law while hearing a case based in the United Kingdom but with a U.S. respondent).

79. Compare Insolvency (England and Wales) Rules 1986, SI 1986/1925, c. 3 § 6.40(2) (Eng.) (provides three scenarios to determine jurisdiction during six months, which do not fall immediately before the application is filed with the court), with 2016 Rules, *supra* note 77, c. 6, § 9.22(2)(a) (provides jurisdiction even when the debtor is not a resident of England or Wales but was a resident or carried out business in that location within the six months immediately preceding when the application is filed with the court).

80. See Bob Wessels, *EU Insolvency Regulation and its Impact on European Business*, CESIFO DICE REPORT 1, 20 (2006) (stating member states can fill certain gaps within their own domestic law that fall outside of the EC Regulation but have not at this time).

81. See *Restructuring & Insolvency in Germany*, HOGAN LOVELLS (Dec. 15, 2017), <https://www.lexology.com/library/detail.aspx?g=7bfad52f-827d-4293-8a90->

insolvency proceedings outside of the EC Regulation's jurisdiction, Germany focuses on the rebuttable presumption of a "company's centre of economic activity," which is similar to COMI.⁸² Also, France separates the head office from COMI because French law specifically states that if the head office is abroad but the COMI is in France, French courts have jurisdiction.⁸³

2. European Case Law Definition of COMI

European case law provides different legal principles and propositions for the courts to consider when determining a company's COMI to prevent forum shopping.⁸⁴ The objective legal principles include: where an individual can be contacted; where an individual keeps their habitual place of residence; where the COMI and the individual has an element of permanence in that jurisdiction;⁸⁵ where the COMI is ascertainable by third parties;⁸⁶ and if the COMI is

60bec84b6550 (stating the primary legislation governing insolvency in Germany is the EU Insolvency Regulation for Member States).

82. See *Insolvenzordnung* [Insolvency Statute], Dec. 20, 2011, BUNDESGESETZBLATT, Teil I [BGBL I] at 74, § 315 (Ger.) (determining that the insolvency court in the district of the center of self-employed business activity); see *Restructuring & Insolvency in Germany*, *supra* note 81 (explaining that the when the foreign company's "centre of main interests" is located outside of Germany, but the company has been established in Germany, the German courts can have jurisdiction over the insolvency proceedings).

83. Philippe Dubois et al., *Insolvency and Directors' Duties in France* (Feb. 1, 2017), <https://uk.practicallaw.thomsonreuters.com/0-606-1327> ("When the head office is located abroad but the centre of main interests (COMI) is in France, proceedings must be commenced before the French court having jurisdiction where that COMI is located."); see CODE DE COMMERCE [C. COM.] [COMMERCIAL CODE] art. L610-1 (Fr.) (providing jurisdiction to the French courts by department or subdivision).

84. See *Re Macari* [2017] NICH 5, [16] (N. Ir.) (stating a major goal of the court system is to be vigilant to prevent forum shopping).

85. See *Sparkasse Hilden Ratingen Velbert v. Horst Konrad Benk* [2012] EWHC (Ch) 2432, [19] (Eng.) (describing the factors influencing COMI determination as including: the location where one can be contacted, an element of permanence, the place where one can be ascertained, and the flexibility for someone to relocate a COMI even on the "eve of insolvency").

86. *Re Northsea Base Inv. Ltd.* [2015] EWHC (Ch) 121, [27] (Eng.) (emphasizing COMI is where third parties are dealt with by noting there is little significance that board meetings were not held in England because third parties would not have any knowledge where director meetings were held nor would it hold any significance to the directors); *Case C-396/09, Interdil Srl v. Fallimento*

relocated, whether the change in COMI is one of substance or “mere illusion.”⁸⁷

For instance, in *Re Macari*, Macari ran a fish and chip shop in the Republic of Ireland, but after getting a divorce, and accumulating large debts, he moved to Northern Ireland.⁸⁸ He claimed to have no remaining business or property interest in the Republic of Ireland, but he had no sufficient evidence that he had a stable link or a degree of permanence in Northern Ireland.⁸⁹ He failed to produce a rent book, lease, or license agreement, and his main creditor still believed he lived in the Republic of Ireland.⁹⁰ On appeal, Macari was able to produce a rent book and a confirmation that his creditors and the bank knew of his move to Northern Ireland.⁹¹ This allowed the court to rule his COMI was in Northern Ireland and not the Republic of Ireland.⁹²

Common law dictates that courts look for the place from which a debtor exercises the management, organization, and control of his or her interests.⁹³ In *Sparkasse v. Benk*, Benk was a former German resident practicing notary with his COMI in Germany.⁹⁴ He claimed he moved from Germany to England and established his COMI in

Interedil Srl, 2011 E.C.R. I-9939, I-9943; Case C-341/04, Eurofood IFSC Ltd., 2006 E.C.R. I-3854, I-3868.

87. *Shierson v. Vlieland-Boddy* [2005] EWCA (Civ) 974, [13] (Eng.) (“The court will need to be satisfied that the change in the place where the activities which fall within the concept of ‘administration of his interests’ are carried on which is said to have occurred is a change based on substance and not an illusion; and that that change has the necessary element of permanence.”).

88. *See Re Macari* [2017] NICH at [2]-[3] (describing his debt with the Bank of Scotland and other traders, including Silvio Rabbitte and Sons Ltd.).

89. *See id.* [4]-[5] (commenting that he also had Northern Ireland national insurance number, lived in Northern Ireland, was receiving benefits from Northern Ireland, received medical care and registered with a doctor in Northern Ireland, and held a bank account in Northern Ireland).

90. *Id.* [4]-[6].

91. *See id.* [7]-[9] (explaining that Macari told the court that he had moved to Northern Ireland permanently, had no intention of returning to the Republic of Ireland, and had told creditors that he had moved to Northern Ireland).

92. *See id.* [17] (finding his COMI was in Northern Ireland in light of Macari’s habitual place of residence, the duration of eighteen months at that residence, the ascertainability of his address by third parties, and because the move was one of substance as opposed to a scheme to benefit from a different insolvency regime).

93. *See Sparkasse Hilden Ratingen Velbert v. Horst Konrad Benk* [2012] EWHC (Ch) 2432, [22] (defining “‘regular administration’ of a debtor’s interest”).

94. *Id.* [8].

England when he was suspended as a notary and no longer carried on any economic activities in Germany.⁹⁵ He claimed he rented an apartment in England, owned a car, was employed as a sports photographer, had insurance, and carried on normal day-to-day life in England.⁹⁶ Sparkasse, the Bank, contended that Benk's presence in England was temporary and designed to present an illusion to the court that he had an English COMI so that he could take advantage of the more favorable insolvency regime.⁹⁷ The court found that Benk's COMI was in Germany because: (1) his sports photography business was not real;⁹⁸ (2) he lived with a joint tenant and had been financially dependent on her since arriving in England; (3) Benk's creditors were all in Germany and he had not given them a notification of his change of COMI to England; and (4) his only client was in Germany and all the money exchanged was German.⁹⁹

The European Court of Justice relies on the following COMI factors: (1) where the company's office and production facilities are located, (2) where the company's employees are located, and (3) where the company's bank accounts are held.¹⁰⁰ In the seminal case *Eurofood*, the court determined that the COMI was in Ireland rather than Italy because the creditors' perception was that they were dealing with a company located in Ireland and the business was carried out in Ireland.¹⁰¹ The European Court of Justice emphasized that the

95. See *id.* (explaining that Benk argued that his COMI was at all material times in England even though he was in Germany).

96. *Id.*

97. *Id.* [8]–[9].

98. See *id.* [25] (stating that Benk's business did not require him to take golfing tours and Benk purposefully scheduled photography sessions around court hearings to make it seem like he was busy working, even though it was off season, to create the illusion of permanence).

99. See *id.* [25] (remarking that it was unlikely that Mr. Schmidt, his only client in Germany, would have and had financed any of Mr. Benk's tours or trips).

100. See Case C-396/09, *Interedil Srl v. Fallimento Interedil Srl*, 2011 E.C.R. I-9939, I-9955 (stating that there is a specific set of circumstances that irrefutably establish COMI: if the management of a company and its registered office (where the managing decisions are executed) are in the same location and ascertainable by third parties, then that place is the COMI).

101. See Case C-341/04, *Eurofood IFSC Ltd.*, 2006 E.C.R. I-3854, I-3868 (explaining that the presumption favoring the registered office location can be rebutted if objective and ascertainable factors can be used to establish that a different actual situation exists than from locating the company at the registered office).

appearance of “letterbox” companies must not be taken as a debtor’s COMI, meaning the debtor was not carrying out any business in the location of the registered office.¹⁰²

D. INCONSISTENT COMI DEFINITION ISSUES

Multiple COMI definitions can affect the outcome of a case.¹⁰³ Laws can be unfairly applied by either the court passing the case onto a different country’s court or by choosing a time in the company’s life which does not fairly represent the company’s COMI.¹⁰⁴ The list of factors used to define COMI is neither comprehensive nor uniform across U.S. and European courts.¹⁰⁵

The goal of determining COMI is to reduce forum shopping; however, forum shopping can still occur, especially when the petition date is used to determine COMI.¹⁰⁶ Abusive forum shopping occurs

102. *See id.*

103. *See, e.g., In re Millennium Glob. Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 70 (Bankr. S.D.N.Y. 2011) (“These deceptively simple [COMI definitions] have engendered considerable litigation.”).

104. *Compare* *Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 133, 139 (2d Cir. 2013) (holding that a debtor’s filing for Chapter 15 recognition is when COMI should be determined), *and* *Lavie v. Ran (In re Ran)*, 607 F.3d 1017, 1025 (5th Cir. 2010) (“Congress’s choice to use the present tense requires courts to view the COMI determination in the present, i.e. at the time the petition for recognition was filed.”), *with In re Millennium Glob. Emerging Credit Master Fund Ltd.*, 458 B.R. at 75 (claiming the use of Chapter 15 petition date as the date for determining COMI recognition leads to the possibility for forum shopping because it gives prima facie recognition to a change of residence between the international proceeding and the Chapter 15 proceeding), *and In re Fairfield Sentry Ltd.*, 714 F.3d at 138 (stating that a court may look at the time period between foreign insolvency proceedings and the filing of a Chapter 15 petition to determine if the debtor has manipulated its COMI in bad faith).

105. *Compare In re SPhinX, Ltd.*, 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006) (listing location of the debtor’s headquarters, location of assets, and location of creditors as relevant factors to determining the COMI), *with Sparkasse Hilden Ratingen Velbert v. Horst Konrad Benk* [2012] EWHC (Ch) 2432, [19] (Eng.) (listing where an individual can be contacted, whether the COMI has an element of permanence, whether the COMI is ascertainable by third parties, and whether the change in COMI is of substance as elements to be considered when determining an individual’s COMI).

106. *See In re Ran*, 607 F.3d at 1026 (“A similar case brought immediately after the party’s arrival in the United States following a long period of domicile in the country where the bankruptcy is pending would likely lead to a different result.”).

when a party seeks to enter proceedings in another foreign jurisdiction in order to obtain a more favorable legal position.¹⁰⁷ Deterring forum shopping has been heavily debated in the Recast Regulation because evidence shows that companies may shift their COMI for the sole purpose of gaining access to a new jurisdiction that would have more favorable insolvency laws than their home jurisdiction.¹⁰⁸ For example, Hellas Telecommunications (HTL), a Luxembourg-registered company in the midst of financial troubles, migrated its COMI, but not its registered office, from Luxembourg to London.¹⁰⁹ Three months later, HTL applied to the English court for the court to hold that HTL had moved its COMI to England.¹¹⁰ The court system does not inquire into the reasons for moving the COMI. Regardless, HTL moved to a country with a more favorable insolvency procedure simply because it was able to.¹¹¹

Additionally, unfairly representing a company's COMI can lead to a lack of cooperation between countries.¹¹² For instance, since the EC and Recast Regulations only allow for the statute to apply within the jurisdiction of the EU Member States, courts have a difficult time figuring out jurisdiction for countries outside of the European

107. See Elizabeth A. McGovern & James Hatchard, *Forum Shopping – The End of an Era?*, GLOBAL RESTRUCTURING WATCH (May 29, 2015), <https://www.globalrestructuringwatch.com/2015/05/forum-shopping-the-end-of-an-era/>.

108. *Id.*

109. See *Forum Shopping, Portable COMI, and the Lessons of Wind Hellas*, JONES DAY (Dec. 2010), <http://www.jonesday.com/forum-shopping-portable-comi-and-the-lessons-of-iwind-hellas-jones-day-business-restructuring-reviewi-12-01-2010/>.

110. See *id.* (explaining the three-month transition was allowed because HTL informed creditors of the change of address, made a press announcement, opened a London bank account, and appointed U.K. resident individuals as directors).

111. See *id.* (arguing that since the central concept of COMI is the idea that it would be unfair to local creditors for a debtor to be able to avail itself of an insolvency regime in a jurisdiction other than what is ascertainable by the creditor, a company that can change its COMI in a relatively short time frame renders the protection obsolete).

112. See *Lavie v. Ran (In re Ran)*, 607 F.3d 1017, 1025 (5th Cir. 2010) (stating COMI should not be used in a manner that would allow it to be used as a shield against foreign creditors – especially since the purpose of these laws is to promote cooperation and avoid the likelihood of conflicting COMI determinations).

Union.¹¹³ Another example is illustrated in *In re Maruko*, in which Maruko went bankrupt in Japan.¹¹⁴ Since Japan's bankruptcy proceedings are restricted in scope, the proceedings did not include his other assets in countries like Australia, where the bankruptcy law gave the mortgagee too much power.¹¹⁵ In order to gain protection, he secured creditors in the United States because he knew the courts would grant him a stay over the other proceedings.¹¹⁶ If all three countries had the same concept of COMI, then the countries could have cooperated and created main and non-main foreign proceedings.¹¹⁷ Another example includes BCCI, a company incorporated in Luxembourg with main offices in London.¹¹⁸ The company moved its main offices back to the United Arab Emirates to avoid the United Kingdom's bankruptcy laws.¹¹⁹

III. ANALYSIS

A. EUROPEAN CASE LAW WILL BENEFIT FROM THE RECAST REGULATION TO REDUCE FORUM SHOPPING

The Recast Regulation was created to articulate specific COMI factors, which have been found in U.K. case law since the enactment of the EC Regulation, but it has yet to be used within cross-border insolvency cases.¹²⁰ The Recast Regulation's goal is to reduce forum shopping, which is the same goal that has been stressed in both recent

113. Actions can be dismissed because the courts could not cooperate properly between countries. *See Kemsley v. Barclays Bank* [2013] EWHC (Ch) 1274, [50] (Eng.) (stating the argument rested on whether COMI was in the U.S. or U.K., leading to injunctions from both courts because deciding which country has the foreign main insolvency proceeding has led to complications that the current Court cannot figure out).

114. *See generally* John A.E. Pottow, *The Myth (and Realities) of Forum Shopping in Transnational Insolvency*, 32 BROOK. J. INT'L L. 785, 805-07 (2007) (discussing *In re Maruko, Inc.*, 200 B.R. 876 (Bankr. S.D. Cal. 1996)).

115. *See id.*

116. *See id.*

117. *See id.* at 806-07 (predicting that had all three jurisdictions been universalists or territorialists, the opportunity forum shopping and relitigation would have failed).

118. *See id.* at 799.

119. *See id.*

120. *See Insolvency Update, supra* note 25, at 17 ("Although essentially stating what has been developed by case law [in relation to COMI determinations] since the [EC] Regulation, these new rules provide welcome[d] clarity.").

and older European cases.¹²¹

1. The Recast Regulation Adds Weight to the Factor of Creditor Perception when Determining COMI and this Would Reduce Forum Shopping

Factors needed to determine COMI usually have the same weight, but the Recast Regulation articulates the need to focus on where creditors think the debtor's COMI is. The court in *Re Macari* cautioned that the lack of a complete list of factors and additional facts, should operate as a clear warning that outcomes could be vastly different.¹²² The appeal in *Re Macari* occurred because the defendant did not give all of the necessary COMI information needed to make a proper argument; he did not provide a rent book for premises leased, there was no lease or tenancy agreement, and his creditor believed his old address was his COMI.¹²³ If all of the facts were given originally, instead of just his testimony with no evidence, the court determined that the previous court may have reached a different conclusion.¹²⁴ The previous court determined his COMI was not in Northern Ireland like the defendant claimed, but instead in the Republic of Ireland.¹²⁵ During the appeals, the common law factors led the court to conclude that the COMI was in Northern Ireland because it was his habitual place of residence, the address is ascertainable by third parties, and the move from the Republic of Ireland to Northern Ireland was a move of substance and not just mere illusion.¹²⁶

121. See *Recast Regulation*, *supra* note 14, at 22 (“[A]void incentives for parties to transfer . . . judicial proceedings from one Member State to another, seeking to obtain a more favorable legal position to the detriment of the general body of creditors”; “this Regulation should contain a number of safeguards aimed at preventing fraudulent and abusive forum shopping. . .”).

122. See *Re Macari* [2017] NICH 5, [15] (N. Ir.).

123. See *id.* [16], [18].

124. See *id.* [15].

125. See *id.* [5] (stating the previous court found the appellant did not have sufficient evidence to prove he had a stable link and a degree of permanence in Northern Ireland).

126. See *id.* [9], [17] (analyzing the documents received for proof including: a rent book, a document of payments, his insurance number, an affidavit confirming the Bank of Scotland knows he resides in Northern Ireland, and a letter from one of his main creditors confirming their knowledge of his move).

Using the factors found in *Eurofood*, the court found an the effective analysis for determining COMI focuses on the corporation's nerve center because the headquarters was where there was "real management" of the business.¹²⁷ Additionally, the court explored details including the location of the offices, board members, and the board's meetings.¹²⁸ Courts have treated these factors with equal weight, leading to a particularized examination of the facts in each case with the old EC Regulation, resulting in a different evaluation, thus, different conclusions.¹²⁹ The weight is important in *Re Macari* since Macari did not give all of the facts the first time, leading to a different result during the appeal.¹³⁰

If the original court had the Recast Regulation instead of just the EC Regulation, it likely would have ruled Macari's COMI was in Northern Ireland because the original court would have requested a letter from Macari's creditors, therefore having no need for an appeal.¹³¹ Applying the Recast Regulation would have saved time, money, and judicial resources because the determination of COMI would be immediate, and a stringent analysis would not take place.¹³²

2. *The Recast Regulation's Specific Timeline for when to Consider a Debtor's COMI Helps Reduce Forum Shopping*

The Recast Regulation would not only shed more insight on the list of facts in *Re Macari* because the Recast Regulation adds additional weight to creditor perception, but also the Recast Regulation only addresses the three-month period before the beginning of the

127. See Bufford, *supra* note 71, at 469-70; see also Case C-341/04, Eurofood IFSC Ltd., 2006 E.C.R. I-3880.

128. See Bufford, *supra* note 71, at 470.

129. See *id.* at 470 n.327 (stating that the difference in evidence presented to the courts changes the COMI decisions, so the evidence presented matters just as much as the weight given to the factors).

130. See *Re Macari* [2017] NICH 5, [5] (N. Ir.) (stating there was no cogent evidence from the first case to prove a stable link and a degree of permanence in Northern Ireland); Bufford, *supra* note 71, at 470 n.327.

131. See *Recast Regulation*, *supra* note 14, at 22 ("Special consideration should be given to the creditors and to their perception as to where a debtor conducts the administration of its interests.").

132. See *Re Macari* [2017] NICH at [18] (urging practitioners to ensure all facts are laid out at the first instance to bear consequences of appeals).

insolvency petition.¹³³ The court in *Re Macari* did not mention when Macari moved, but the assumption is that he moved after his divorce on May 3, 2007.¹³⁴ Working with the assumption that “the appellant claims that the residual ill-will towards him from his former wife was in large part responsible for him fleeing the Republic of Ireland and moving to Northern Ireland,” he would have moved in plenty of time before the petition date.¹³⁵

Sparkasse also deals with the pressure to reduce forum shopping.¹³⁶ The court was worried that Benk was forum shopping because the period of bankruptcy in Germany is much longer than in the United Kingdom, especially because he “clearly regarded German law as outdated and English law as more civil[ized].”¹³⁷ The defendant claimed to have moved to England right before insolvency proceedings were opened in Germany, but the court found his COMI to be Germany because: (1) he said he opened up a photography studio in England without ever buying a camera; (2) he rented an apartment which was someone else’s furnished apartment; (3) he did not notify his German creditors that he was moving to England; and (4) he still remained on the Register of Notaries in Germany while he was in England.¹³⁸

The court’s decision aligns directly with what the Recast Regulation articulates, the court paid attention to the date Benk said he moved to England and when the proceeding was opened.¹³⁹ Since Benk tried to assert his English COMI twice, the court was concerned that he was attempting to forum shop.¹⁴⁰ This case would have benefitted greatly from the Recast Regulation because the definitive timeline of six months in the regulation would have caused this case to be thrown out

133. See *Recast Regulation*, *supra* note 14, at 22 (stating a debtor must have moved his COMI three months prior to the start of the insolvency proceedings).

134. See *Re Macari* [2017] NICH at [3].

135. See *id.*

136. See *Sparkasse Hilden Ratingen Velbert v. Horst Konrad Benk* [2012] EWHC (Ch) 2432, [7] (Eng.) (“Whenever there are differences between one bankruptcy system and another, the less harsh system will inevitably attract the attention of those wishing to avoid the stricter system.”).

137. *Id.*

138. See *id.* [17], [25]-[26].

139. See *id.* [18].

140. See *id.* [27].

immediately.¹⁴¹ The Recast Regulation states that in the case of an individual who is exercising an independent business, or in this case, a professional activity, the debtor has to relocate his or her registered office within three months prior to the request of the opening of the insolvency proceedings.¹⁴²

B. ANALYZING U.S. CASE LAW USING THE RECAST REGULATION WOULD HELP STREAMLINE INSOLVENCY CASES

Analyzing U.S. cases using the Recast Regulation helps distinguish important COMI factors from less persuasive factors.¹⁴³ The Recast Regulation has only built upon the EC Regulation, making the factors more specific.¹⁴⁴ The UNCITRAL Model Law, which United States laws reflect in its entirety, only defines COMI as the place of a debtor's registered office.¹⁴⁵ The original EC Regulation adds an important factor of the COMI being "ascertainable by third parties," which is language not found in the UNCITRAL Model Law nor in Chapter 15 of the U.S. Code.¹⁴⁶ Third party acknowledgement coupled with the Recast Regulation's narrower definition, stresses the importance of special consideration given to "creditors and to their perception as to where a debtor conducts the administration of its interests."¹⁴⁷ Making creditor perception an important COMI factor comes from the rationale that insolvency is a foreseeable risk, so potential creditors must know where the debtor is located and where legal risks would be assumed in an insolvency proceeding.¹⁴⁸

141. *See id.*

142. *See Recast Regulation, supra* note 14, at 22.

143. *See, e.g., id.* (stating COMI should be ascertainable by third parties); *In re Millennium Glob. Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 77 (Bankr. S.D.N.Y. 2011) (finding the most important factor is whether the COMI was ascertainable by third parties). *But see In re SPhinX, Ltd.*, 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006) (lacking a factor that has to do with third party recognition).

144. *See Recast Regulation, supra* note 14, at 19 ("[T]he [EC] Regulation is functioning well in general but . . . it would be desirable to improve the application of certain of its provisions in order to enhance the effective administration of cross-border insolvency proceedings.").

145. *See UNCITRAL Model Law, supra* note 7, at 8.

146. *EC Regulation, supra* note 7, at 2.

147. *Recast Regulation, supra* note 14, at 22.

148. *See Bufford, supra* note 71, at 438.

The importance of a debtor's COMI being ascertainable by third parties, and especially creditor location and perception, can only be found within U.S. case law.¹⁴⁹ Since the U.S. courts could not rely on statutory language, their factors were discretionary.¹⁵⁰ A combination of any of the factors could lead to different results based on what factors the courts deem to be more important.¹⁵¹ The COMI factors have helped the European Union reduce forum shopping, which is an important goal articulated in the Recast Regulation. Although forum shopping remains a problem in the United States, the UNCITRAL Model Law and Chapter 15 have not articulated any solutions or goals to eradicate this problem.¹⁵²

1. The Recast Regulation Codifies Third Party Acknowledgment and Creditor Perception which Does Not Exist in U.S. Statutory Law

The biggest difference between the Recast Regulation and U.S. cases is the focus on third party acknowledgement.¹⁵³ If the United States follows in the European Union's footsteps, there would be more authority to allow using "ascertainable by third parties" as a legitimate COMI definition instead of following common law.¹⁵⁴

In *In re Millennium Global*, there were only three factors that pointed to Bermuda being the defendant's COMI, but the court

149. See, e.g., *In re Millennium Glob. Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 79 (Bankr. S.D.N.Y. 2011) ("In addition to the fact that Bermuda was the only COMI reasonably ascertainable by third parties, there is insufficient evidence in this case that establishes the COMI in a location other than Bermuda."); *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 130 (Bankr. S.D.N.Y. 2007) ("[E]ach of the Funds' real seat and therefore their COMI is the United States, the place . . . is therefore ascertainable by third parties. . . .").

150. See *In re Betcorp, Ltd.*, 400 B.R. 266, 287-88 (Bankr. D. Nev. 2009) (listing multiple factors and explaining that the formulation has been adopted or used by most courts that have addressed the components of COMI).

151. See, e.g., *Hallock*, *supra* note 16, at 1105 (explaining "letterbox" companies that do not conduct business in the country where they are incorporated cannot use the formality of their registered office to justify recognition as COMI).

152. See *Recast Regulation*, *supra* note 14, at 22; *infra* note 191 (discussing how the United States still invites forum shopping).

153. See, e.g., *Lavie v. Ran (In re Ran)*, 607 F.3d 1017, 1025 (5th Cir. 2010) ("It is important that the debtor's COMI be ascertainable by third parties.").

154. See *id.* at 1026 (stating that third party observation of a debtor's COMI is consistent with English cases interpreting the EC Regulation).

believed it was ascertainable by third parties, which mattered more than the factors pointing to the United Kingdom as the COMI.¹⁵⁵ The court spent time analyzing the UNCITRAL Model Law and the U.S. Chapter 15 bankruptcy law to no avail.¹⁵⁶ Since there was no guidance from statutory law, the court turned only to case law.¹⁵⁷ Since the Recast Regulation focuses on allowing creditors to determine where they perceive a debtor's COMI to be, the court would have been able to automatically determine Bermuda as the Funds' COMI, because this was where the creditors assumed it to be.¹⁵⁸ There would be no need for further analysis if the United States codified creditor perception into the law.

As another example, the court in *In re SPhinX* looked to European statutory and case law, including the EC Regulation, because the United States did not have any cases involving a COMI dispute under its law.¹⁵⁹ The court cites relied heavily on the EC Regulation and even determined creditors have an important purpose.¹⁶⁰ If this case was decided today with the Recast Regulation, the court's emphasis on creditor's support for the COMI not being in the Cayman Islands would be more than just dicta. It would be the sole determining factor because the creditor acknowledgment would outweigh the other factors, including the registered office being in the Cayman Islands.¹⁶¹ Although the court's twenty-two-page analysis led to the same conclusion, a statutory reference point would have saved the court time and effort from having to research foreign laws and

155. See *In re Millennium Glob. Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 79 (Bankr. S.D.N.Y. 2011) (finding that COMI in Bermuda was ascertainable by third parties because there was a Bermuda-based board of directors and all investors sent their cash to an account in Bermuda).

156. *Id.* at 76.

157. See *id.* (looking to *In re SPhinX* for a list of COMI factors in which to analyze).

158. See *Recast Regulation*, *supra* note 14, at 22.

159. See, e.g., *In re SPhinX, Ltd.*, 351 B.R. 103, 118 (Bankr. S.D.N.Y. 2006) ("There appear to be no published cases involving a dispute over COMI under Chapter 15.").

160. See *id.* (citing to the EC Regulation and quoting *Eurofood* as to the creditors' interests).

161. See *id.* at 122 (deciding whether the Court should deny the request to recognize the COMI as the Cayman Islands for lack of contacts).

jurisprudence.¹⁶²

As a contrast, the *In re Fairfield Sentry* approach is problematic because the court believed the COMI should not be ascertainable to third parties during the life of the debtor's company before the opening of the proceeding.¹⁶³ The court in this case believed that creditors would look to the law of the jurisdiction the debtor was operating from, meaning that the creditor or third party would focus on the jurisdiction before doing business with the party.¹⁶⁴ This is not the case because third parties cannot predict the jurisdiction of future insolvency; however, with the Recast Regulation, creditors would have a say if they think the company has purposefully moved locations.¹⁶⁵

2. U.S. Law Lacks the Recast Regulation's Ability to Reduce Forum Shopping without Codified Timelines

Additionally, the court in *In re Millennium Global* had to turn to European law to decide when the debtor's establishment of its business began.¹⁶⁶ The court looked at the EC Regulation, which does not worry about the commencement of two different proceedings because all members of the European Union are automatically required to recognize foreign proceedings from the initial date of petition.¹⁶⁷ Conversely, in the United States Chapter 15 supersedes the authority of the UNCITRAL Model Law.¹⁶⁸

162. The ultimate decider was whether it was ascertainable by creditors and third parties. See *Recast Regulation*, *supra* note 14, at 22 (focusing on creditor and third-party acknowledgement for COMI determinations).

163. *Hallock*, *supra* note 16, at 1106; see *Lavie v. Ran (In re Ran)*, 607 F.3d 1017, 1025 (5th Cir. 2010) (stating a COMI that is ascertainable to third parties is important).

164. See *Hallock*, *supra* note 16, at 1106.

165. See *Recast Regulation*, *supra* note 14, at 22 ("Special consideration should be given to the creditors and to their perception as to where a debtor conducts the administration of its interests.")

166. See *In re Millennium Glob. Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 74 (Bankr. S.D.N.Y. 2011) (claiming the EC Regulation was the first major legislation to employ the terms COMI and establishment).

167. See *Bufford*, *supra* note 71, at 434 (stating the EC Regulation was the principal source for international cooperation within the European Union because the EC Regulation overrides every individual Member country's national law).

168. See *In re Millennium Glob. Emerging Credit Master Fund Ltd.*, 458 B.R. at

If the United States codified specific dates in the Recast Regulation,¹⁶⁹ the court in *In re Millennium Global* would be able to quickly deem the debtor's COMI in Bermuda because it was within the three-month period articulated in the Regulation instead of spending time analyzing multiple authorities.¹⁷⁰

Courts have been worried about the possibility of forum shopping since the debtor would be able to change residences between the date of the foreign proceeding and the Chapter 15 petition date. The shallow presumption of COMI being a debtor's registered office, codified in the UNCITRAL Model Law and U.S. law, worries courts because it can lead to forum shopping, which the Recast Regulation steadfastly objects to.¹⁷¹ In *In re Bear Stearns*, the debtor's registered office and place of incorporations was in the Cayman Islands, but the court refused to recognize the Cayman Islands as the COMI because the debtor had no other connection to the area.¹⁷² The factors needed to rebut the presumption of registered office as COMI are only available in common law in the United States.¹⁷³ If the court used the Recast Regulation, it would come to the same conclusion, but through a different analysis. Instead of analyzing why the Cayman Islands

74 ("The date of the opening of initial insolvency proceeding is the only date that the original drafts of the term for the E[C] Regulation could have contemplated."); *EC Regulation, supra* note 7, at 3 ("Automatic recognition of insolvency proceedings to which the law of the opening state normally applies. . . .").

169. *See Recast Regulation, supra* note 14, at 22 ("[T]he debtor has relocated its registered office or principal place of business to another Member State within the 3-month period prior to the request for opening insolvency proceedings. . . .").

170. *See In re Millennium Glob. Emerging Credit Master Fund Ltd.*, 458 B.R. at 75.

171. *See In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 129 (Bankr. S.D.N.Y. 2007) (stating COMI should be overcome in the case of a company not carrying out business in the state in which its registered office is situated).

172. *See id.*

173. There are a number of factors used by the U.S. court system: location of the debtor's headquarters; the location of those who manage the debtor, like a holding company's headquarters; location of the debtor's primary assets; location of the majority of the debtor's creditors; the jurisdiction whose law would apply to most disputes. Another important factor found only in U.S. common law, rather than statutory law, is that COMI should be ascertainable by third parties. *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. at 128 (explaining that the Bankruptcy Code does not state the type of evidence required to rebut the presumption so the Court cited cases for the factors).

could not be the COMI even though it was the registered office, the court could have used the factors listed in the Recast Regulation to prove creditors and third parties ascertained the COMI to be in the United States, thus in this case, it would render a foreign main insolvency proceeding obsolete.¹⁷⁴

If the United States had the guidelines of the Recast Regulation, the chance for abuse would be mitigated because the Recast Regulation requires the re-location of the principal place of business to be three months before the request to open insolvency proceedings.¹⁷⁵ Additionally, the Recast Regulation requires the debtor to inform creditors of its new location by “drawing attention to the change of address in commercial correspondence or by making the new location public through other appropriate means.”¹⁷⁶ In *In re Millennium Global*, the court would not worry about *In re Ran*'s focus on present tense language of the statute because the creditors believed the COMI to be Bermuda, and the debtor did not make any advancements to move locations or contact the creditors with a change of address.¹⁷⁷

Allowing businesses to change their headquarters at the slightest whim is detrimental to the concept of cross-border insolvency: a debtor's COMI needs to survive a sudden move to evade insolvency proceedings. The Recast Regulation is in a better position to stop this unnecessary forum shopping with the time limit of three months before the petition date.¹⁷⁸ For instance, the company BCCI moved its main offices from London to the United Arab Emirates at the time of its fraud culminating into a bankruptcy claim.¹⁷⁹ By moving where the decision makers did their business, the company believed it could escape the United Kingdom's jurisdiction.¹⁸⁰ Since the company's original place of business was in London before the beginning of the

174. See *Recast Regulation*, *supra* note 14, at 22 (recognizing the consideration of creditor and third-party acknowledgment as the most important factor).

175. See *id.*

176. See *id.*

177. See *In re Millennium Glob. Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 76 (Bankr. S.D.N.Y. 2011).

178. See *Recast Regulation*, *supra* note 14, at 22.

179. See Pottow, *supra* note 114, at 799-800.

180. See *id.* (claiming BCCI's movement of personnel from the United Kingdom to the United Arab Emirates had the effect of “deselecting” the U.K. as a COMI forum).

insolvency proceeding, the Recast Regulation would have only allowed arguments choosing between the United Kingdom and Luxemburg as BCCI's COMI.¹⁸¹

The outcome of *In re Millennium Global* would stay consistent, but the analysis required to determine the Funds' COMI at commencement of the liquidation would not require a long-winded analysis, since the determination would not be based on common law analysis. If Chapter 15 or the UNCITRAL Model Law had been updated like the Recast Regulation to include the important factors of "determining COMI from three months prior to petition filing" and "notification to creditors," then the court would have been able to use statutory authority rather than case law.¹⁸² Reliance on statutory law would simplify the court's analysis and lead to a faster resolution to the case.

Additionally, *In re Fairfield Sentry* would not have a long analysis if the court followed the Recast Regulation. The Recast Regulation focuses on where the debtor's COMI was three months before the filing of a petition.¹⁸³ In this case, the debtor did not have a place of business, management, or any tangible assets located in the United States at the time of the filing of the Chapter 15 proceeding.¹⁸⁴ The debtor ceased doing business activities eighteen months before foreign liquidation proceedings began, so the Recast Regulation would have prevented the debtor from changing its COMI since it would not recognize anything new.¹⁸⁵

Without the Recast Regulation applying in the United States, forum shopping will continue to be a problem.¹⁸⁶ Only the EC Regulation and

181. See *Recast Regulation*, *supra* note 14, at 22 (limiting the presumption that the center of main interest exists in the registered office, the individual's principal place of business, or the individual's residence from instances in which the debtor relocated within three months prior to the request for reopening insolvency proceedings).

182. See *In re Millennium Glob. Emerging Credit Master Fund Ltd.*, 458 B.R. at 76.

183. See *Recast Regulation*, *supra* note 14, at 22.

184. See *In re Fairfield Sentry Ltd.*, 440 B.R. 60, 64 (Bankr. S.D.N.Y. 2010).

185. See *Recast Regulation*, *supra* note 14, at 22.

186. See *generally* Pottow, *supra* note 114, at 790 (explaining the COMI rule being so fact dependent creates discretion in outcomes of bankruptcy cases, effectively reducing "shopability" for debtors).

the Recast Regulation articulate the prohibition of forum shopping as a goal.¹⁸⁷ Not mentioning the reduction of forum shopping as a goal in the UNCITRAL Model Law directly affects the theory of universalism and comity amongst jurisdictions, which are the goals of the UNCITRAL Model Law.¹⁸⁸ By adopting the UNCITRAL Model Law, the U.S. courts are supposed to be working with a legal construct that focuses on harmonization and cooperation. This progressive approach has been emphasized by the courts, but the courts use discretion that some scholars believe will not lead to cooperation.¹⁸⁹ Without the goals being specifically enforced within the UNCITRAL Model Law, and then specifically in Chapter 15, there will be only common law to guide the U.S. courts when it comes to forum shopping and cooperation.¹⁹⁰

The universalism of the UNCITRAL Model Law and Chapter 15 should have created more predictability, but instead may have led to more forum shopping because the rules are not specific enough.¹⁹¹ For instance, in *In re Maruko*, Maruko was bankrupt in Japan, where Japanese law is not universalist.¹⁹² But instead of contesting his COMI because he had assets all over the world, he was able to forum shop and choose the United States as his place of proceeding and created a worldwide stay; the other countries were not able to have a say in what

187. *EC Regulation*, *supra* note 7, at 1; *Recast Regulation*, *supra* note 14, at 22.

188. *UNCITRAL Model Law*, *supra* note 7, at 3; see Beckering, *supra* note 34, at 300 (stating the language of the Model Law, paralleled in Chapter 15, the United States can mimic the procedural law of all adopting nations, encouraging other nations to “set aside their passé bankruptcy laws in favor of the modern Model Law”).

189. See Beckering, *supra* note 34, at 301 (stating that harmonious interaction between bankruptcy courts of different nations will prove challenging: “courts must take an open-minded approach toward transnational insolvency analysis in the context of interconnected global market growth and cross-border bankruptcy law reform.”).

190. See *id.* (claiming that courts are working within a legal construct that emphasizes coordination and communication).

191. Pottow, *supra* note 114, at 788 (“The universalists are generally correct in their claim to greater predictability . . . [y]et they should not necessarily trumpet their predictability than territorialism . . . celebration of ‘predictability’ may actually be misguided, especially in a world now sensitive to the perceived evils of forum shopping.”).

192. See *id.* at 805.

happened next.¹⁹³ If all countries were universalists and under the Recast Regulation, there would be no ability for him to forum shop and essentially block the other proceedings.¹⁹⁴ Without the argument of universalism versus territorialism, the Recast Regulation would have stopped Maruko from achieving these forum shopping goals because the United States would not open proceedings with a COMI in Japan for the past three months prior to the bankruptcy.¹⁹⁵

IV. RECOMMENDATIONS

A. THE UNCITRAL MODEL LAW NEEDS TO CONSOLIDATE GUIDELINES AND FOLLOW THE RECAST REGULATION

The UNCITRAL Model Law needs to update its guideline to follow the EC Regulation and the Recast Regulation by consolidating the COMI factors found in both European and U.S. case law. The EC Regulation and the Recast Regulation add more substantive rules to the guidelines in the European Union, which the UNCITRAL Model Law is lacking.¹⁹⁶ The easiest way to update the UNCITRAL Model Law would be for the United Nations and the European Union to come up with a consolidated list together and create a consistent model guideline that can be used by any country.

If the European Union and the United Nations would like to keep their guideline laws separate, they should have a joint conference in order to make sure that their laws apply uniformly to ensure consistent determinations for cross-border insolvencies. The UNCITRAL Model

193. See *id.* at 806-07 (“Had all three jurisdictions been universalists, this cross-global forum shop would have failed. It was only the interaction between territorialist Japanese law and universalist U.S. law that created this opportunity for forum shopping and re-litigation.”).

194. See, e.g., *id.* at 806 (hypothesizing Maruko would have had a different outcome “[h]ad Japan subscribed to a system of universalism, none of this would have (or should have) happened.”).

195. *Recast Regulation*, *supra* note 14, at 22.

196. See *EC Regulation*, *supra* note 7, at 2 (“Centre [sic] of main interests should correspond to the place where debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.”); *Recast Regulation*, *supra* note 14, at 22 (“When determining whether the centre [sic] of the debtor’s main interest are ascertainable by third parties, special consideration should be given to the creditors and to their perception as to where a debtor conducts the administration of its interests.”).

Law should substantially update its guidelines to match the new Recast Regulation. The Recast Regulation already acknowledges the need for consolidation:

When cooperating, insolvency practitioners and courts should take into account best practices for cooperation in cross-border insolvency cases, as set out in principles and guidelines on communication and cooperation adopted by European and international organizations active in the area of insolvency law, and in particular the relevant guidelines prepared by the United Nations Commission on International Trade Law.¹⁹⁷

Courts should not have to look to individual nations' laws in order to ascertain what COMI factors need to be applied. For example, the Recast Regulation codified some of the common law elements found in European case law because originally the EC Regulation did not provide for some of the factors used by the courts. By creating a comprehensive list of factors, courts will be able to use the guide as a checklist to ensure the proper COMI is being applied, instead of relying on purely common law ideals.

The purpose of Chapter 15 in the United States was to bring harmony to international insolvency law by building upon existing concepts already provided in the UNCITRAL Model Law.¹⁹⁸ It was meant to be a "crucial jurisdictional test" that should be "uniform around the world" in order to encourage other countries to use it as well.¹⁹⁹ Since the United States was attempting to create a uniform standard for COMI, there needs to be a more comprehensive list so all countries can follow the same jurisdictional test.

If full cooperation is not possible, the major factor that needs to be added to the UNCITRAL Model Law is that a debtor's COMI can be ascertainable by third parties.²⁰⁰ This factor ensures COMI is not just the registered office or place of incorporation, but where daily administrative duties take place.²⁰¹ Additionally, adding this factor

197. *Recast Regulation*, *supra* note 14, at 24.

198. *See In re Betcorp, Ltd.*, 400 B.R. 266, 287 (Bankr. D. Nev. 2009).

199. Jay Westbrook, *Chapter 15 at Last*, 79 AM. BANKR. L.J. 713, 719-20 (2005).

200. *See, e.g., Recast Regulation*, *supra* note 14, at 22 ("[C]entre [sic] of the debtor's main interests is ascertainable by third parties. . ."); *EC Regulation*, *supra* note 7, at 2.

201. *E.g., Thomas v. Frogmore* [2017] EWHC (Ch) 25, [56] (Eng.) (explaining

would help reduce forum shopping.²⁰² This factor already exists under common law as one of many factors courts use to decide COMI, but codifying third party acknowledgment will ensure this factor is not overlooked and is given the superior weight it deserves.

B. THE UNCITRAL MODEL LAW NEEDS TO UPDATE ITS FACTORS TO INCLUDE SPECIFIC TIMELINES FOR ANALYZING COMI

The list of factors should also advise when in a company's life the court should start analyzing COMI. The time analyzed should be similar to the Recast Regulation, which has a specific timeline of at least three months before the opening of insolvency proceedings within that jurisdiction.²⁰³ By a court analyzing a debtor's COMI as soon as the insolvency proceeding petition is filed, the proceeding cannot be used to unfairly avoid the law by moving locations.²⁰⁴ Instead of focusing on when the insolvency petition was filed within the specific country, the courts need to focus on whenever a foreign proceeding was filed.²⁰⁵ This will help foster cooperation between the nations in order to have a universal approach to cross-border insolvency proceedings.

C. INDIVIDUAL COUNTRIES SHOULD UPDATE THEIR LAWS TO CREATE A COMPREHENSIVE LIST OF COMI FACTORS

If uniformity cannot be achieved by changing the UNCITRAL Model Law, each jurisdiction should include a definitive list of COMI factors the court will consider within its individual national bankruptcy laws. By having an articulated and codified list, countries do not need to rely solely on the UNCITRAL Model Law, the EC

that even though board meetings are held in New Jersey, third parties would not know or care because day to day dealings with third parties are based in London – even though that may not be the official registered office).

202. *Id.*

203. *See Recast Regulation, supra* note 14, at 22 (adding that if the insolvency proceeding is against an individual, they are required to relocate their habitual residence within six months prior to the petition opening an insolvency proceeding).

204. *See In re Millennium Glob. Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 76 (Bankr. S.D.N.Y. 2011) (“The appropriate date at which to determine COMI is on or about the date of commencement of the foreign proceeding for which recognition is sought.”).

205. *See id.*

Regulation, or the Recast Regulation. Currently, the guidelines have only a slight bearing on how courts analyze COMI factors because most courts admit there is a lack of definition.²⁰⁶ By analyzing a codified list of COMI factors, courts will experience less confusion regarding what factors should be applied rather than relying on common law. This will lead to a more uniform application of COMI factors and a lower likelihood of abuse by either a debtor or a creditor.²⁰⁷

V. CONCLUSION

The factors used to determine a debtor's COMI need to be consolidated and regulated for each country by changing the UNCITRAL Model Law to reflect the Recast Regulation's definition of COMI. The Recast Regulation provides more guidelines for the European Union courts to analyze COMI factors. Since the Recast Regulation requires consideration of the involved creditor's perception and only allows court to determine COMI from either three months before the petition date or six months if the individual does not have any independent business or professional activity, the Recast Regulation relieves the courts from spending extra time analyzing simple COMI determinations. The United States needs to follow in the European Union's footsteps and create a more articulated list of COMI factors. Such a list would ensure uniformity across nations and allow courts to decide COMI more easily and efficiently.

206. *See id.* at 70 (“Neither the Model Law nor Chapter 15 defines the term COMI.”).

207. *See id.* at 82 (“It has been suggested that laxity in the application of the COMI principle or in recognition of cases from tax havens would encourage companies to register and then file in an ‘outlier’ jurisdiction whose law is unduly favorable to debtors and disadvantageous to creditor interests.”).