

The Other Establishment Clause: The Misunderstood Minimum Threshold for Recognition

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This paper studies the concept of “establishment,” the minimum threshold for a U.S. bankruptcy court to recognize a foreign bankruptcy proceeding. This concept is shared by EU Regulations, the UNCITRAL Model Law on Cross Border Insolvency, and Chapter 15 of the U.S. Bankruptcy code. I compare these three manifestations of establishment in order to come to a more accurate understanding of the concept than the current rule of thumb: “place of business.” Specifically, I dissect the shared definition of establishment into separate elements that must be met in order to satisfy the test. I then analyze each element in the context of hypothetical examples. Finally, I argue that mere registration of a company in a jurisdiction will not suffice to meet the definition of establishment.

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Globalization and the proliferation of multinational companies have created a need for greater harmony among the commercial laws of the world’s nations. By definition, multinational companies operate in more than one jurisdiction, each with its own unique legal system. In order to smooth the operation of the global economy, many nations are taking a collective approach toward the complex legal issues created by international businesses.

Bankruptcy is one particular area of law in which a great deal of progress has been made to integrate the laws of separate sovereignties. Because one multinational company may have operations, assets, debts, and other interests in a number of jurisdictions, “a unified legal response to a debtor’s general default” is required.¹ One important issue this raises is how to identify which of those jurisdictions may participate in the international bankruptcy proceedings (and more importantly, which jurisdictions may not).² This process of “recognition” creates a struggle to strike a balance among the interests of debtors, creditors, and the sovereignty of the jurisdictions in which they operate.

The United States has adopted a new system of recognition as part of Chapter 15 of the U.S. Bankruptcy Code. Under Chapter 15, recognition is the main gateway to bankruptcy relief³ available to a foreign representative of a debtor, absent the filing of a plenary U.S. Chapter 7 or Chapter 11 proceeding.⁴ Recent case law has clarified that this recognition system is not a subjective, pragmatic process; it is a rigid, procedural mechanism.⁵ This definitional, not discretionary, approach better comports with the intent of Chapter 15.⁶

1. Jay Lawrence Westbrook, *Locating the Eye of the Financial Storm*, 32 BROOK. J. INT’L L. 1019, 1019 (2007) (citation omitted).

2. See *id.* at 1020 (arguing that choice of bankruptcy forum affects the interests of the stakeholders).

3. For the purposes of this article, interim relief during the pendency of recognition proceedings and relief through non-bankruptcy civil lawsuits are excluded from the consideration of bankruptcy relief or Chapter 15 relief.

4. *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 132–33 (Bankr. S.D.N.Y. 2007) aff’d, 389 B.R. 325 (S.D.N.Y. 2008). But there may be other opportunities to obtain relief. See, e.g., Brendan M. Driscoll, *International Comity After Chapter 15: A Residual Right to Recognition?*, 17 J. BANKR. L. & PRAC. 5 ART. 5 (2008) (discussing various means of obtaining relief through international comity).

5. *Id.* at 126.

6. See Westbrook, *supra* note 1, at 1024 (“The Model Law...imposes a fairly rigid procedural structure for recognition of foreign proceedings.”); Look Chan Ho, *Proving COMI: Seeking Recognition Under Chapter 15 of the US Bankruptcy Code*, J. INT’L BANKING L. & REG. 636, 650 (2007) (stating “the

Chapter 15 provides two opportunities for recognition. First, a foreign representative may petition for recognition of a central, coordinating proceeding, known as a “foreign main proceeding,” in the jurisdiction where the debtor has its “center of main interests” (“COMI”).⁷ COMI is not further defined, though much scholarship has been generated toward that end.⁸ Second, a foreign representative may petition for recognition of qualified ancillary proceedings, known as “foreign nonmain proceedings,” in any jurisdiction where the debtor has an “establishment.”⁹ An establishment is defined as “any place of operations where the debtor carries out a non-transitory economic activity.”¹⁰

If the foreign representative meets the COMI or establishment standard, the U.S. bankruptcy court must recognize the proceeding unless recognition would be “manifestly contrary to the public policy of the United States.”¹¹ But this exception is to be applied narrowly and should be invoked only when the most fundamental policies of the United States are at risk.¹² Key to the functioning of this system is a mandate that courts may not recognize foreign proceedings which fail to meet either the COMI or establishment standards for recognition.¹³

A brief example of the recognition procedure may help clarify this simple process. The process starts with the commencement of a foreign proceeding. The foreign representative of that proceeding petitions a U.S. bankruptcy court for recognition in hopes of accessing the court’s powers to grant relief. The U.S. bankruptcy court then makes a determination of whether the foreign proceeding meets the definitional requirements of Chapter 15. Presuming the foreign representative has met all other statutory requirements¹⁴ and recognition would not be manifestly contrary to the public policy of the United States, there are three possible outcomes:

1) *Recognition as a Foreign Main Proceeding:* If the debtor’s COMI is in the same jurisdiction as the foreign proceeding, that proceeding must be recognized as the foreign main proceeding.

2) *Recognition as a Foreign Nonmain Proceeding:* If the debtor has an establishment, but not its COMI, in the same jurisdiction as the foreign proceeding, that proceeding must be recognized as the foreign nonmain proceeding.

determination of the existence of a foreign main or non-main proceeding is a definitional matter, not a discretionary matter”).

7. 11 U.S.C. §§ 1502(4), 1517 (2006).

8. Ho, *supra* note 6, at 636.

9. 11 U.S.C. §§ 1502(5), 1517 (2006).

10. 11 U.S.C. § 1502(2) (2006).

11. 11 U.S.C. § 1506 (2006).

12. H.R. REP. NO. 109–31, pt. 1, at 109 (2005), as reprinted in 2005 U.S.C.C.A.N. 88, 172 [hereinafter “House Report”]; see also *In re Ephedra Prod. Liab. Litig.*, 349 B.R. 333, 336–37 (S.D.N.Y. 2006) (holding the inability to have a jury trial in Canada, where one would be allowed in the United States, was not “manifestly contrary to the public policy of the United States”). In fact, the 11 U.S.C. § 1506 exception has yet to be invoked by any court.

13. House Report, *supra* note 12 at 114; André J. Berends, *The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview*, 6 TUL. J. INT’L & COMP. L. 309, 332 (1998).

14. See 11 U.S.C. § 1517 (2006) (listing these statutory requirements).

3) *Denial of Recognition*: If the debtor has neither its COMI nor an establishment in that jurisdiction, the foreign proceeding must be denied recognition and access to U.S. bankruptcy court relief.¹⁵

This article focuses on the definition of establishment, the minimum threshold for recognition. This article will clarify the concept of establishment to help solidify the border between when a court should recognize a foreign nonmain proceeding and when it should deny recognition. Part I explains why a clearer understanding of the term establishment is needed. Part II gives a brief history of the evolution of the term “establishment” and will identify the major interpretive aids to be used in comparison. Part III explains why a “place of business” test is insufficient. Part IV analyzes the various elements of the establishment definition, including those which are not clearly apparent from the language of Chapter 15. Part V discusses and rejects the possibility of automatic or presumptive recognition of a foreign nonmain proceeding in the jurisdiction of a debtor’s registered office. The scope of this article is limited to businesses that are corporations or other types of legal entities, to the exclusion of natural persons.

I. THE PROBLEM

An analysis of the establishment definition is required to ensure the proper functioning of the recognition process. Because the establishment test is vague, there exists the potential for gaming by interested parties. Thus, all involved parties must understand the establishment standard to defend their interests.

A. *Abuse of the Establishment Test as an Alternative Route to COMI Relief*

There has been much debate over the potential for abuse of the recognition process, most often in the context of forum shopping.¹⁶ Generally, such discussion focuses on the potential for misapplication of the COMI standard, often ignoring the lower establishment test. This is because of the broad swath of entitlements automatically granted to a petitioner upon recognition of a foreign main proceeding, particularly the U.S. bankruptcy court’s automatic stay.¹⁷

But meeting the establishment test gives a foreign representative access to similar relief without meeting the lofty COMI standard.¹⁸ The two main differences in available relief are that upon recognition of a foreign nonmain proceeding (1) relief is not provided automatically, but on a discretionary basis;¹⁹ and (2) relief is limited to assets in the foreign proceeding’s jurisdiction.²⁰ Yet these limitations may not be as restrictive as one might think.

15. 11 U.S.C. §§ 1506, 1517 (2006); In re *Bear Stearns*, 374 B.R. at 132–33.

16. See, e.g., Lynn M. LoPucki, *Universalism Unravels*, 79 AM. BANKR. L.J. 143, 143 (2005); Samuel L. Bufford, *Global Venue Controls Are Coming: A Reply to Professor LoPucki*, 79 AM. BANK. L.J. 105, 105–06 (2005) (discussing the negative effects of forum shopping that would result from an indeterminate recognition process).

17. 11 U.S.C. §§ 1520–21 (2006).

18. *Id.* § 1521.

19. *Id.*

20. *Id.*

First, for a foreign representative who wishes to avoid filing a proceeding in the debtor's actual COMI, the discretionary basis for granting relief in a foreign nonmain proceeding may be more attractive than attempting to convince a judge that another jurisdiction is the debtor's COMI. A foreign representative may have more weapons in his arsenal when requesting discretionary relief than in a COMI determination. While the recognition process itself is a dry, procedural mechanism, the decision to grant Chapter 15 relief is a subjective question revolving around the vague concept of comity.²¹ Also, the request for discretionary relief may come with the foreign court's stamp of approval and the absence of any objection (or any conflicting evidence whatsoever) from other parties.²² Indeed, the statute even directs the court to cooperate with courts of other jurisdictions.²³ Additionally, the U.S. bankruptcy court would likely grant an interim stay during recognition proceedings.²⁴ Thus, the foreign representative need only request an extension of the interim stay upon recognition as a foreign nonmain proceeding.

Second, although relief is limited to assets within the jurisdiction of the foreign nonmain proceedings, debtors can (and do) move assets between jurisdictions before bankruptcy proceedings.²⁵ By moving key assets into the jurisdiction of the foreign nonmain proceeding, a debtor may circumvent the limitation on asset location. While a judge may deny relief if the transfer of assets was suspicious, a clever attorney might find a way to legitimize the transfer with only minimal advance planning.

One curious issue that arises is that a U.S. court must recognize a qualifying foreign nonmain proceeding whether or not a foreign main proceeding or plenary U.S. proceeding ever exists.²⁶ It is theoretically possible for a debtor to have only one foreign nonmain proceeding and a Chapter 15 proceeding in the winding up of its business.²⁷ Thus, if creditors are unable to file an involuntary plenary proceeding, the debtor may forum shop for a favorable nonmain proceeding jurisdiction. Moreover, it may even be possible for a debtor to delay filing until it has created an establishment in a particular jurisdiction.

21. *Id.* §§ 1507(b), 1521, 1525 (2008); Brief of Amici Curiae at 3, *In re Bear Stearns*, 374 B.R. 122, available at http://chapter15.com/c15_adversary_dockets/20071128/Appeal_07_BRIEF.pdf.

22. Rarely has a creditor participated in the determination of a debtor's COMI, which would automatically grant such entitlements. It seems reasonable that creditors absent from recognition proceedings may fail to appear after recognition of a foreign nonmain proceeding.

23. 11 U.S.C. § 1501 (2006).

24. 11 U.S.C. § 1519 (2006).

25. This was evidenced by the actions of the defendants in the *Bear Stearns* cases. *In re Bear Stearns*, 374 B.R. 122. There are several reasons a debtor or foreign representative might take such action, not the least of which is in anticipation of a denial of COMI but recognition of a foreign nonmain proceeding.

26. The statute does not require that a foreign main proceeding be recognized before a foreign nonmain proceeding is recognized. *See generally* 11 U.S.C. §§ 1519–21 (2006).

27. Note that the E.U. Convention's recognition system, on which Chapter 15 was based, prohibits such a scenario except in limited circumstances. *See* Council Regulation 1346/2000, On Insolvency Proceedings, ch. 1 art. 3(4)(a)–(b), 2000 O.J. (L 160) 5 (EC). The EU Convention refers to foreign nonmain proceedings opened before a foreign main proceeding as "territorial proceedings." Territorial proceedings may only be opened in two situations: (1) if a main proceeding cannot be opened because of conditions laid down by the law of the member state within the territory of which the COMI of the debtor is situated. *Id.* art. 3(4)(a); or (2) where the opening of territorial proceedings is requested by a creditor who has its domicile, habitual residence, or registered office in the member state within the territory of which the establishment is situated, or whose claim arises within the territory of the member state. *Id.* art. 3(4)(b). The U.S. has no such safeguards.

Granted, there are legitimate situations where a debtor's COMI may not be a viable place to host an insolvency proceeding. Moreover, a debtor should be free to organize its business however it chooses. That said, a vague, malleable establishment test encourages post-hoc gaming by foreign representatives seeking alternative routes to U.S. bankruptcy relief.

B. Who Is Affected?

Clarification of the definition of establishment will provide consistency and predictability to the recognition process. Failure to adequately prepare for such a determination may come at a high cost to any interested parties. The consequences of recognition (or non-recognition) affect more than just the debtor.

Local creditors of the foreign main proceeding (or a U.S. plenary proceeding) should be wary of a foreign nonmain proceeding initiated by foreign creditors. There exists the possibility that the foreign proceeding's local creditors secure a better deal than other creditors by manipulating the nonmain proceeding's secured credit laws. Alternatively, those foreign creditors could make such a nuisance of themselves as to force the liquidator of the main proceedings into acceding to their demands.²⁸

By the same token, local creditors of a foreign nonmain proceeding hoping to collect from the debtor's estate will often want to ensure recognition in their local jurisdiction in order to reduce the expense of participating in a foreign insolvency proceeding. They also have the possibility of obtaining a "home field advantage" in their favorable local court.

The liquidator itself has a powerful stake in nonmain recognition. Indeed, without the discretionary powers of a U.S. bankruptcy court to assist the foreign proceeding, the liquidator may be unable to fulfill its duties. On the other hand, the liquidator may wish to avoid a foreign nonmain proceeding if it feels the proceeding would be more of a nuisance than a benefit.

Even a U.S. bankruptcy court must have a thorough understanding of establishment before attorneys begin proffering their own interpretations (which often coincidentally suit their clients' interests). Once the court decides upon its interpretation of the definition, it is required to grant recognition if the foreign representative provides sufficient proof to meet its burden.²⁹

As such, all interested parties must be prepared to petition for (or contest) recognition of foreign nonmain proceedings using the establishment definition. Thus, a more thorough analysis of the concept of establishment is required.

28. Harry Rajak, *The Inter-Relationship Between Main and Secondary Bankruptcies under the E.U. Regulation*, presentation at the Fourth Annual III Conference in New York (June 7, 2004), <http://www.iiiglobal.org/component/jdownloads/?task=view.download&cid=422> (last visited Apr. 14, 2009).

29. See 11. U.S.C. § 1517 (2006) ("...[A]n order recognizing a foreign proceeding *shall* be entered if (1) such foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502....") (emphasis added).

II. THE EVOLUTION OF CHAPTER 15

The term “establishment” and its definition originated in the E.U. Convention on Insolvency Proceedings, later incorporated into the E.U. Regulation.³⁰ Chapter 15’s definitional requirements for recognition are virtually identical to those of the E.U. Regulation. As such, U.S. courts have looked to European court interpretations of the E.U. Regulation for guidance in interpreting Chapter 15.³¹ The *Report on the Convention on Insolvency Proceedings* (“Virgos–Schmidt Report”) is the authoritative report on the E.U. Convention on Insolvency Proceedings.³² It is also helpful in interpreting the concept of establishment.

The UNCITRAL Model Law on Cross-Border Insolvency adopted the EU Convention’s definition of establishment with only negligible changes.³³ The language of the UNCITRAL Model Law is the same as that of Chapter 15 save for inconsequential changes made purely to ease American understanding of the text.³⁴ Thus, case law interpreting the UNCITRAL Model Law is recognized as being helpful to understanding Chapter 15, as is the UNCITRAL Guide to Enactment of the Model Law on Cross-Border Insolvency.³⁵

Chapter 15 is the incorporation of the UNCITRAL Model Law on Cross-Border Insolvency into Title 11 of the U.S. Bankruptcy Code.³⁶ Congress adopted

30. U.N. COMM’N ON INT’L TRADE, Guide to Enactment of the Model Law on Cross-Border Insolvency, ch. 1, art. 2, para. 75, available at <http://www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf> [hereinafter Guide to Enactment]. See Council Regulation 1346/2000, ch. 1, art. 2(h), 2000 O.J. (L 160) 5.

31. E.g., *In re Bear Stearns*, 374 B.R. 122, (citing *Eurofood*); Judith Elkin, Scott Everett, & Autumn Smith, *Chapter 15 of the U.S. Bankruptcy Code—New Procedures for Cross Border Insolvencies*, ANN. SURV. OF BANKR. LAW, 2006, Part I § 8 (“U.S. courts may also find guidance in the decisions of European courts applying the similar European COMI and establishment standards.”). Using European case law for interpreting recognition concepts is often difficult, as European courts often use shorthand references to statutes without discussing the facts supporting their holding. Bob Wessels, *International Jurisdiction to Open Insolvency Proceedings in Europe, in Particular Against (Groups of) Companies*, at 19, <http://www.iiiglobal.org/component/jdownloads/?task=view.download&cid=403> (last visited Apr. 14, 2009) (noting that when reading European case law it is important to note that there are several conventions which separately use and define the word “establishment”). See, e.g., Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 art. 5(5), Sep. 27, 1968, Court of Justice of the European Communities, available at <http://www.jus.uio.no/lm/brussels.jurisdiction.and.enforcement.of.judgments.in.civil.and.commercial.matters.convention.1968/doc.html>. It must be remembered that the concept of establishment from the EU Convention on Insolvency Proceedings (which was later adopted by Chapter 15) is an independent concept. Miguel Virgos & Etienne Schmidt, *Report on the Convention on Insolvency Proceedings*, EU Council Doc. 6500/96, DRS 8 (EFC) para. 70 (May 3, 1996), available at http://aei.pitt.edu/952/01/insolvency_report_schmidt_1988.pdf [hereinafter Virgos–Schmidt Report].

32. Hon. Samuel L. Bufford, *Center of Main Interests, International Insolvency Case Venue, and Equality of Arms: The Eurofood Decision of the European Court of Justice*, 27 NW. J. INT’L L. & BUS. 351, n.21 (2007) (citation omitted).

33. Guide to Enactment, *supra* note 30, para. 75.

34. House Report, *supra* note 12, at 170.

35. UNCITRAL compiles case law on UNCITRAL Texts (CLOUT), to which the U.S. subscribes persuasive authority in interpreting the UNCITRAL Model Law and consequently Chapter 15. *Id.* at 106–07. The House Report also references the Guide to Enactment, *supra* note 30, para. 75.

36. House Report, *supra* note 12, at 105–06.

Chapter 15 as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.³⁷ The legislative guide to Chapter 15 is the House Report.³⁸

III. WHY NOT “PLACE OF BUSINESS”?

Many scholars have treated the concept of establishment as a “place of business” test.³⁹ But “place of business” is not the definition of, nor the test for, establishment. While place of business may be a helpful rule of thumb in many cases, it would be misleading to suggest the terms are legal equivalents. The concept of “establishment,” as used in Chapter 15 and its progenitors, was intended to be unique.

Nowhere in the definition of establishment is “place of business” included. As stated above, the definition of establishment is “any place of operations where the debtor carries out a non-transitory economic activity.”⁴⁰ Congress, UNCITRAL, and EU members have used the phrase “place of business” in statutory language before.⁴¹ If they had intended “place of business” to be the definition of establishment they would have used such wording. They did not. To impute place of business into the definition would require evidence of the drafter’s intent.

The concept of establishment, as used in the recognition process, was intended to be unique. The concept of establishment as used in Chapter 15 originated in the EU Convention on Insolvency Proceedings, which was later incorporated into the EU Regulation.⁴² Previous European conventions had already used and defined the term “establishment.”⁴³ The drafters specifically rejected other concepts of establishment in favor of developing an “independent” concept.⁴⁴ The drafters explained:

[T]o import a concept [from another convention] involved the risk of conveying a possibly restrictive interpretation of the concept of establishment to the Convention on insolvency proceedings, which was precisely the opposite of what most of the working party intended. For this reason, they opted to give the Convention its own definition, which is contained in Article 2.⁴⁵

Thus, this unique concept, adopted by UNCITRAL and later Chapter 15, was intentionally created to avoid the influence of the prior case law and interpretations of other concepts of establishment.⁴⁶

37. *Id.* (citing BAPCPA, Pub. L. No. 109-8 (2005)).

38. *Id.*

39. *E.g.*, Daniel Glosband, *Bankruptcy Court Rejects Cayman Proceedings of Bear Stearns Hedge Funds*, 26 AM. BANKR. INST. J. 38, 63 (2007).

40. 11 U.S.C. §§ 1502(2), (5), 1517 (2006).

41. *E.g.*, S.516, 109th Cong. § 191 (2005), G.A. Res. 31/98, § 1, art. 2, para. 1, U.N. Doc. A/Res/31/98 (Dec. 15, 1976), Convention 80/934/EEC, art. 4, para. 2, 1980 O.J. (L266) (EC).

42. *See* Guide to Enactment, *supra* note 30, para. 75 (defining establishment); Council Regulation (EC) No. 1346/2000 of 29 May 2000, ch. 1, art. 2(h).

43. *E.g.*, Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, art. 5(5), Sep. 27, 1968, O.J. L/299/32.

44. Virgos-Schmidt Report, *supra* note 31, para. 70.

45. *Id.*

46. *Id.*

To claim place of business is a legal equivalent to the concept of establishment would bring with it all of the preconceptions and bias the EU Convention drafters specifically intended to avoid. “Place of business” is an “often used notion[] commonly found in international conventions.”⁴⁷ It has its own expansive set of precedents from many nations that the drafters most likely desired to avoid, just as they intended to avoid precedents of prior notions of “establishment.” Moreover, the various interpretations of “place of business” would likely encompass multiple concepts of “establishment,” not the singular concept the drafters intended. Thus, it is against the drafters’ intent to treat establishment as a legal equivalent of place of business.

One may argue that the specific intentions of the drafters of the EU Convention, the Model Law, and Chapter 15 are not necessarily the same. Nevertheless, each expressly adopted the language of their predecessor.⁴⁸ Moreover, there is no expression of an intent to change the meaning behind any such concept.

Had Congress intended to use the term “place of business,” they would have simply used that term and abandoned UNCITRAL’s peculiar definition of establishment. They did not. Congress did modify the definition of establishment to “comport with United States terminology.”⁴⁹ In this modification, they could have inserted “place of business” into the definition, such as by substituting “place of business” for “place of operations.” They did not. Moreover, Congress could have mentioned “place of business” in the legislative guide, the House Report. They did not.

Admittedly, “place of business” is helpful when trying to generally understand the concept of establishment. UNCITRAL’s Legislative Guide even states that an establishment is “essentially” a place of business.⁵⁰ But, that does not mean that the two are exact legal equivalents. It is more likely that UNCITRAL meant the two are very similar, though not exactly the same.⁵¹ (This parallels the distinction made by the EU Convention drafters between their concept of establishment and that of other conventions.) Equating the two would muddle the concept of establishment with “place of business” precedent which was decided without any consideration of its effects on this later-developed international insolvency regime.

This is especially apparent when considering the ambiguity as to which definition of “place of business” UNCITRAL would have been trying to refer had they been intending to denote legal equivalency. Not only do numerous U.N. member nations use varying versions of the concept,⁵² but UNCITRAL itself uses more than one definition in other conventions and treaties.⁵³ Moreover, if

47. José Angelo Estrella Faria, *Online Contracting: Legal Certainty for Global Business—The New U.N. Convention on the Use of Electronic Communications In International Contracts*, 39 UCC L.J. 1 art. 2, § 3(B) (2006).

48. Guide to Enactment, *supra* note 30, para. 75; House Report, *supra* note 12, at 170.

49. *Id.*

50. See UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW, Part II, para. 15, U.N. Sales No. E.05.V.10, (2005) (“Essentially, an establishment is a place of business.”) [hereinafter Legislative Guide].

51. See OXFORD ENGLISH DICTIONARY 402–03 (2d ed. 1989) (stating that the use of the word “essentially” to mean “in fact, really” is obsolete).

52. In addition to the various uses of “place of business” throughout U.S. criminal and civil law, other countries also have their own conceptions of the term. See, e.g., England’s Civil Procedure Rule 6.5(6).

53. See, e.g., Francesco G. Mazzotta, *Notes on the U.N. Convention on the Use of Electronic*

UNCITRAL were trying to adopt a “place of business” definition from one of those treaties, it could have expressly done so. For the sake of argument, even if UNCITRAL had intended to use one of its own concepts of “place of business,” that would still do very little to aid in interpreting “establishment.”⁵⁴

IV. ANALYSIS OF ESTABLISHMENT

A. *The Framework in Which the Establishment Test Is Invoked*

The court must conduct an independent determination as to whether a foreign proceeding meets the requirements of recognition.⁵⁵ Recognition is not to be given by a court simply as a “rubber stamp.”⁵⁶ Recognition is a rigid procedural mechanism which can only be met by satisfying the elements listed in 11 U.S.C. § 1517.⁵⁷ First, there must be a foreign proceeding as defined in 11 U.S.C. § 101(23).⁵⁸ Second, the foreign representative seeking recognition must be a person or body as defined in 11 U.S.C. § 101(24).⁵⁹ Third, the petition for recognition must meet the sufficiency requirements of 11 U.S.C. § 1515.⁶⁰ Fourth, the foreign proceeding must be recognized as either a “foreign main proceeding” or a “foreign nonmain proceeding” as defined in 11 U.S.C. §§ 1502(4) and (5), respectively.⁶¹ The inclusion of this final requirement is important, as it signifies that not all foreign proceedings are eligible for recognition. Not every foreign proceeding other than the main proceeding⁶² will qualify as a foreign nonmain proceeding.⁶³ Thus, foreign nonmain proceedings would more properly be considered to include only “qualified” foreign nonmain proceedings.⁶⁴

Communications in International Contracts and its Effects on the U.N. Convention on Contracts for the International Sale of Goods, 33 RUTGERS COMPUTER & TECH. L.J. 251, 267 (2007) (comparing the definitions of “place of business” in the United Nations Convention on the Use of Electronic Communications in International Contracts (the “ECC”) with those in the United Nations Convention on Contracts for the International Sale of Goods (the “CISG”)).

54. See generally UNITED NATIONS CONVENTION ON THE USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS, Art. 4(h), U.N. Sales No. E.07.V.2 (2007) (defining place of business as “any place where a party maintains a non-transitory establishment to pursue an economic activity other than the temporary provision of goods or services out of a specific location”; this is little more than a rearrangement of the definition we are already attempting to interpret).

55. In re *Bear Stearns*, 374 B.R. at 126.

56. *Id.*

57. See Westbrook, *supra* note 1, at 1024 (characterizing the moment when Section 1517 is satisfied); Daniel M. Glosband, *SPhinX Chapter 15 Opinion Misses the Mark*, 25 AM. BANKR. INST. J. 44, 45 (2007) (explaining Congress’ intent behind the concept of recognition).

58. See 11 U.S.C. § 1517(a) (2006) (listing stipulations for foreign-proceeding recognition).

59. *Id.*

60. *Id.*

61. See 11 U.S.C. § 1517(b)(1)–(2) (2006) (defining foreign main proceeding and non-proceeding); In re *Bear Stearns*, 374 B.R. at 117 (citing House Report, *supra* note 12, at 114) (“A petition under section 1515 must show that a proceeding is main or a qualifying non-main proceeding in order to obtain recognition under this section.”).

62. The requirement for a foreign proceeding to be considered “main” is that the debtor must have its COMI in the jurisdiction. 11 U.S.C. § 1502(4) (2006).

63. 11 U.S.C. §§ 1502(5) (2006).

64. House Report, *supra* note 12, at 114 (“A petition under section 1515 must show that a proceeding is main or a qualifying non-main proceeding in order to obtain recognition under this section.”). Contrast the position taken by Canadian law, where any foreign proceeding may be recognized. See generally Jacob

Foreign nonmain proceedings are defined as “...foreign proceeding[s], other than a foreign main proceeding, pending in a country where the debtor has an establishment.”⁶⁵ In effect, whether the debtor has an establishment in the jurisdiction of the foreign proceeding is the determining factor as to whether the foreign proceeding may be characterized as a foreign nonmain proceeding.

B. *Lessons From Direct Comparisons of the Three Texts*

When reading the three definitions together, it becomes apparent that there are slight discrepancies in the texts, despite the drafters’ stated intention to have each subsequent definition maintain the meaning of the prior definition. The three definitions compared are:

EU Convention:

“[A]ny place of operations where the debtor carries out a non-transitory economic activity with human means and goods.”

UNCITRAL Model Law:

“[A]ny place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.”

11 U.S.C. 1502(2):

“[A]ny place of operations where the debtor carries out a non-transitory economic activity ~~with human means and goods or services~~.”

The EU Convention contains the phrase “with human means and goods,” and the UNCITRAL Model Law adds “or services.” Though the definition of establishment adopted by 11 U.S.C. § 1502(2) removes both phrases, Congress claims that such variation was done merely to “comport with United States terminology,” which avoids unintended results.⁶⁶ For example, “with human means” might be incorrectly interpreted as excluding certain enterprises, such as those operating in a strictly electronic environment.⁶⁷

In Europe, the condition that the economic activity must be carried out “with human means” is interpreted to demonstrate a need for a minimum level of organization.⁶⁸ Because Congress intended to stay as close to the UNCITRAL text as possible, this minimum level of organization standard has not been abandoned by the U.S. definition.⁶⁹

What exactly this minimum level of organization requires is difficult to articulate, but is made clearer by example. It has been interpreted to preclude a lone

Ziegel, *Canada-United States Cross-Border Insolvency Relations and the UNCITRAL Model Law*, 32 *BROOK. J. INT’L L.* 1041, 1058 (2007) (discussing recognition of foreign insolvency orders).

65. 11 U.S.C. § 1502(5) (2006).

66. House Report, *supra* note 12, at 170; See Jay Lawrence Westbrook, *Multinational Enterprises in General Default: Chapter 15, the ALI Principles, and the EU Insolvency Regulation*, 76 *AM. BANKR. L.J.* 1, 19 (2002).

67. U.N. Comm’n on Int’l Trade Law, *Report of the Working Group on Insolvency Law on the Work of Its Twenty-First Session*, para. 113, U.N. Doc. A/CN.9/435, (Vienna, 19 February 1997), available at <http://daccessdds.un.org/doc/UNDOC/GEN/V97/209/05/PDF/V9720905.pdf?OpenElement>.

68. Virgos-Schmidt Report, *supra* note 31, para. 71; Berends, *supra* note 13, at 332.

69. See House Report, *supra* note 12, at 169–70.

individual trade representative or agent from satisfying the establishment requirement.⁷⁰ At the same time, a single shop in a jurisdiction is usually sufficient to constitute an establishment.⁷¹ Thus, a minimum level of organization is best considered as a factor in the evaluation of whether the debtor actually has a “place of operations.”

C. *Establishment as a Broad, Objective Standard*

The importance and function of the establishment definition is that it is the minimum requirement for recognition. Establishment distinguishes between those foreign proceedings that must be recognized by a court and those foreign proceedings that need not be recognized at all.⁷² Because establishment is such a determinative test, the application of the definition must be carefully applied.

One heavily debated question during the drafting of the EU Convention was whether the definition of establishment should be inclusive of jurisdictions where a debtor only has assets but not economic activity.⁷³ As a compromise, the drafters agreed that mere assets would be insufficient to constitute an establishment, but that in exchange the concept of establishment should be interpreted broadly.⁷⁴

The result is that the standard for establishment is higher than in general domestic insolvency proceedings.⁷⁵ In a U.S. domestic proceeding, a debtor may simply have property in the United States.⁷⁶ For recognition of a foreign nonmain proceeding, the debtor cannot merely own property in the jurisdiction of the foreign proceeding.⁷⁷ The debtor must also carry out a non-transitory economic activity.⁷⁸

The purpose of having such a broad establishment definition is best described in the Virgos–Schmidt Report:

Foreign economic operators conducting their economic activities through a local establishment should be subject to the same rules as national economic operators as long as they are both operating in the same market.

70. Paul L. C. Torremans, in 2 COLLIER INTERNATIONAL BUSINESS INSOLVENCY GUIDE P 15.06, 15.06[1][b] (Richard F. Broude, et. al. eds., 2008).

71. *Id.*

72. Berends, *supra* note 13, at 332; House Report, *supra* note 12, at 113.

73. Virgos–Schmidt Report, *supra* note 31, para. 70.

74. *Id.*; Contrast Ian Fletcher, *European Union Regulation On Insolvency Proceeding*, in 3 COLLIER INTERNATIONAL BUSINESS INSOLVENCY GUIDE P 43.03, 43.03[2] (Richard F. Broude, et. al. eds., 2008) (“jurisdiction under Article 3(2) cannot be founded on the mere presence of assets, however large or small their value might be”). Those scholars who point to a narrow drafting of the definition generally are referring to how its construction is littered with limiting elements. Yet when taken as a whole, the resulting concept of “establishment” is actually quite large. Also note that one of the reasons that an independent notion of establishment was created for the E. U. Convention on Insolvency Proceedings was because the adoption of other definitions of establishment used in EU law at the time ran the risk of imposing a “possibly restrictive interpretation...which was precisely the opposite of what most of the working party intended.” Virgos–Schmidt Report, *supra* note 31, para. 70.

75. Hon. Sid Brooks & Robert Lantz, *Transnational Insolvency 101: A Guide to Cross-Border Bankruptcy Proceedings*, 16 J. BANKR. L. & PRAC. 5 art. 1 (2007).

76. 11 U.S.C. § 109(a) (2006); 11 U.S.C. § 1528 (2006).

77. House Report, *supra* note 12, at 113; Guide to Enactment, *supra* note 30, paras. 73, 128, 184–87; Legislative Guide, *supra* note 50, at 42.

78. House Report, *supra* note 12, at n.107; Model Law art. 2(c), 28; Guide to Enactment, *supra* note 30, paras. 73, 75, 128, 184–87.

In this way, potential creditors concluding a contract with a local establishment will not have to worry about whether the company is a national or foreign one. Their information costs and legal risks in the event of insolvency of the debtor will be the same whether they conclude a contract with a national undertaking or a foreign undertaking with a local presence on that market.⁷⁹

This rationale also justifies why the courts apply the definition as an objective test.⁸⁰ By making the test an objective one, courts ensure that a determination of whether a debtor has an establishment in a particular jurisdiction is more likely to comport with the expectations of creditors. A subjective determination, which would focus on questions of comity, would tend to neglect the expectations of creditors in favor of the intent of the debtor. The drafters specifically intended to avoid such a subjective result.⁸¹

D. Application of the Chapter 15 Establishment Definition

When applying the definition of establishment under Chapter 15, there are four elements. The debtor must have 1) an economic activity, 2) that is non-transitory, 3) at a place of operations, and 4) carried out by the debtor.⁸²

1. An Economic Activity

The debtor is required to carry out an economic activity.⁸³ The concept of economic activity in relation to an establishment contemplates commercial, industrial, and professional activities, among others.⁸⁴ Similarly, professional activities, such as medical, legal, and accounting work, suffice as a type of economic activity contemplated by the EU definition. Thus, what exactly constitutes an economic activity is quite expansive, especially when considering the definition in a broad manner.

Moreover, there is no specification in the definition as to the degree of activity the debtor must perform at any given time. Nor is there a requirement of how many types of activities the debtor must carry out.⁸⁵ Put another way, whether the debtor's business is flourishing and successful is not contemplated by the definition. For example, if the debtor company were a storage company and had one single

79. See Guide to Enactment, *supra* note 30, para. 71. This rationale corresponds to two specific rationales expressed in Chapter 15: greater legal certainty for trade and investment; and fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested entities, including the debtor. 11 U.S.C. § 1501(a)(2)–(3).

80. Case C-341/04, Eurofood IFSC Ltd., (May 2, 2006) (requiring that criteria be “objective and ascertainable by third parties.”), available at <http://curia.eu.int/en/content/juris>.

81. Glosband, *supra* note 57, at 45.

82. 11 U.S.C. § 1502(2); see Virgos–Schmidt Report, *supra* note 31, para. 70.

83. 11 U.S.C. § 1502(2).

84. See Virgos–Schmidt Report, *supra* note 31, para. 71.

85. This point is emphasized by the phrasing “a...economic activity” instead of “economic activities.”

warehouse in a jurisdiction, housing only one item for a customer, the economic activity element would likely be satisfied.⁸⁶

Note that, these economic activities need not relate to the assets of the debtor.⁸⁷ Thus, whether the debtor uses its own equipment or that of a third party in conducting its economic activities will not effect the determination of establishment. But without the presence of sufficient debtor assets in the jurisdiction, it may not make sense to have a foreign proceeding in that jurisdiction at all.⁸⁸

2. Non-transitory

The economic activity of the debtor must be non-transitory.⁸⁹ This means that mere occasional operations will generally be insufficient to meet the requirements for a debtor establishment.⁹⁰ One explanation for the non-transitory requirement is that it requires a certain degree of stability for the debtor's activities to qualify as an establishment.⁹¹ Thus, carrying out "some" business transactions within a certain territory would not meet the standard, but if the debtor shows that these activities were conducted as part of a continuing course of activity, it may meet the non-transitory requirement.⁹²

As with any of the sub-elements of 11 U.S.C. § 1502(2), whether an economic activity is non-transitory should be viewed objectively, from the perspective of a third party.⁹³ The determination of non-transitory should not be based on the intent of the debtor. Whether the debtor had extensive plans to continue business in the jurisdiction is largely irrelevant. The only contradiction should be whether it would appear to a third party that such conduct was actually occurring in a non-transitory fashion. This protects the reasonable expectations of the debtor's creditors.⁹⁴

Moreover, there is no mention of a minimum time requirement. In fact, one specific purpose of the inclusion of the term non-transitory was to avoid any durational requirement.⁹⁵ As long as there is an objective showing of sufficient permanence, the debtor will meet this prong of the establishment test. One could imagine a debtor with a history of expansion who makes a sizeable investment in a branch office (*e.g.*, research, purchase of property, hiring of several employees, and entering into various contracts for the pursuit of business in that region). After only a few months of continuous operations at the branch, the debtor becomes insolvent. If an objective third party considered the debtor's activities in the region to be non-transitory, conducted in the course of continuous activity, it seems to follow that this branch would suffice as an establishment.

86. *Cf.* Torremans, *supra*, note 70, at P 15.06[1][b] (this example would still have to meet the non-transitory requirements of the statutory definition).

87. Virgos-Schmidt Report, *supra* note 31, para. 71.

88. *Id.*

89. 11 U.S.C. § 1502(2) (2006).

90. *Id.*; Berends, *supra* note 13, at 332.

91. Virgos-Schmidt Report, *supra* note 31, para. 71.

92. Fletcher, *supra*, note 74, at P 43.03[2].

93. Glosband, *supra* note 57, at 45; Virgos-Schmidt Report, *supra* note 31, para. 71.

94. *See* Virgos-Schmidt Report, *supra* note 31, para. 71.

95. *Id.*

Another possible scenario in terms of whether certain activities are “non-transitory” is that of an oil drilling operation. A company that obtains a lease to the mineral rights on a piece of foreign property may have that single operation in the country only for a particular duration. A temporary office for conducting a single transaction would generally not be sufficiently non-transitory to qualify as an establishment.⁹⁶ But if the debtor had a series of such operations in the region running consecutively, or if that individual operation were of sufficient duration (for example, 10 years), it is likely that the activity would be considered non-transitory.

3. Place of Operations

The location of a debtor’s economic activity must be a place of operations.⁹⁷ A place of operations may be shown by the presence of offices, employees, and directors in a jurisdiction.

The Virgos–Schmidt Report clarifies that a place of operations is a place from which the debtor’s economic activities are “exercised on the market (*i.e.* externally).”⁹⁸ This seems to exclude jurisdictions in which the debtor partakes in an economic activity in a merely passive role. For example, in the case of services, the debtor may have an office in a jurisdiction where it only receives accounting or legal services from other parties, but that office never participates in other economic activities.⁹⁹ The economic activities of such a debtor would not necessarily be exercised on the market externally,.

There may arise a situation where the economic activity engaged in by a debtor is the purchase and sale of goods, and the debtor is always the buyer in the jurisdiction in question (*i.e.*, the debtor is never the seller). For example, an importer who has an office in China where it regularly purchases goods and an office in the United Kingdom from which it sells them would most likely be considered to have a place of business in both China and the United Kingdom, if all other requirements are met. The economic activities of the debtor have a recognizable effect on each respective market. Thus, it seems better to simply interpret the external effects qualifier as one requiring the economic activities to merely have some noticeable effect on a market, as opposed to mere self-dealing.¹⁰⁰ In this way, the broad categories of commercial, industrial, and professional economic activity is qualified such that the debtor’s participation in those activities must affect others.

The Virgos–Schmidt report suggests a similar conclusion through its use of the phrase “the market.”¹⁰¹ Its use of the definite article “the” as opposed to the indefinite article “a” implies that there must be an effect on the immediate market

96. Torremans, *supra* note 70, at P 15.06[1][b].

97. 11 U.S.C. § 1502(2) (2006).

98. Virgos–Schmidt Report, *supra* note 31, para. 71; Berends, *supra* note 13, at 332.

99. See, e.g., Appellants’ Opening Brief at 31–32, *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325 (Bankr. S.D.N.Y. 2008) (Chapter 15 No. 07-12383 Civ. 07-8730) (pre-filing attorneys’ and pre-filing auditors’ work performed in the Cayman Islands was insufficient to establish the Cayman Islands as the fund’s place of operation).

100. In this sense, mere self-dealing would generally not include trading between a parent and subsidiary company if the two were separate legal entities. See *infra* Part IV.D.4.

101. Virgos–Schmidt Report, *supra* note 31, para. 71.

where the operations take place, as opposed to an effect on a market in any other jurisdiction.

This interpretation is further supported by the rationale behind the term “establishment”’: creditor expectations. The presence of the debtor’s creditors in a jurisdiction may strongly suggest an establishment.¹⁰²

The rationale behind the rule is that foreign economic operators conducting their economic activities through a local establishment should be subject to the same rules as national economic operators as long as they are both operating in the same market. In this way, potential creditors concluding a contract with a local establishment will not have to worry about whether the company is a national or foreign one. Their information costs and legal risks in the event of insolvency of the debtor will be the same whether they conclude a contract with a national undertaking or a foreign undertaking with a local presence on that market.¹⁰³

If a debtor has no effect on the market of the jurisdiction of the foreign proceeding, it is unlikely that the debtor would have any creditors in that jurisdiction.

But presume the debtor has a creditor in the jurisdiction of the foreign proceeding, but the transaction that created that creditor’s interest did not occur in that jurisdiction (*i.e.*, it occurred in a second jurisdiction’s market where the two participate). It is more likely that the debtor should expect the creditor to petition the courts of the second market for relief. After all, that market would be the location where any security interests of the creditor were created, and likely would be subject to the laws of that second jurisdiction.

An argument could be made for a more expansive understanding of establishment. This would encompass situations where the debtor, from one particular location, only conducted transactions with parties outside of that jurisdiction. Thus, the debtor would arguably not affect the immediate market, but would affect other markets. Consider a middle-man shipper with an office in Singapore that purchases goods in China and sells them to firms in the United States. Assume that the debtor has an external effect on foreign markets, but no effect on the local market. In this hypothetical, foreign creditors may reasonably expect that if an insolvency proceeding were instituted, assets located in Singapore may still be subject to an insolvency proceeding in Singapore.

Contrast this with the recent case law surrounding Chapter 15 recognition of Cayman Islands proceedings. In those cases, the debtor is often an “exempted” company under Cayman Islands law.¹⁰⁴ Such “exempted” debtors are prohibited from engaging in business in the Cayman Islands except in furtherance of their business carried on outside of the Cayman Islands.¹⁰⁵ Whether such debtors are capable of actually exercising their economic activities on the local market is questionable.¹⁰⁶ But note that, unlike the hypothetical Singapore firm, the Cayman

102. See *In re Bear Stearns*, 374 B.R. at 128 (listing various factors that could be relevant to a COMI determination).

103. Virgos-Schmidt Report, *supra* note 31, para. 71.

104. See, e.g., *In re Bear Stearns*, 374 B.R. at 131 (discussing treatment of exempted companies under Cayman Islands law).

105. *Id.* (citing Companies Law (2004 Revision) of the Cayman Islands § 193).

106. *Id.* at 131. See also Westbrook, *supra* note 1, at 1029–30 (noting the existence of “legal havens“

Island debtors in question did not even engage in the buying and selling activities from the Cayman Island.¹⁰⁷ Those activities were engaged in at other locations.¹⁰⁸ Thus, it is more appropriate to interpret a place of operations as a place where the debtor's economic activity is exercised externally upon others (no matter where those counterparties are located), as opposed to mere self-dealing.

4. Debtor Carries Out

The debtor must be the one to carry out its economic activities in the jurisdiction.¹⁰⁹ It is easy to state that the presence and activities of a debtor's employees should be considered as being "carried out" by the debtor. More complicated questions arise with corporate agents and subsidiaries of the debtor.

i. Corporate Agents

It is not exactly clear whether a debtor's commercial agent that conducts the administration and operations of the debtor through an agency agreement should constitute an "establishment." That is, depending on the relationship between the debtor and the contracted entity, would a court determine that the debtor was effectively carrying out the activity through an agent? This question is especially important in the context of securitizations, which commonly use a service company as an integral part of the structure.¹¹⁰ To date, most U.S. courts faced with this decision have accepted the activities of corporate agents as sufficing for activities of the debtor without much deliberation.

The obvious U.S. example is that of the *Bear Stearns* case. There, the debtor hedge funds' assets and investments were managed by a separate firm, Bear Stearns Asset Management ("BSAM"). Another separate firm, PFPC Inc., pursuant to an administrative services agreement, acted as administrator of the funds and conducted virtually all activities of the fund not performed by BSAM.¹¹¹ BSAM and PFPC Inc. were located in the United States, while the debtor was located in the Cayman Islands. The U.S. bankruptcy court stated that the facts of the case establish that the debtor's COMI was in the United States, even though the debtor did not present any evidence that it carried out any activities there itself.¹¹² This suggests that were BSAM and PFPC Inc. located in a third country and not the United States, the debtor's COMI would be in that third country. Thus, it appears that the actions and location of a debtor's agent may be sufficient grounds for recognition.¹¹³

where companies incorporate themselves but where the bankruptcy laws are uncertain).

107. In re *Bear Stearns*, 374 B.R. at 124-25.

108. *Id.*

109. 11 U.S.C. § 1502(2) (2006).

110. City of London Law Society, *Review of Regulation on Insolvency Proceedings (NO 1346/2000) ("The Regulation")*: *Comments of the Financial Law Committee of the City of London Law Society*, para. 5.1.2 (June 15, 2004), available at http://www.citysolicitors.org.uk/_word/fininsolreg.pdf.

111. In re *Bear Stearns*, 374 B.R. at 124.

112. *Id.* at 129. This invites the question as to whether a debtor can actually outsource its COMI and what the ramifications of that may be. Unfortunately, this question is beyond the scope of this article.

113. In *Bear Stearns*, the court did not grant recognition because the foreign representatives were seeking recognition of a proceeding in the Cayman Islands, not the United States. *Id.* at 130.

In his opinion, Judge Lifland cites another case which granted recognition on similar facts.¹¹⁴ In *Amerindo Internet Growth Fund Limited*, a fund similar to that in *Bear Stearns* had contractual arrangements with an investment manager and an administrator to conduct all of the fund's business. Yet unlike in *Bear Stearns*, both Amerindo's investment manager and administrator were also located in the Cayman Islands.¹¹⁵ The court in *Amerindo* granted recognition to the proceeding in the Cayman Islands, stating the debtor met the requirements of 11 U.S.C. § 1517, but without elaborating.¹¹⁶ It seems clear that the economic activities of the debtor's agents were attributed to the debtor to justify recognition.

In dicta, Judge Lifland characterized the contractual arrangements between the debtor in that case and its agents as "business" commenced by the debtor.¹¹⁷ Note that Judge Lifland did not specify whether the actions of the corporate agent were economic activities carried out by the debtor, or whether the actual contract for services itself was sufficient economic activity carried out by the debtor. That said, the latter seems unlikely. First, the corporate agent is not acting as the agent of the debtor in the contract. Thus, there would be neither assumption of the agent's economic activity nor assumption of the agent's place of business for the purposes of engaging in the contract. Second, even if the debtor did have an office in the jurisdiction, a mere agreement to enter into a single contract would probably not be considered non-transitory economic activity. By the time the contract was considered non-transitory, the agent would presumably already be acting on behalf of the debtor, thus rendering moot the status of the contract as non-transitory economic activity.

ii. Subsidiaries

Another recent issue in Europe is the effect of the legal relationship between a debtor and other companies it claims carried out economic activities on its behalf.¹¹⁸ Such a concern may be particularly important when considering whether a parent company may treat affiliates or subsidiaries as their establishment. According to many scholars, the key consideration is whether the affiliate or subsidiary is separately incorporated from the parent company.¹¹⁹ They argue that if the subsidiary or affiliate has a separate legal personality from the parent, then the subsidiary cannot be seen as an establishment of the parent company.¹²⁰ Many European scholars agree with this assessment.¹²¹ Furthermore, the legislative history

114. *Id.* at 131 (citing Verified Petition for Recognition of Foreign Main Proceedings Pursuant to Sections 1515 and 1517 of the Bankruptcy Code and Related Relief, *In re Amerindo Internet Growth Fund Ltd.*, No. 07-10327 (Bankr. S.D.N.Y., Feb. 9, 2007), available at http://chapter15.com/c15_files/20070314/0002ForeignProceedingPetition.pdf).

115. *Id.*

116. Order Granting Recognition of Foreign Main Proceeding Pursuant to Sections 1515 and 1517 of the Bankruptcy Code and Related Relief at 3, *In re Amerindo*, No. 07-10327 (Bankr. S.D.N.Y., Mar. 6, 2007), available at http://chapter15.com/c15_files/20070521/0007ORDgrantingrecog.pdf.

117. *In re Bear Stearns*, 374 B.R. at 131 (citation omitted).

118. Irit Mevorach, *The Road to a Suitable and Comprehensive Global Approach to Insolvencies Within Multinational Corporate Groups*, 15 J. BANKR. L. & PRAC. 5 art. 1 (2006).

119. Hon. Samuel L. Bufford, *Center of Main Interests, International Insolvency Case Venue, and Equality of Arms: the Eurofood Decision of the European Court of Justice*, 27 NW. J. INT'L L. & BUS. 351, 356-57, n.41 (2007).

120. Torremans, *supra* note 70, at P 15.06[1][b].

121. See Laurent Gaillot, *The interpretation by French courts of the EU COMI notion: an EU*

of the EU Convention definition mentions that one of the purposes for creating a concept of establishment distinct from other European definitions of establishment was specifically to avoid having subsidiaries treated as establishments of their parents.¹²²

Recent European case law has affirmed the view of keeping subsidiaries separate from their parent companies.¹²³ For example, in *Telia v. Hillcourt*, a petitioner for insolvency proceedings claimed that the UK subsidiary company of a Swedish debtor parent should constitute an establishment in order to initiate proceedings within the UK.¹²⁴ The English High Court refused the petition, holding that the mere presence of a subsidiary was in itself insufficient to constitute an establishment.¹²⁵

On the other hand, several arguments have been raised in favor of allowing subsidiaries to be recognized as establishments of their parent companies. First, the definition of establishment does not mention what legal relationship the establishment may have with the debtor.¹²⁶ For such a rigid procedural mechanism, to add in considerations of legal status not expressed by the statute would not comport with the mechanical approach suggested by the courts and other scholars. Second, one should consider the expectations of creditors, many of whom will legitimately believe that, although they are dealing with a separate legal entity, the subsidiary brings to bear the economic resources of the parent company. For example, in the *Bear Stearns* case, the individual investors in the debtor hedge funds perceived the funds to be investment vehicles of BSAM, not arms-length third parties beyond the scope of the Bear Stearns Companies.¹²⁷ Finally, the practical realities of prohibiting the recognition of subsidiaries as establishments of a parent company, and instead having only separate foreign main proceedings for each separate legal entity, can be defeating to the multinational insolvency process.¹²⁸ To illustrate this point, a single group of companies operating solely in Europe could have twenty-seven different foreign main proceedings, speaking twenty-seven

perspective, INSOLVENCY, RESTRUCTURING AND CREDITORS' RTS. SEC. NEWSL. (Int'l Bar Ass'n, London, Eng.), Sept. 2006, at 38–39, (citing Urbain-Parléani, *La faillite des sociétés*, REV. SOCIÉTÉS 101 (2004); Menjucq, note under the Versailles Daisytek Decision, JCP Ed G (2004), at 92; Par. 1.2.2 of the note issued by the French Ministry of Justice relating to the coming into force of the Regulation, Official Journal (July 30, 2003) at 12939) available at http://www.iiiglobal.org/country/european_union/060927Gaillot.pdf.

122. See Wessels, *supra* note 31, at 19 (citations omitted).

123. See *Telia v. Hillcourt*, [2003] B.C.C. 856, 856, 2002 WL 31523284 (holding that a UK subsidiary was not an establishment of the Swedish parent company); Case C-341/04, *Bondi v. Bank of Am. (Eurofood IFSC Ltd.)*, 2006 E.C.R. I-3813 (discussing the French Tribunal's ruling in *Emtec*, which allowed secondary proceedings to be opened against a subsidiary in the Member State where that subsidiary had its registered seat, thereby treating the subsidiary as a separate legal entity) available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004J0341:EN:HTML>.

124. *Telia v. Hillcourt*, [2003] B.C.C. at 856.

125. *Id.* at 856–57.

126. See Gaillot, *supra* note 121, at 41 (citing M. Menjucq, *Les Groupes De Sociétés*, in L'EFFET INTERNATIONAL DE LA FAILLITE 173 (2004)).

127. Gabriel Moss, Q.C., *Group Insolvency-Choice of Forum and Law: The European Experience Under the Influence of English Pragmatism*, 32 BROOK. J. INT'L L. 1005, 1008–09 (2007).

128. *Id.*

different languages, in twenty-seven different legal systems, answering to twenty-seven different courts.¹²⁹

As a general rule, it is best to maintain the distinction between separate legal entities such that a subsidiary will not suffice as the establishment of its parent. Nevertheless, there may be situations where a subsidiary is fully controlled by the parent, and thus for all intents and purposes *is* the parent. This would be a situation where a court might invoke the 11 U.S.C. § 1506 power to refuse recognition on public policy grounds in order to “pierce the corporate veil” under the doctrine of substantive consolidation.¹³⁰ In this way, there would be uniformity throughout the nations adopting the UNCITRAL Model Law in their definitions of establishment, but the United States would be able to stay true to its treatment of various corporate structures.

E. Establishment in the Context of Assets

The plain language of the statute makes no mention of a requirement of assets in the jurisdiction in the definition of establishment.¹³¹ While the location of debtor assets is relevant to the determination of whether the debtor has an establishment in a certain jurisdiction, the mere presence of assets does not constitute an establishment.¹³² Likewise, the mere absence of debtor assets should not bar the court from determining the presence of an establishment.

At first blush, it would seem bizarre to open an insolvency proceeding in a jurisdiction where the debtor has no assets. This is especially so because the relief available to a foreign nonmain proceeding is limited to the assets of the jurisdiction where the proceeding is taking place.¹³³ Nevertheless, there exist scenarios where a U.S. bankruptcy court may want to recognize such a foreign proceeding. For example, a foreign representative might seek relief from the U.S. courts to recover assets that belong in the jurisdiction of the foreign nonmain proceeding, but were removed due to fraud or other reasons. In fact, the foreign representative may actually require recognition from a U.S. bankruptcy court in order to recover such assets.

As such, whether or not a debtor possesses assets in the jurisdiction of the foreign proceeding should be a consideration, but not the determining factor as to whether the debtor has an establishment there.¹³⁴ If the court feels that there are other reasons to deny recognition of the foreign proceeding, outside of the scope of the determination of whether the debtor has an establishment or not, then the court or an objecting party may still resort to a separate legal concept to argue that recognition would be against the public policy of the United States.¹³⁵

129. *Id.*

130. George Bazinas, *E.U. Regulation on Insolvency Proceedings: the First Year and the Outlook from Greece*, para. B(13) (2003), (on file with author).

131. 11 U.S.C. § 1502(2) (2006).

132. *Cf.* Virgos-Schmidt Report, *supra* note 31 (“In the Convention, the mere presence of assets (*e.g.* the presence of a bank account) does not enable local territorial proceedings to be opened.”).

133. *Id.*; 11 U.S.C. § 1521 (2006).

134. Virgos-Schmidt Report, *supra* note 31, para. 70.

135. 11 U.S.C. § 1506 (2006).

F. *The Reference Date for Determining Establishment*

Chapter 15 does not specify the reference date for when the establishment should be in existence. This arguably should be the same as it would for a consideration of COMI, since the determination of COMI would supersede any determination of an establishment.¹³⁶ Most scholars agree that the requirements for an establishment must be present at the time when the foreign proceeding is opened, and not necessarily at the time when the petition for recognition is filed.¹³⁷ This is because in many jurisdictions such as Europe, the court of the foreign proceeding will not have jurisdiction in the insolvency proceeding unless an establishment exists there.¹³⁸ In many jurisdictions such as the United States, various procedural mechanisms (*e.g.*, stays, appointment of liquidators/trustees, among others) are invoked upon opening the proceeding which dramatically change the nature of the company, making reference dates past the date of opening the foreign proceeding inappropriate.

Additionally, the determination should not be made in reference to a date before the opening of the foreign proceeding. This position was reiterated by the English court in *Shierson v. Vlieland-Boddy*.¹³⁹ On one hand, Lord Justice Chadwick held in *Shierson* that it would be inconsistent with the purpose of the statute to hold that a debtor's COMI was fixed by some past event.¹⁴⁰ This is because it is for the debtor to choose where it carries on its activities.¹⁴¹ That same freedom should be available for a debtor's establishments. In such transitions, though, a debtor should ensure that its economic activities will be considered non-transitory despite the shift.¹⁴²

On the other hand, Lord Justice Chadwick also noted that there may be "circumstances where there are grounds for suspicion" that such a reference date is improper.¹⁴³ For example, a debtor may deliberately transfer assets and activities in order to alter the insolvency rules which will apply to pre-existing debts.¹⁴⁴ In such situations, "the court should look critically at the facts which are said to give rise to a change" and may alter the reference date appropriately.¹⁴⁵ The key to Lord Justice Chadwick's point is whether the affected debts are pre-existing at the time the debtor makes such transfers. After all, it is the debtor's prerogative where it incurs its debts in the first place. Only when the shift of assets would affect the laws applicable to obligations already existing at that time should the court be suspicious.

136. See 11 U.S.C. § 1502(4)–(5) (2006) (defining foreign main and nonmain proceedings based on where debtor has the center of its main interests).

137. See, *e.g.*, Torremans, *supra* note 70, at P 15.06(1)(b) (citations omitted) (discussing why the requirements for an establishment should be present at the time when the secondary insolvency is opened); See Wessels, *supra* note 31, at 12 (stating that the center must be present at the moment the court opens the proceedings).

138. Torremans, *supra* note 70, at P 15.06(1)(b).

139. *Shierson v. Vlieland-Boddy*, [2005] EWCA (Civ) 974, [41] (UK).

140. *Id.*

141. *Id.* [43].

142. *Id.* [55](3).

143. *Id.* [46].

144. *Id.*

145. *Shierson*, EWCA (Civ) 974 at [46].

If there are sufficient grounds to suggest a reference date is improper, a U.S. bankruptcy court should be able to adjust the reference date to ignore certain transactions of the debtor.¹⁴⁶ Consider the prior example, where an insolvent debtor abandons an establishment (or transfers it to a third party) for the sole purpose of changing which jurisdiction's bankruptcy laws will apply to the debtor's existing debts.¹⁴⁷ Even if such transactions occurred with the consent of all known creditors of that jurisdiction, such activities by the debtor should be viewed by a judge with suspicion for the protection of unknown creditors.

V. AUTOMATIC RECOGNITION OF REGISTERED OFFICE AS ESTABLISHMENT

Some commentators have suggested that it should always be possible to open secondary proceedings in the jurisdiction of the debtor's registered office.¹⁴⁸ This position should not be adopted by U.S. bankruptcy courts. The mere maintenance of a company in good standing in the jurisdiction of its registered office is not sufficient to meet the definition of establishment. No presumption (as with COMI) exists in reference to establishment, and to create an "automatic" grant of such recognition would ignore the plain text of the statute. In fact, the presence of a debtor's registered office has no bearing on the determination of establishment.

One might (wrongly) suggest that merely incorporating and maintaining the registration of a company in good standing would constitute sufficient non-transitory economic activity. If the debtor actually conducted non-transitory economic activity beyond such corporate formalities, there would be little doubt it had an establishment. A debtor might offer that, in terms of economic activities, it had 1) hired attorneys to handle the registration; 2) paid taxes; 3) hired accountants for audits; and 4) made required filings with the government. In addition, the debtor would point to its assets and anyone related to the company who lived in the jurisdiction to evince a place of business.

In fact, this is exactly what the foreign representatives asserted in the *Bear Stearns* matter.¹⁴⁹ The court clarified that these corporate formalities do not constitute the "pertinent" economic activities required to meet the definition of establishment. One way to view this is that none of the activities of the debtor in the Cayman Islands had an effect on the Cayman Islands market. For that matter, none of the activities of the debtor in the Cayman Islands had an effect on any market.¹⁵⁰

An alternative approach is made by proposing the registered office be considered an "establishment" without the need for meeting the definitional

146. *See id.* at [55](5) (suggesting a court should, when a debtor's change of COMI is suspicious, ensure that the change was "based on substance and not an illusion; and that the change has the necessary element of permanence").

147. *Cf.* Thomas Felsberg, *in* 2 COLLIER INTERNATIONAL BUSINESS INSOLVENCY GUIDE P 16.03 (Richard F. Broude, et. al. eds., 2008) (citing Article 97 of Brazilian Law 11,101).

148. City of London Law Society, *supra* note 110, para. 2.1.3.

149. Appellant's Opening Brief, *In re Bear Stearns*, para. VI, B, 2.

150. Recall that all activities of the debtor were handled by an investment manager and third-party administrator, both located in the United States. Thus, all of their activities were done in the United States, not the Cayman Islands. Contrast *Amerindo*, where the investment manager and administrator were located in the Cayman Islands with the debtor, *supra* note 4, at 131.

requirements of the term.¹⁵¹ But this is simply another example of the fallacies inherent in the assertion that the statutory definition of “establishment” is extraneous. Moreover, it would be imputing language into the statute which is not there, nor in the legislative history. The only way to bypass the definition in 11 U.S.C. § 1502(2) and still have a finding of an “establishment” would be if there were a presumption for such a finding.

Although 11 U.S.C. § 1516(c) provides a rebuttable statutory presumption that a debtor’s COMI exists where the debtor is registered, there is nothing in the statutory language referencing a presumption of establishment. One may argue that the COMI standard is a higher threshold than the establishment standard; that COMI is a definitional requirement inclusive of the term establishment. Thus, just as the registered office triggers a presumption of the debtor’s COMI, so to must the registered office trigger a presumption of a debtor establishment. But the correlation simply is not there—nowhere in the language of the statute is a COMI correlated with an establishment. Moreover, nowhere is there evidence that the presumption would be transferrable to a separate concept.

In the end, no such statutory presumption exists for recognition of foreign nonmain proceedings.¹⁵² Moreover, there is no mention of such a presumption of establishment in the legislative history of Chapter 15 or its predecessors. If anything, there is evidence that the drafters would *not* have wanted such a presumption. The drafters considered allowing another presumption to apply to both standards, but rejected the idea.¹⁵³

Furthermore, an establishment presumption would not serve the accepted purpose of the COMI presumption to “permit and encourage fast action in cases where speed may be essential, while leaving the debtor’s true ‘center’ open to dispute in cases where the facts are more doubtful.”¹⁵⁴ The rationale is moot in regards to foreign nonmain proceedings. If a foreign main proceeding has already been recognized in another jurisdiction, or if a U.S. plenary proceeding is filed, there is no plausible reason for an “emergency” foreign nonmain proceeding. The foreign main proceeding or U.S. proceeding would have control over the debtor’s entire estate, including assets in the jurisdiction of the registered office. Even the process of actually removing the company from the register of its state of incorporation does not need recognition from a U.S. court. If neither the debtor’s COMI nor an actual establishment exists in the jurisdiction of the debtor’s incorporation, there is no reason to recognize a proceeding there.

Thus, it seems clear that when petitioning for recognition of a foreign nonmain proceeding, as opposed to a foreign main proceeding, the foreign representative must

151. City of London Law Society, *supra* note 110, para. 5.1.2.

152. Brief of Amici Curiae at 27, *In re Bear Stearns High-Grade Credit Strategies Master Fund, Ltd.*, 374 B.R. 122 (Bankr. S.D.N.Y. 2007), *available at* http://chapter15.com/c15_adversary_dockets/20071128/Appeal_07_BRIEF.pdf.

153. The UNCITRAL drafters listed instances when there was discussion over whether to include foreign nonmain proceedings in the scope of another presumption. U.N. Comm’n on Int’l Trade Law, *Report of the United Nations Commission on International Trade Law on the work of its thirtieth session*, paras. 103–05, U.N. GAOR5Z Session Supp. No. 17, U.N. Doc. A/52/17 (May 30, 1997) *available at* <http://daccessdds.un.org/doc/UNDOC/GEN/V97/251/88/PDF/V9725188.pdf?OpenElement>. 11 U.S.C. § 1516(c) was not one of them.

154. Westbrook, *supra* note 1, at 1033.

start from scratch in its burden of proof and will receive no presumptive assistance¹⁵⁵ from having a registered office in that jurisdiction.¹⁵⁶ If a foreign proceeding does not meet the definition of establishment proscribed by Chapter 15, it must not be recognized at all.¹⁵⁷

VI. CONCLUSION

This paper has shown the need for a greater understanding of the establishment test. The establishment standard has the same potential for abuse as the COMI standard. Merely equating the establishment standard to a place of business test, while helpful in obvious cases, does not provide sufficient guidance in difficult cases. As such, all of the various participants involved must be capable of fully articulating how the facts support or negate the existence of an establishment in the jurisdiction of the foreign proceeding.

The establishment definition of Chapter 15 and its analogues, that of the UNCITRAL Model Law and the EU Convention, though possessing minor differences to aid in local application, are intended to be the same. This promotes consistency and predictability in international insolvency proceedings.

Establishment is intended to be a broad, objective standard that does not contemplate a debtor's assets or registered office location. It should be determined from the date of filing to open the foreign proceeding, and not from the date of the petition for recognition. As scholars suggest, there will be a number of cases in the near future testing the boundaries of what exactly constitutes an establishment.¹⁵⁸ Those cases will help guide all participating countries in determining exactly how the various elements of the establishment definition will be applied.

It seems certain that courts will take a closer look at the relationship between the debtor and its agents. A court's willingness to consider outsourced activity as being carried out by a debtor means that outsourcing business to countries without strong laws to protect creditors seems to provide a method of asset protection and forum shopping. Furthermore, though the UNCITRAL Model Law and the EU Convention appear adamantly opposed to considering subsidiaries as establishments of their parent companies, it remains to be seen whether U.S. courts will pierce the corporate veil when U.S. policy would deem such action appropriate in a domestic context.

Already, U.S. courts are beginning to probe deeper into the facts and circumstances surrounding the questions of COMI and establishment.¹⁵⁹ This is a

155. Though a court may consider a registered office to be circumstantial evidence of an establishment when looking at all of the facts and circumstances of the case.

156. The foreign representative has the burden of proof in the determination of an establishment, and has no opportunity to shift the burden of proof as in 11 U.S.C. § 1516(c). See House Report, *supra* note 12, at 112–13; *In re SPhinX, Ltd.*, 351 B.R. at 117; *In re Bear Stearns*, 374 B.R. at 128.

157. House Report, *supra* note 12, at 113; Berends, *supra* note 13, at 332.

158. See, e.g., Fletcher, *supra* note 74, at P 43.03[2] (predicting that national courts will frequently explore the meaning of “establishment”).

159. Order re Upcoming Hearing on Motion for Recognition at 2, *In re Basis Yield Alpha Fund* (Master), Chapter 15 Case No. 07-12762, at 2 (Bankr. S.D.N.Y., Sept. 12, 2007), (on file with author) (ordering joint provisional liquidators to introduce evidence related to 21 fact questions, whether another party objects or not).

step in the right direction. Scholars have known for some time that the concepts of COMI and establishment are fact intensive inquiries.¹⁶⁰

Other courts and legislatures throughout the world also continually shape our collective understanding of the concept of establishment.¹⁶¹ Inconsistencies among states adopting the UNCITRAL Model Law should be expected. The resulting conflicting case law will be persuasive authority for U.S. courts.¹⁶² How U.S. courts reconcile these varying approaches will likely set the precedent other nations will follow in applying the UNCITRAL Model Law.

160. See, e.g., Carl Felsenfeld et al., INTERNATIONAL INSOLVENCY 5–11 (Juris Publishing 2000); Wessels, *supra* note 31, at 11.

161. See, e.g., South African Law Commission, Project 63, *Interim Report on Review of the Law of Insolvency: The Enactment in South Africa of UNCITRAL's Model Law on Cross Border Insolvency*, para. 4.8 (1999) (stating that the word “establishment” is “clearly intended to limit the recognition of such proceedings to countries with whom the debtor has a *significant* connection”) (emphasis added).

162. UNCITRAL compiles Case Law on UNCITRAL Texts (CLOUT) to which the United States subscribes as persuasive authority in interpreting the UNCITRAL Model Law and consequently Chapter 15.