

11-4376-cv  
Morning Mist Holdings Ltd. v. Kryz

1 **UNITED STATES COURT OF APPEALS**

2  
3 **FOR THE SECOND CIRCUIT**

4  
5 August Term, 2012

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7  
8 (Argued: November 19, 2012 Decided: April 16, 2013)

9  
10 Docket No. 11-4376

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14 In the Matter of: Fairfield Sentry Limited,

15  
16 Debtor,

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18 MORNING MIST HOLDINGS LIMITED, MIGUEL LOMELI,

19  
20 Appellants,

21  
22 - v.-

23  
24 KENNETH KRYS, CHRISTOPHER STRIDE,

25  
26 Appellees.

27  
28 - - - - -x

29  
30 Before: JACOBS, Chief Judge, WINTER, Circuit  
31 Judge, SWAIN, District Judge.\*

32  
33 Morning Mist Holdings Limited and Miguel Lomeli appeal  
34 from the judgment of the United States District Court for  
35 the Southern District of New York (Daniels, J.), affirming

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\* The Honorable Laura Taylor Swain, United States District Judge for the Southern District of New York, sitting by designation.

1 the order of the United States Bankruptcy Court for the  
2 Southern District of New York (Lifland, J.), which  
3 determined that the debtor in this case, Fairfield Sentry  
4 Limited, had its center of main interests in the British  
5 Virgin Islands, and therefore recognized Fairfield Sentry's  
6 liquidation in the British Virgin Islands as a "foreign main  
7 proceeding" under 11 U.S.C. § 1517. We affirm.

8 ROBERT A. WALLNER, Milberg LLP,  
9 New York, New York (Kent A.  
10 Bronson, on the brief; Stephen  
11 A. Weiss, Seeger Weiss LLP, New  
12 York, New York, on the brief),  
13 for Appellants.

14  
15 DAVID J. MOLTON, Brown Rudnick  
16 LLP, New York, New York (Daniel  
17 J. Saval, May Orenstein, Kerry  
18 L. Quinn, on the brief), for  
19 Appellees.

20  
21 DENNIS JACOBS, Chief Judge:

22  
23 The question presented is where the debtor in this  
24 bankruptcy proceeding had its "center of main interests"  
25 within the meaning of Chapter 15 of the Bankruptcy Code  
26 (enacted as part of the Bankruptcy Abuse Prevention and  
27 Consumer Protection Act of 2005). The answer determines  
28 whether the pending foreign bankruptcy proceeding is a  
29 "foreign main proceeding," in which event U.S. proceedings  
30 against the debtor are stayed. Morning Mist Holdings

1 Limited and Miguel Lomeli (collectively, "Morning Mist")  
2 appeal from the judgment of the United States District Court  
3 for the Southern District of New York (Daniels, J.),  
4 affirming the order of the United States Bankruptcy Court  
5 for the Southern District of New York (Lifland, J.), which  
6 determined that the debtor, Fairfield Sentry Limited  
7 ("Sentry"), had its "center of main interests" in the  
8 British Virgin Islands ("BVI"), and therefore recognized  
9 Sentry's liquidation in the BVI as a "foreign main  
10 proceeding" under 11 U.S.C. § 1517. For the following  
11 reasons, we affirm.

12 To determine the proper "center of main interests"  
13 ("COMI," as the term is abbreviated by the parties and other  
14 courts), we consider the relevant time period for weighing  
15 the interests, and the principles and factors for  
16 determining which jurisdiction predominates. We conclude  
17 (as did the bankruptcy court and the district court) that  
18 the relevant time period is the time of the Chapter 15  
19 petition, subject to an inquiry into whether the process has  
20 been manipulated. The relevant principle (for which we  
21 consult foreign law, as directed by the statute) is that the  
22 COMI lies where the debtor conducts its regular business, so

1 that the place is ascertainable by third parties. The  
2 statute includes a presumption that the COMI is where the  
3 debtor's registered office is found. Among other factors  
4 that may be considered are the location of headquarters,  
5 decision-makers, assets, creditors, and the law applicable  
6 to most disputes.

7

8 **BACKGROUND**

9 Sentry was organized in 1990 as an International  
10 Business Company under the laws of the BVI. From 1990 until  
11 Bernard Madoff's arrest on December 11, 2008, Sentry was the  
12 largest of the "feeder funds" that invested with Bernard L.  
13 Madoff Investment Securities LLC ("BLMIS"). Roughly 95% of  
14 Sentry's assets were invested with BLMIS, totaling over \$7  
15 billion.

16 Pursuant to its Memorandum of Association, Sentry  
17 administered its business interests from the BVI, where its  
18 registered office, registered agent, registered secretary,  
19 and corporate documents, among other things, were located.  
20 Sentry's Board of Directors oversaw the management, with  
21 day-to-day operations handled by an investment manager,

1 Fairfield Greenwich Group ("FGG"), based in New York.<sup>2</sup>  
2 Sentry's three directors, Walter Noel, Jr., Jan Naess, and  
3 Peter Schmid, resided in New York, Oslo, and Geneva,  
4 respectively.

5 When Madoff was arrested, Sentry's two independent  
6 directors, Naess and Schmid, suspended all share  
7 redemptions. (Noel was recused from that meeting as the  
8 owner and principal of FGG, Sentry's investment manager.)  
9 Over the ensuing months, Naess and Schmid focused on winding  
10 down Sentry's business and preserving assets in anticipation  
11 of litigation and bankruptcy. From December 2008 to July  
12 2009 (when Sentry entered liquidation in the BVI), they  
13 participated in approximately 44 teleconference board  
14 meetings initiated by Sentry's registered agent in the BVI.  
15 During this time, Naess and Schmid advised Sentry's  
16 shareholders as to measures being taken in response to the  
17 Madoff scandal. That correspondence issued from Sentry's  
18 address in the BVI, as shown on the letterhead.

19 In February 2009, Naess and Schmid constituted  
20 themselves as a litigation committee with the authority to

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<sup>2</sup> Fairfield Greenwich (Bermuda) Ltd., a member company of FGG, served as Sentry's investment manager. We refer to those entities collectively as "FGG."

1 (among other things) consider, commence, and settle  
2 litigation to be taken by or against Sentry. Sentry would  
3 subsequently become engulfed in lawsuits.

4 In May 2009, Morning Mist, a Sentry shareholder, filed  
5 a derivative action in New York state court, claiming that  
6 Sentry's directors, management, and service providers  
7 breached duties to Sentry (the "derivative action").<sup>1</sup>

8 Back in the BVI, ten of Sentry's shareholders applied  
9 for the appointment of a liquidator. On July 21, 2009, the  
10 High Court of Justice of the Eastern Caribbean Supreme Court  
11 (the "BVI court") entered an order which commenced Sentry's  
12 liquidation proceedings under the Virgin Islands Insolvency  
13 Act of 2003. The order appointed Kenneth Kryz and  
14 Christopher Stride (from the BVI liquidation firm of Kryz  
15 and Associates) as liquidator,<sup>2</sup> and gave the liquidator  
16 "custody and control of all the assets of the Company."

17 On June 14, 2010, pursuant to an order of the BVI  
18 court, the liquidator petitioned the United States

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<sup>1</sup> Later that month, Sentry would file a direct lawsuit in New York state court against its investment manager, FGG, and FGG's affiliates.

<sup>2</sup> Stride later resigned and was replaced by Joanna Lau, who herself then resigned. Kryz is currently Sentry's sole liquidator and the appellee in this case (hereafter referred to as the "liquidator").

1 Bankruptcy Court in the Southern District of New York  
2 (Lifland, J.) for recognition of the BVI liquidation  
3 proceedings under Chapter 15 of the Bankruptcy Code (the  
4 "Chapter 15 petition").<sup>3</sup>

5 As of that date, Sentry's liquid assets consisted of  
6 approximately \$73 million in Ireland, \$22 million in the  
7 United Kingdom, and \$17 million in the BVI. Its other  
8 assets were claims and causes of action, including claims  
9 for approximately: \$6 billion in customer funds under the  
10 Securities Investor Protection Act; \$3 billion from Madoff  
11 customers who profited from redemptions in New York; and  
12 \$150 million in similar redemption claims in the BVI. Other  
13 proceedings were commenced in the Netherlands and Ireland.  
14 The litigations were undertaken under the supervision of the  
15 BVI court and with the assistance of the liquidator's  
16 BVI-based counsel.

17 On July 22, 2010, the bankruptcy court granted the  
18 liquidator's Chapter 15 recognition petition. In  
19 determining Sentry's COMI for purposes of Chapter 15, the  
20 bankruptcy court examined the period between December 2008,

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<sup>3</sup> Recognition of a foreign proceeding under Chapter 15 can have the effect of staying all other actions against the debtor in the United States, as explained in Part I below.

1 when Sentry stopped doing business, and June 2010, when the  
2 Chapter 15 petition was filed. The bankruptcy court  
3 determined that Sentry's "COMI for the purpose of  
4 recognition as a main proceeding is in the BVI, and not  
5 elsewhere," and therefore recognized the BVI liquidation as  
6 a "foreign main proceeding" under 11 U.S.C. § 1517(b)(1).  
7 Modified Bench Mem. & Order Granting Chapter 15 Petitions of  
8 Fairfield Sentry Ltd., Fairfield Sigma Ltd. & Fairfield  
9 Lambda Ltd. for Recognition of Foreign Proceedings, In re  
10 Fairfield Sentry Ltd., No. 10-13164(BRL), at 6 (Bankr.  
11 S.D.N.Y. July 30, 2010) (hereinafter "Bankr. Order").

12 Pursuant to 11 U.S.C. § 1520, recognition of the BVI  
13 liquidation as a foreign main proceeding imposed an  
14 automatic stay on any other proceedings against Sentry in  
15 the United States--including the derivative action brought  
16 by Morning Mist. Id. at 9 (recognizing automatic stay); see  
17 also 11 U.S.C. § 1520(a)(1) (imposing automatic stay from 11  
18 U.S.C. § 362). The bankruptcy court concluded in the  
19 alternative that even if the BVI liquidation was a "nonmain"  
20 proceeding (in which a stay would not be automatic), a stay  
21 of the derivative action was appropriate under 11 U.S.C.  
22 § 1521, which allows for such relief. Bankr. Order at 9-11.

1 Morning Mist appealed the bankruptcy court's order to  
2 the district court. On September 16, 2011, the United  
3 States District Court for the Southern District of New York  
4 (Daniels, J.) affirmed, holding that the bankruptcy court  
5 properly considered Sentry's administrative activities in  
6 its COMI analysis, and correctly considered Sentry's COMI as  
7 of the filing of the Chapter 15 petition (not over its 18  
8 year operational history). Mem. Decision & Order, In re  
9 Fairfield Sentry Ltd., No. 10 Civ. 7311(GBD), at 7-12  
10 (S.D.N.Y. Sept. 16, 2011). Morning Mist had argued there  
11 (as it argues here) that recognition of the BVI liquidation  
12 would be manifestly contrary to U.S. public policy, and was  
13 therefore barred by 11 U.S.C. § 1506, because the court  
14 records in the BVI liquidation were sealed. The argument  
15 was rejected on the ground that the right of public access  
16 to court records is not absolute. Id. at 14-17.

17 Imposition of the automatic stay was affirmed,  
18 including the stay of Morning Mist's derivative action  
19 against Sentry. Id. at 18. Morning Mist timely appealed.  
20  
21  
22



1 Chapter 15 is derived from the Model Law promulgated by  
2 the United Nations Commission on International Trade Law  
3 ("UNCITRAL"), and it instructs that "[i]n interpreting  
4 [Chapter 15], the court shall consider its international  
5 origin, and the need to promote an application of this  
6 chapter that is consistent with the application of similar  
7 statutes adopted by foreign jurisdictions." 11 U.S.C.  
8 § 1508. The legislative history accompanying the passage of  
9 Chapter 15 recommends the Guide to Enactment of the Model  
10 Law, promulgated by UNCITRAL, "for guidance as to the  
11 meaning and purpose of [the Model Law's] provisions." H.R.  
12 Rep. No. 109-31, pt. 1, at 106 n.101 (2005) (hereinafter  
13 "House Report").<sup>3</sup>

14 The recognition of foreign proceedings is governed by  
15 Sections 1515 through 1524. Under Section 1517, "an order  
16 recognizing a foreign proceeding shall be entered if--(1)  
17 such foreign proceeding . . . is a foreign main proceeding  
18 or foreign nonmain proceeding within the meaning of section

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<sup>3</sup> See also id. at 109-10 ("Uniform interpretation will also be aided by reference to CLOUT, the UNCITRAL Case Law On Uniform Texts . . . . Not only are these sources persuasive, but they advance the crucial goal of uniformity of interpretation. To the extent that the United States courts rely on these sources, their decisions will more likely be regarded as persuasive elsewhere.").

1 1502; (2) the foreign representative applying for  
2 recognition is a person or body; and (3) the petition meets  
3 the requirements of section 1515." 11 U.S.C. § 1517(a).  
4 There is no dispute that the second and third requirements  
5 are met here. The only point at issue is whether the BVI  
6 liquidation qualifies as a foreign main or nonmain  
7 proceeding.

8 Section 1502 defines a foreign main proceeding as a  
9 "foreign proceeding pending in the country where the debtor  
10 has the center of its main interests," and defines a foreign  
11 nonmain proceeding as a "foreign proceeding, other than a  
12 foreign main proceeding, pending in a country where the  
13 debtor has an establishment."<sup>4</sup> 11 U.S.C. § 1502(4)-(5).  
14 The statute does not define COMI. It does, however,  
15 establish a presumption: "In the absence of evidence to the  
16 contrary, the debtor's registered office . . . is presumed  
17 to be the center of the debtor's main interests." 11 U.S.C.  
18 § 1516(c).

19 Upon recognition of a foreign main proceeding, Section  
20 1520 provides certain automatic, nondiscretionary relief,

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<sup>4</sup> "Establishment" is defined as "any place of operations where the debtor carries out a nontransitory economic activity." 11 U.S.C. § 1502(2).

1 including an automatic stay of all proceedings against the  
2 debtor in the United States. 11 U.S.C. § 1520(a). A  
3 discretionary stay is also available under Section 1521,  
4 regardless of whether a foreign main proceeding is  
5 recognized. 11 U.S.C. § 1521(a).

6 Finally, Section 1506 provides an overriding public  
7 policy exception to all of Chapter 15: "Nothing in this  
8 chapter prevents the court from refusing to take an action  
9 governed by this chapter if the action would be manifestly  
10 contrary to the public policy of the United States." 11  
11 U.S.C. § 1506.

## 13 II

14  
15 Few courts have considered the meaning of COMI under  
16 Chapter 15, especially with respect to the time frame and  
17 the factors that bear on the question.<sup>5</sup>

### 18 A. Relevant Time Period

19 Morning Mist argues that the bankruptcy court should

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<sup>5</sup> We have only mentioned Chapter 15 in cases where Section 304 of the Bankruptcy Code, the predecessor provision to Chapter 15, applied. See, e.g., In re Bd. of Dirs. of Telecom Arg., S.A., 528 F.3d 162, 169 (2d Cir. 2008) (noting that Section 304 controls because the bankruptcy petition was filed prior to Chapter 15's effective date).

1 have looked at Sentry's entire operational history, while  
2 the liquidator advocates affirmance of the determinations  
3 that COMI should be considered as of the filing of the  
4 Chapter 15 petition. To identify the time frame relevant to  
5 the COMI determination, we consider: (1) the text of the  
6 statute; (2) guidance from other federal courts; and (3)  
7 international sources. We conclude that a debtor's COMI is  
8 determined as of the time of the filing of the Chapter 15  
9 petition. To offset a debtor's ability to manipulate its  
10 COMI, a court may also look at the time period between the  
11 initiation of the foreign liquidation proceeding and the  
12 filing of the Chapter 15 petition.

13 Statutory Text. Chapter 15 does not define COMI.  
14 Section 1517 provides that a "foreign proceeding shall be  
15 recognized . . . as a foreign main proceeding if it *is*  
16 *pending* in the country where the debtor *has* the center of  
17 its main interests." 11 U.S.C. § 1517(b) (emphases added).

18 The present tense suggests that a court should examine  
19 a debtor's COMI at the time the Chapter 15 petition is  
20 filed. "Consistent with normal usage, we have frequently  
21 looked to Congress' choice of verb tense to ascertain a  
22 statute's temporal reach." Carr v. United States, 130 S.

1 Ct. 2229, 2236 (2010); see also Dobrova v. Holder, 607 F.3d  
2 297, 301 (2d Cir. 2010) (relying on Congress's use of  
3 present perfect tense in statutory construction). In In re  
4 AroChem Corp., we were guided by the tense used in a  
5 provision of the Bankruptcy Code allowing bankruptcy  
6 trustees to hire professionals (e.g., lawyers, accountants),  
7 as long as the professionals "*do not hold or represent an*  
8 *interest adverse to the estate.*" In re AroChem Corp., 176  
9 F.3d 610, 623 (2d Cir. 1999) (quoting 11 U.S.C. § 327(a))  
10 (emphasis added). The present tense signified that an  
11 estate's counsel would not be disqualified based on past or  
12 future representations. Id.

13 It therefore matters that the inquiry under Section  
14 1517 is whether a foreign proceeding "*is pending in the*  
15 *country where the debtor has the center of its main*  
16 *interests.*" 11 U.S.C. § 1517(b)(1) (emphases added).  
17 In this light, we reject Morning Mist's invitation for us to  
18 consider the debtor's entire operational history. Likewise,  
19 a COMI determination based on the date of the *initiation* of  
20 the foreign proceeding is not compelled by the statute. A  
21 foreign proceeding "*is pending,*" 11 U.S.C. § 1517(b)(1)  
22 (emphasis added), only after it has been commenced. Under

1 the text of the statute, therefore, the filing date of the  
2 Chapter 15 petition should serve to anchor the COMI  
3 analysis.

4 Other Federal Courts. Nearly every federal court to  
5 address this question has determined that COMI should be  
6 considered as of the time the Chapter 15 petition is filed.

7 Among circuit courts, only the Fifth has specifically  
8 decided the question. The argument that the COMI  
9 determination should be made with regard to the debtor's  
10 operational history was rejected in In re Ran:

11 Every operative verb is written in the present or  
12 present progressive tense. . . . Congress's choice to  
13 use the present tense requires courts to view the COMI  
14 determination in the present, i.e. at the time the  
15 petition for recognition was filed. If Congress had,  
16 in fact, intended bankruptcy courts to view the COMI  
17 determination through a look-back period or on a  
18 specific past date, it could have easily said so.

19  
20 In re Ran, 607 F.3d 1017, 1025 (5th Cir. 2010). The court  
21 highlighted a provision in the Bankruptcy Code that  
22 explicitly includes a look-back period (11 U.S.C. §  
23 522(b)(3)(A)), as was not done in Chapter 15. Id.

24 The Fifth Circuit observed that its approach would  
25 advance Congress's purpose of harmonizing transnational  
26 insolvency proceedings because looking at a company's full  
27 operational history could make it more difficult to pinpoint

1 a single COMI: "In fact, a meandering and never-ending  
2 inquiry into the debtor's past interests could lead to a  
3 denial of recognition in a country where a debtor's  
4 interests are truly centered, merely because he conducted  
5 past activities in a country at some point well before the  
6 petition for recognition was sought." Id.

7 For similar reasons, the Fifth Circuit emphasized that  
8 third parties (primarily creditors) should be able to  
9 ascertain a debtor's COMI. Id. at 1025-26. We agree.<sup>6</sup>

10 The Fifth Circuit left open the possibility (albeit in  
11 dicta) of looking at a broader time frame in order to  
12 frustrate possible bad-faith COMI manipulation:

13 Lastly, we note that this case does not involve a  
14 recent change of domicile by the [debtor] in question.  
15 A similar case brought immediately after the party's  
16 arrival in the United States following a long period of  
17 domicile in the country where the bankruptcy is pending  
18 would likely lead to a different result.

19  
20 Id. at 1026.

21 Most courts in this Circuit and throughout the country  
22 appear to have examined a debtor's COMI as of the time of

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<sup>6</sup> The Fifth Circuit pointed to English cases "which seem to select a time linked to the *commencement or service of the relevant insolvency proceeding.*" Id. at 1026 (emphasis added). But the italicized phrase is (at least) ambiguous, a matter not resolved by the Fifth Circuit. We consider international law on this point in the following section.

1 the Chapter 15 petition. See, e.g., In re Fairfield Sentry  
2 Ltd., No. 10 Civ. 7311(GBD), 2011 WL 4357421, at \*6  
3 (S.D.N.Y. Sept. 16, 2011); In re British Am. Isle of Venice  
4 (BVI), Ltd., 441 B.R. 713, 720-21 (Bankr. S.D. Fla. 2010);  
5 In re British Am. Ins. Co., 425 B.R. 884, 909-10 (Bankr.  
6 S.D. Fla. 2010); In re Betcorp Ltd., 400 B.R. 266, 290-92  
7 (Bankr. D. Nev. 2009). But there have certainly been courts  
8 that have taken a different approach. See, e.g., In re  
9 Millennium Global Emerging Credit Master Fund Ltd., 474 B.R.  
10 88, 92 (S.D.N.Y. 2012) (recognizing bankruptcy court's  
11 conclusion that "COMI should be determined as of the date of  
12 the commencement of the foreign proceeding, rather than--as  
13 most of the courts that have looked at the issue have  
14 concluded--the date on which the Chapter 15 petition was  
15 filed").

16 Morning Mist, taking a cue from a prominent bankruptcy  
17 court decision, suggests that we should employ the American  
18 jurisdictional concept of "principal place of business" when  
19 considering COMI, which would thus require consideration of  
20 a debtor's operational history. Appellants' Br. 33 (citing  
21 In re Millennium Global Emerging Credit Master Fund Ltd.,  
22 458 B.R. 63, 72 (Bankr. S.D.N.Y. 2011)). In In re

1 Millennium Global, the bankruptcy court suggested  
2 substituting principal place of business for COMI, in which  
3 case "it is obvious that the date for determining an  
4 entity's place of business refers to the business of the  
5 entity before it was placed into liquidation." 458 B.R. at  
6 72. In support, the bankruptcy court quoted a law review  
7 article by one of the drafters of Chapter 15. Id. The  
8 quoted text, however, supports the contrary view: Congress's  
9 decision to use the term "COMI" instead of "principal place  
10 of business" was intentional:

11 Chapter 15 was drafted to follow the Model Law as  
12 closely as possible, with the idea of encouraging other  
13 countries to do the same. One example is use of the  
14 phrase "center of main interests," which could have  
15 been replaced by "principal place of business" as a  
16 phrase more familiar to American judges and lawyers.  
17 The drafters of Chapter 15 believed, however, that such  
18 a crucial jurisdictional test should be uniform around  
19 the world and hoped that its adoption by the United  
20 States would encourage other countries to use it as  
21 well.

22  
23 Jay Lawrence Westbrook, *Chapter 15 At Last*, 79 Am. Bankr.  
24 L.J. 713, 719-20 (2005).

25 As further support for the analogy to principal place  
26 of business, the bankruptcy court in In re Millennium Global  
27 pointed to Chapter 15's predecessor, Section 304 of the  
28 Bankruptcy Code. 458 B.R. at 73. Section 304, now

1 repealed, allowed a party to commence a proceeding in U.S.  
2 bankruptcy court "ancillary" to a "foreign proceeding" and  
3 defined "foreign proceeding" as a proceeding "in a foreign  
4 country in which the debtor's domicile, residence, principal  
5 place of business, or principal assets were located at the  
6 commencement of such proceeding." 11 U.S.C. § 101(23)  
7 (2000). That wording looks to a debtor's principal place of  
8 business at the time of the commencement of the foreign  
9 liquidation proceeding. But while the concept may be useful  
10 in adducing factors that point to a COMI, Congress abandoned  
11 that provision in enacting Chapter 15.

12 International Interpretations. Congress instructed  
13 that "[i]n interpreting [Chapter 15], the court shall  
14 consider its international origin, and the need to promote  
15 an application of this chapter that is consistent with the  
16 application of similar statutes adopted by foreign  
17 jurisdictions." 11 U.S.C. § 1508. Legislative history  
18 points to the Guide to Enactment of the UNCITRAL Model Law  
19 on Cross-Border Insolvency (the "UNCITRAL Guide") "for  
20 guidance as to the meaning and purpose of [Chapter 15's]  
21 provisions." House Report at 106 n.101. Although the  
22 statutory text controls, first and ultimately, we consider

1 international sources to the extent they help us carry out  
2 the congressional purpose of achieving international  
3 uniformity in cross-border insolvency proceedings.

4 The UNCITRAL Guide, which does not define COMI,  
5 indicates that the concept was drawn from the European Union  
6 Convention on Insolvency Proceedings. See UNCITRAL Guide  
7 ¶¶ 31, 72. In turn, the European Union Council Regulation  
8 enacting the Convention on Insolvency Proceedings provides  
9 some guidance: "The 'centre of main interests' should  
10 correspond to the place where the debtor *conducts the*  
11 *administration of his interests on a regular basis* and is  
12 *therefore ascertainable by third parties.*" Council  
13 Regulation (EC) No 1346/2000 of 29 May 2000, Preamble ¶ 13  
14 (emphases added) (hereinafter "EU Regulation"). Like the  
15 U.S. statute, the EU Regulation employs the present tense.  
16 The focus on regularity and ascertainability should also  
17 inform our interpretation of the text. The reference to the  
18 debtor's administration "on a regular basis," however, could  
19 suggest a potentially broader time frame.

20 But the EU Regulation does not operate as an analog to  
21 Chapter 15. Under the EU Regulation, a main insolvency  
22 proceeding in one EU member state is automatically

1 recognized by all other EU member states. See EU Regulation  
2 art. 16. So the EU has no need for a recognition petition  
3 such as provided under Chapter 15. (Because the United  
4 States and the BVI are not parties to an agreement on the  
5 subject and are not otherwise governed by a common legal  
6 framework, a debtor must file a Chapter 15 petition in the  
7 United States for the BVI proceeding to be recognized).<sup>7</sup>  
8 Although the EU Regulation might refer to a broader time  
9 frame for considering a debtor's COMI, it is not a fit for  
10 construing Chapter 15.

11 Relevant European case law interpreting COMI appears to  
12 generally focus on whether a debtor's COMI is regular and  
13 ascertainable, as suggested by the EU Regulation. For  
14 example, in In re Eurofood IFSC Ltd., the Court of Justice  
15 of the European Union focused on "criteria that are both  
16 objective and ascertainable by third parties" to determine a

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<sup>7</sup> In In re Millennium Global, the bankruptcy court observed that "[t]he EU Regulation does not contemplate the commencement of a separate ancillary proceeding to seek recognition of a foreign insolvency case, as in the Model Law and chapter 15, as the members of the Union are automatically required to recognize foreign proceedings from the date of their opening." 458 B.R. at 74. But that conclusion does not persuade us that we should determine COMI under Chapter 15 based on the date of commencement of the foreign proceeding as the bankruptcy court held in that case; rather, it suggests that the EU Regulation may be a poor analog for interpreting Chapter 15.

1 debtor's COMI. In re Eurofood IFSC Ltd., Case C-341/04,  
2 2006 E.C.R. I-3813, 2006 WL 1142304, ¶ 33 (E.C.J. 2006).  
3 Likewise, in In re Stanford International Bank Ltd., the  
4 England and Wales Court of Appeal (Civil Division) looked to  
5 whether third parties could ascertain a debtor's COMI,  
6 specifically by examining factors "in the public domain."  
7 In re Stanford Int'l Bank Ltd., Case No. A3/2009/1565 &  
8 1643, 2010 EWCA Civ 137, 2010 WL 605796, ¶¶ 54-56 (Ct. of  
9 Appeal 2010). These interpretations also reflect a concern  
10 about possible COMI manipulation. See, e.g., In re Eurofood  
11 IFSC Ltd., 2006 WL 1142304, ¶ 35 (indicating concern with a  
12 "'letterbox' company not carrying out any business in the  
13 territory of the Member State in which its registered office  
14 is situated"). A COMI that is regular and ascertainable is  
15 not easily subject to tactical removal.

16 Overall, international sources are of limited use in  
17 resolving whether U.S. courts should determine COMI at the  
18 time of the Chapter 15 petition or in some other way.

19 \* \* \*

20  
21 We therefore hold that a debtor's COMI should be  
22 determined based on its activities at or around the time the

1 Chapter 15 petition is filed, as the statutory text  
2 suggests. But given the EU Regulation and other  
3 international interpretations, which focus on the regularity  
4 and ascertainability of a debtor's COMI, a court may  
5 consider the period between the commencement of the foreign  
6 insolvency proceeding and the filing of the Chapter 15  
7 petition to ensure that a debtor has not manipulated its  
8 COMI in bad faith.

9 **B. COMI Factors**

10 The parties also dispute what factors are relevant for  
11 locating a COMI. Morning Mist argues that Sentry's  
12 liquidation activities are irrelevant to the COMI  
13 determination; the liquidator responds that these activities  
14 and the fact of the BVI proceedings are the kind of  
15 objective criteria that can be ascertained by third parties,  
16 and are therefore critical. We hold that any relevant  
17 activities, including liquidation activities and  
18 administrative functions, may be considered in the COMI  
19 analysis.

20  
21 Chapter 15 creates a rebuttable presumption that the  
22 country where a debtor has its registered office will be its

1 COMI: "In the absence of evidence to the contrary, the  
2 debtor's registered office, or habitual residence in the  
3 case of an individual, is presumed to be the center of the  
4 debtor's main interests." 11 U.S.C. § 1516(c). But federal  
5 courts have focused on a variety of other factors as well.  
6 The United States Bankruptcy Court for the Southern District  
7 of New York has developed a widely adopted list of COMI  
8 factors--warning, however, against mechanical application:

9 Various factors, singly or combined, could be relevant  
10 to such a determination: the location of the debtor's  
11 headquarters; the location of those who actually manage  
12 the debtor (which, conceivably could be the  
13 headquarters of a holding company); the location of the  
14 debtor's primary assets; the location of the majority  
15 of the debtor's creditors or of a majority of the  
16 creditors who would be affected by the case; and/or the  
17 jurisdiction whose law would apply to most disputes.

18  
19 In re SPhinX, Ltd., 351 B.R. 103, 117 (Bankr. S.D.N.Y.

20 2006). This nonexclusive list is a helpful guide, but  
21 consideration of these specific factors is neither required  
22 nor dispositive.

23 The SPhinX court and other federal courts have also  
24 turned to international law, as directed by Congress. See,  
25 e.g., In re SPhinX, Ltd., 351 B.R. at 118; In re  
26 Tri-Continental Exch. Ltd., 349 B.R. 627, 634 (Bankr. E.D.  
27 Cal. 2006). As discussed in Part II.A above, the EU

1 Regulation enacting the European Union Convention on  
2 Insolvency explains that COMI "should correspond to the  
3 place where the debtor conducts the administration of his  
4 interests on a regular basis and is therefore ascertainable  
5 by third parties." EU Regulation, Preamble ¶ 13. While  
6 this guidance may have been of limited utility in resolving  
7 the timing question discussed in Part II.A, it underscores  
8 the importance of factors that indicate regularity and  
9 ascertainability.<sup>8</sup>

10 The absence of a statutory definition for a term that  
11 is not self-defining signifies that the text is open-ended,  
12 and invites development by courts, depending on facts  
13 presented, without prescription or limitation.

14  
15 **III**

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<sup>8</sup> As mentioned above, the bankruptcy court in In re Millennium Global employed the concept of "principal place of business" to guide its COMI analysis. Accordingly, it applied the Supreme Court's recent definition of that concept, which looks at a corporation's "nerve center," i.e., "where a corporation's officers direct, control, and coordinate the corporation's activities." Hertz Corp. v. Friend, 130 S. Ct. 1181, 1192 (2010). Given Congress's choice to use COMI instead of "principal place of business," that concept does not control the analysis. But to the extent that the concepts are similar, a court may certainly consider a debtor's "nerve center," including from where the debtor's activities are directed and controlled, in determining a debtor's COMI.

1  
2 Applying the principles set out above, we affirm the  
3 decision of the district court (which affirmed the  
4 bankruptcy court) recognizing the BVI liquidation as a  
5 foreign main proceeding.

6 In a nutshell: for a proceeding to be recognized as a  
7 "foreign main proceeding," it must be "pending in the  
8 country where the debtor has the center of its main  
9 interests." 11 U.S.C. § 1517(b)(1). That determination is  
10 based on a debtor's COMI at the time the Chapter 15 petition  
11 is filed. A court may look at the period between the  
12 commencement of the foreign proceeding and the filing of the  
13 Chapter 15 petition to ensure that a debtor has not  
14 manipulated its COMI in bad faith, but there is no support  
15 for Morning Mist's contention that a debtor's entire  
16 operational history should be considered. The factors that  
17 a court may consider in this analysis are not limited and  
18 may include the debtor's liquidation activities.

19 The bankruptcy court made factual findings that place  
20 Sentry's COMI in the BVI during the relevant time period:

21 Upon the revelation of the notorious Madoff fraud in  
22 December of 2008, the Debtors discontinued the transfer  
23 of funds for investment with BLMIS in New York, which  
24 comprised 95% of Sentry's investments. The board of  
25 representatives at the Debtors' New York-based

1 investment managers, [FGG], resigned shortly  
2 thereafter, and the Debtors' contracts with FGG were  
3 severed in 2009, still long before the filing of the  
4 Petition. As a result, the Debtors have no place of  
5 business, no management, and no tangible assets located  
6 in the United States. Rather, the Debtors' activities  
7 for an extended period of time have been conducted only  
8 in connection with winding up the Debtors'  
9 business. . . . The Court finds that the facts now  
10 extant provide a sufficient basis for finding that the  
11 Debtors' COMI for the purpose of recognition as a main  
12 proceeding is in the BVI, and not elsewhere.

13  
14 Bankr. Order at 5-6. The court went on to find that, even  
15 though Sentry had assets in other jurisdictions, the  
16 administration of its affairs in the relevant time was  
17 orchestrated from the BVI. Id. at 6. There was no finding  
18 of bad-faith COMI manipulation: "the record here as to the  
19 relevant time period beginning December 2008, which  
20 straddles the Liquidators' appointment dates, does not  
21 support a finding of an opportunistic shift of the Debtors'  
22 COMI or any biased activity or motivation to distort factors  
23 to establish a COMI in the BVI." Id. at 8.

24 The bankruptcy court's factual findings are not clearly  
25 erroneous and support the conclusion that Sentry's COMI was  
26 in the BVI at the time of the Chapter 15 petition, and that  
27 Sentry did not manipulate its COMI in bad faith between the  
28 initiation of the BVI proceeding and the filing of the  
29 Chapter 15 petition. True, the relevant time period was

1 when the Chapter 15 petition was filed (with a look backward  
2 to thwart manipulation), whereas the bankruptcy court looked  
3 at a longer period (beginning with Madoff's arrest), but the  
4 difference is not material. We therefore affirm.<sup>9</sup>

5  
6 **IV**  
7

8 Finally, Morning Mist argues that the bankruptcy court  
9 should have applied the public policy exception available  
10 under 11 U.S.C. § 1506, because the BVI proceedings, which  
11 are in the main confidential, were "cloaked in secrecy."  
12 Appellants' Br. 25.

13 Section 1506 provides: "Nothing in this chapter  
14 prevents the court from refusing to take an action governed  
15 by this chapter if the action would be manifestly contrary  
16 to the public policy of the United States." 11 U.S.C.  
17 § 1506. This Court has not had occasion to discuss the  
18 application of Section 1506.

19 The statutory wording requires a narrow reading.

---

<sup>9</sup> Morning Mist also claims that the bankruptcy court erroneously stayed the derivative action that it brought against Sentry. Appellants' Br. 36-37. Because we affirm the recognition of the BVI liquidation as a foreign main proceeding, the stay was automatic. See 11 U.S.C. § 1520(a) (imposing automatic stay on U.S. proceedings against debtor upon recognition of foreign main proceeding).

1 Section 1506 does not create an exception for any action  
2 under Chapter 15 that may conflict with public policy, but  
3 only an action that is "*manifestly* contrary." 11 U.S.C.

4 § 1506 (emphasis added). The legislative history confirms:

5 [Section 1506] follows the Model Law article 5 exactly,  
6 is standard in UNCITRAL texts, and has been *narrowly*  
7 *interpreted on a consistent basis in courts around the*  
8 *world*. The word "manifestly" in international usage  
9 restricts the public policy exception to *the most*  
10 *fundamental policies of the United States*.

11  
12 House Report at 109 (emphases added). The UNCITRAL Guide  
13 further explains that the exception should be read  
14 "restrictively" and invoked only "under exceptional  
15 circumstances concerning matters of fundamental importance  
16 for the enacting State." UNCITRAL Guide ¶ 89. Federal  
17 courts in the United States have adopted this view. See,  
18 e.g., In re Vitro S.A.B. de CV, 701 F.3d 1031, 1069-70 (5th  
19 Cir. 2012); In re Iida, 377 B.R. 243, 259 (B.A.P. 9th Cir.  
20 2007); In re Ephedra Prods. Liab. Litig., 349 B.R. 333, 336  
21 (S.D.N.Y. 2006); In re Toft, 453 B.R. 186, 193 (Bankr.  
22 S.D.N.Y. 2011); In re Metcalfe & Mansfield Alt. Invs., 421  
23 B.R. 685, 697 (Bankr. S.D.N.Y. 2010).<sup>10</sup>

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<sup>10</sup> Even beyond the bankruptcy context, we apply public policy exceptions sparingly. For example, in the judgment enforcement context, a foreign judgment "is unenforceable as against public policy to the extent that it is repugnant to fundamental notions of what is decent and just in the State

1           The confidentiality of BVI bankruptcy proceedings does  
2 not offend U.S. public policy. Although the BVI liquidation  
3 has proceeded under seal, Morning Mist's assertion that they  
4 are "shrouded in secrecy" is overwrought. Appellants'  
5 Br. 7. The BVI court did seal the various applications and  
6 orders in the liquidation, but public summaries have been  
7 made available. See, e.g., J.A. 445-46 (summarizing  
8 applications and orders before BVI court). Such restricted  
9 access to court documents is not unusual in the BVI, as the  
10 liquidator explains, because only certain limited records  
11 are typically available to non-parties. Appellees' Br.  
12 12-13. And in all cases in the BVI, including this  
13 liquidation, any non-party may apply to the court for access  
14 to sealed documents. Id.

15           In any event, Morning Mist cannot establish that  
16 unfettered public access to court records is so fundamental  
17 in the United States that recognition of the BVI liquidation  
18 constitutes one of those exceptional circumstances  
19 contemplated in Section 1506. "[T]he right to inspect and  
20 copy judicial records is not absolute." Nixon v. Warner

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where enforcement is sought," but that "standard is high,  
and infrequently met." Ackermann v. Levine, 788 F.2d 830,  
841 (2d Cir. 1986) (internal quotation marks omitted).

1 Commc'ns, Inc., 435 U.S. 589, 598 (1978). In Lugosch v.  
2 Pyramid Co. of Onondaga, we discussed at length the common  
3 law and constitutional rights to public access of court  
4 documents. Lugosch v. Pyramid Co. of Onondaga, 435 F.3d  
5 110, 119-20 (2d Cir. 2006). The right to access court  
6 documents is not absolute and can easily give way to  
7 "privacy interests" or other considerations. Id. at 120;  
8 see also United States v. Amodeo, 44 F.3d 141, 146 (2d Cir.  
9 1995) ("Although there is a presumption favoring access to  
10 judicial records, the fact that a document is a judicial  
11 record does not mean that access to it cannot be  
12 restricted." (internal citation omitted)).

13 Important as public access to court documents may be,  
14 it is not an exceptional and fundamental value. It is a  
15 qualified right; and many proceedings move forward in U.S.  
16 courtrooms with some documents filed under seal, including  
17 many cases in this Court. There is no basis on which to  
18 hold that recognition of the BVI liquidation is manifestly  
19 contrary to U.S. public policy.

#### 20 21 **CONCLUSION**

22 For the foregoing reasons, we affirm.