



COMI in the US

Our US correspondent David Conaway contrasts two cases involving the determination of “centre of main interests” (COMI) with different outcomes



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The United States Bankruptcy Court in Delaware recently entered an order that impacts international insolvency cases. When foreign-based debtors file for creditor protection in their “home” jurisdiction, they may also need to protect any US assets from claims of creditors. Chapter 15 was added to the US Bankruptcy Code as a vehicle for foreign debtors to file for insolvency in their home jurisdiction, but also have a secondary bankruptcy proceeding in the US. Foreign debtors often find it necessary to invoke certain benefits of the US Bankruptcy Code, including for example the “automatic stay” which enjoins actions of creditors against the debtor or its assets.

Foreign main proceeding

On 3 February 2010, the Delaware Bankruptcy Court in *Saad Investments Finance Company (No. 5) Limited* (SIFCO No. 5), entered an order recognising SIFCO’s Cayman Island “winding up” proceeding as a “foreign main proceeding”. The Delaware Bankruptcy Court’s decision in SIFCO stands in contrast to the New York Bankruptcy Court’s prior ruling in *Bear Stearns*, where the Bankruptcy Court **denied** a Chapter 15 proceeding filed by two

Bear Stearns funds that were also in “winding up” proceedings in the Cayman Islands.

In the *Bear Stearns* cases, two Bear Stearns hedge funds, registered as exempt companies under the laws of the Cayman Islands, and with their primary operations apparently in New York, filed “winding up” proceedings in the Cayman Islands. The “winding up” proceedings were filed in the Cayman Island since the funds were registered in the Cayman Islands. In response to investor lawsuits arising from sub-prime investments filed against the Bear Stearns funds in the United States, the Bear Stearns funds needed creditor protection in the United States. The administrators of the Bear Stearns funds’ “winding up” proceedings in the Cayman Islands thus filed Chapter 15 petitions in New York seeking recognition of the Cayman Islands proceedings as “foreign main” proceedings or in the alternative as “foreign non-main” proceedings. Without recognition of the Cayman Islands “winding up” proceeding by the US Bankruptcy Court as the primary insolvency proceeding, a Chapter 15 petition will not be granted, and the debtor cannot invoke the debtor protections of the US Bankruptcy Code.

In *Bear Stearns*, even though no party objected to the Chapter

15 petitions, the US Bankruptcy Court for the Southern District of New York refused to recognise the Cayman Islands proceedings as either “foreign main” or “foreign non-main” proceedings since the Court found that the Cayman Islands was neither the place of Centre of Main Interests (COMI) nor of an “establishment”. Rather, the Court concluded that the Bear Stearns funds operated in New York. In so ruling, the Bear Stearns court effectively ignored Chapter 15’s presumption that an entity’s COMI is where it is organised. The effect of this ruling is that to obtain the protections of the US Bankruptcy Code, the Bear Stearns funds would be required to file Chapter 11 proceedings in New York. The Court also suggested that involuntary proceedings might be filed against the Bear Stearns funds in New York.

Establishing the centre of main interests

COMI is a key concept in Chapter 15, the UNCITRAL Model Law and the European Union Insolvency Regulation, all of which presume COMI is where an entity has its corporate registration. COMI impacts where the main proceeding is deemed to be located, based on where a business has its “centre of main interests”,

which is analogous to the principal place of business. Thus, if COMI exists in a foreign country, a US Bankruptcy judge should recognise a foreign insolvency proceeding as the “foreign main” proceeding and the US Chapter 15 proceeding as an “ancillary” proceeding. If a debtor does not have COMI in the country where it files its insolvency proceeding, but has an “establishment” in such country, the US Bankruptcy Court should recognise the foreign proceeding as a “foreign non-main” proceeding. If the foreign insolvency proceeding is recognised as a “foreign main” proceeding, the approval of the Chapter 15 proceeding will invoke the automatic stay. If the foreign insolvency proceeding is recognised as a “foreign non-main” proceeding, the Chapter 15 proceeding will not invoke the automatic stay protections.

In both Bear Stearns (NY) and SIFCO (Delaware), the debtor funds were registered (organised) as

exempt as companies under the laws of the Cayman Islands. Many have suggested that the presumption should be determinative, absent substantial contrary evidence that the debtor’s operations, or “centre of main interest” was somewhere else. In Bear Stearns, in the absence of any creditor objection, the New York Bankruptcy Court virtually ignored the presumptive location of the Cayman Islands and examined where the Bear Stearns funds business operations were truly conducted, which it found to be in New York. The result was the Chapter 15 proceeding was denied, and the assets of the Bear Stearns funds in the US were subject to creditor claims.

It appears that in SIFCO, as in Bear Stearns, much of the business activity of SIFCO occurred outside the Cayman Islands, where SIFCO was registered as an exempt company. Unlike the New York Bankruptcy Court in Bear Stearns, the Delaware Court largely ignored

this fact and focused on the location of the business activities at the time of the filing of the Chapter 15 petition. At that time, SIFCO was in the Cayman Islands “winding up” proceeding, with Cayman Islands representatives appointed to effect the “winding up” of SIFCO. The Delaware Court also appeared to be more willing to recognise the presumptive COMI, SIFCO’s place of registration in the Cayman Islands.

Based on this, the Delaware Bankruptcy Court found that SIFCO’s COMI at the time of the Chapter 15 filing was in fact in the Cayman Islands. As such, the SIFCO’s Cayman Islands “winding up” proceeding was deemed to be a “foreign main proceeding” giving rise to a successful Chapter 15 filing in the US. Once in Chapter 15, SIFCO was able to invoke the automatic stay to enjoin all creditor action against SIFCO in its assets in the US.

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