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Bankruptcy Court Rulings Establish Parameters for Chapter 15 Eligibility

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Introduction

For some time, chapter 15 of the US Bankruptcy Code (the 'Bankruptcy Code')[1] was a sleeping giant. Chapter 15, which was enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 to replace former section 304, sets forth the statutory provisions that permit debtors in non-US insolvency proceedings to obtain ancillary protection through US courts. For nearly a full year after its enactment, there were no noteworthy decisions interpreting chapter 15.

Three recent decisions of the US Bankruptcy Court for the Southern District of New York (the 'Bankruptcy Court') have placed chapter 15 in the spotlight.[2] Although these cases are not entirely consistent, viewed together, and considered in chronological order, they demonstrate an evolution in courts' approach to assessing chapter 15 eligibility. The central teaching of these decisions is that a request for recognition of a foreign proceeding under chapter 15 must be supported by sufficient evidence to establish that the debtor is subject to a non-US insolvency proceeding in a jurisdiction that is either (i) the debtor's center of main interests ('COMI') or (ii) a place where the debtor has an 'establishment' (i.e., conducts nontransitory business operations). Depending on the procedural posture of a case, the requisite evidence may be provided through court filings, such as the chapter 15 petition and supporting affidavits, or through live testimony at a recognition hearing. Absent such evidence, courts are likely to withhold chapter 15 protection, whether or not interested parties object to the petition.

Chapter 15 overview

To seek chapter 15 relief, a foreign representative files with the court a petition for recognition of a foreign proceeding. Unlike the procedure under former section 304, the recognition of a foreign proceeding under chapter 15 is based on objective criteria and is not discretionary. The petition for recognition must include, among other things, evidence of the existence of the foreign proceeding and the appointment of the foreign representative, as those terms are defined in the Bankruptcy Code.[3] Where these requirements are met and the foreign proceeding is either a 'foreign main proceeding' or a 'foreign nonmain proceeding,' the court must enter an order recognising the foreign proceeding.[4]

The Bankruptcy Code defines 'foreign main proceeding' as 'a foreign proceeding pending in the country where the debtor has the center of its main interests.'[5] Section 1516 provides that, 'in the absence of evidence to the contrary,' the debtor's registered office is presumed to be the center of its main interests. Upon recognition of a foreign main proceeding, certain relief is granted automatically; most significant for the discussion that follows is that the automatic stay provisions of section 362 apply. 'Foreign nonmain proceeding' is defined as 'a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment.'[6] 'Establishment' is defined as 'any place of operations where the debtor carries out a nontransitory economic activity.'[7] Automatic relief is not granted upon recognition of foreign nonmain proceedings, although foreign representatives may seek discretionary

Notes

1 The Bankruptcy Code is set forth in Title 11 of the United States Code. Unless otherwise specified, section references herein shall be references to sections of the Bankruptcy Code.

2 *See In re Basis Yield Alpha Fund (Master)*, 381 BR 37 (Bankr. SDNY 2008); *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd*, 374 BR 122 (Bankr. SDNY 2007); *In re Sphinx, Ltd*, 351 BR 103 (Bankr. SDNY 2006).

3 11 USC § 1515.

4 11 USC § 1517.

5 11 USC §1502.

6 *Id.*

7 *Id.*

and additional relief, such as injunctive relief, upon proving that the legal standard for injunctive relief has been met.

I. *In re Sphinx, Ltd*

A. Background of the Sphinx *dispute*

The first of these noteworthy chapter 15 rulings was entered in the *Sphinx* case. Sphinx, Ltd and certain related hedge funds (collectively, the 'Sphinx Funds') were engaged in the business of purchasing and selling securities. Although the funds were incorporated and registered in the Cayman Islands (thereby offering favorable tax treatment to investors), they did not conduct any business or trade in the Cayman Islands, and had no physical offices or employees there. Substantially all of the Sphinx Funds' assets were located in accounts in the United States, and their hedge fund business was conducted by investment managers located in New York. Investors in the Sphinx Funds were located all over the world.

Among the parties with which the Sphinx Funds had business dealings was Refco Capital Markets, Ltd ('RCM'). In October 2005, RCM and certain of its affiliates encountered severe financial distress when an internal review revealed the existence of over USD 400 million in previously undisclosed loans, and, on 17 October 2005, RCM and various Refco affiliates (collectively, 'Refco') filed petitions under chapter 11 of the Bankruptcy Code. The creditors' committee appointed in the Refco cases sued the Sphinx Funds seeking to recover USD 312 million that had been paid to the Sphinx Funds on the eve of RCM's bankruptcy. The Sphinx Funds agreed to settle the lawsuit by returning USD 263 million to RCM and waiving any further recovery from the RCM bankruptcy estate. Certain investors in the Sphinx Funds filed objections to the settlement, claiming the settlement was too favorable to RCM. The court overruled these objections and approved the settlement, but the investors appealed the ruling, thereby preventing the settlement from becoming effective.

On 4 July 2006, the Sphinx Funds, now apparently under investor control, commenced voluntary winding up proceedings in the Cayman Islands. On 31 July 2006, the joint official liquidators ('JOLs') appointed in those proceedings filed chapter 15 petitions and applied to the Bankruptcy Court pursuant to Bankruptcy Code section 1519(a) for a temporary restraining order enjoining further activity in the appeal of the RCM settlement. In support of this request, the JOLs argued that they needed additional time to examine, from the Sphinx Funds' perspective, the propriety of the RCM settlement. The Bankruptcy Court denied the requested relief, and characterised it as an 'end run' around the Bankruptcy Court's prior order approving the RCM settlement.

B. Sphinx *recognition ruling*

Having denied the requested injunctive relief, the Bankruptcy Court turned to the question of whether the Cayman proceedings were entitled to recognition as foreign proceedings under chapter 15 of the Bankruptcy Code. The first step toward obtaining chapter 15 relief, the court observed, involved 'recognition' of a foreign proceeding as either a 'foreign main proceeding' or a 'foreign nonmain proceeding.' The court explained that while recognition as a foreign main proceeding triggered additional relief and debtor protections beyond those automatically granted in a foreign nonmain proceeding, the distinction was not as momentous as it might first appear because the court has the discretion, under chapter 15, to grant relief in a case tied to a foreign nonmain proceeding that mirrors the relief available with respect to a foreign main proceeding.

Turning to the facts before it, the court readily concluded that the Cayman proceedings qualified as foreign proceedings, and noted that the real dispute involved whether the proceedings were foreign main proceedings or foreign nonmain proceedings. A foreign main proceeding, the court explained, is a foreign insolvency proceeding pending in the country where the debtor has its COMI. Absent evidence to the contrary, the COMI is presumed to be the country of the debtor's incorporation or registered office. This presumption may be overcome depending on the location of the debtor's headquarters, management and primary assets, as well as the location of the debtor's principal creditors.

The Bankruptcy Court concluded that the facts pointed to a COMI outside of the Cayman Islands. The court noted that the Sphinx Funds' business was conducted by managers located outside of the Cayman Islands, the funds had no employees or managers in the Cayman Islands, and the board of directors never met there. Moreover, other than corporate books and records, the debtors did not have any assets in the Cayman Islands. Finally, the Bankruptcy Court expressed concern that the request for foreign main recognition might have been motivated by improper goals, since such recognition would trigger the automatic stay of Bankruptcy Code section 362(a) and thereby thwart the appeal relating to the RCM settlement.

The Bankruptcy Court weighed the alternatives of (i) denying or deferring the request for foreign main recognition or (ii) recognising the Cayman proceedings as foreign nonmain proceedings, subject to possible modification at a later time. The court concluded that with many factors pointing to a COMI outside the Cayman Islands, and 'no negative consequences' resulting from

nonmain recognition, the latter was the better choice.[8] Accordingly, the court entered an order recognising the Cayman proceedings as foreign nonmain proceedings (albeit without any meaningful discussion of whether the statutory requirements for foreign nonmain recognition had been satisfied).

II. *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd*

A. Background of the Bear Stearns *dispute*

The *Bear Stearns* case involved two Cayman Islands-chartered limited liability companies (the 'Funds'). The Funds were both open-ended investment companies with registered offices in the Cayman Islands. They invested in a wide spectrum of securities and financial products, including various derivatives.

The Funds had minimal commercial ties to the Cayman Islands. A New York corporation, Bear Stearns Asset Management Inc. ('BSAM'), served as the Funds' investment manager, and all of the Funds' managed assets were located in New York. A Massachusetts corporation served as the Funds' Administrator and provided accounting, clerical and other administrative services. The Administrator maintained the Funds' books and records in Delaware. An affiliate of the Administrator maintained the Funds' investor registers in Dublin, Ireland. The primary commercial activities of the Funds were thus conducted outside the Cayman Islands. Moreover, as exempted companies, the Funds were prohibited under the Cayman Islands Companies Law from trading in the Cayman Islands except in furtherance of their off-shore businesses.

The Funds encountered financial distress during the first half of 2007, in part as a result of the extreme turbulence arising from the sub-prime lending market in the United States. The value of the Funds' investment portfolios deteriorated greatly, leading to margin calls by trade counterparties. When the Funds were unable to meet these margin calls, counterparties issued notices of default and began to exercise rights against collateral.

In response, on 31 July 2007, the Funds filed petitions commencing insolvency proceedings in the Cayman Islands. Later that day, the Grand Cayman Court entered an order appointing joint provisional liquidators ('JPLs') for the Funds. The order granted the JPLs broad discretion to act on behalf of the Funds to preserve the Funds' assets, including express authority to file petitions for chapter 15 protection. Within hours, the JPLs filed chapter 15 petitions seeking recognition of the Cayman proceedings in the United States.

To initiate the chapter 15 proceedings, the JPLs filed verified petitions with the Bankruptcy Court, together with numerous supporting declarations setting forth their legal and factual arguments. Through these court filings, the JPLs asserted that the Cayman proceedings constituted 'foreign main proceedings' within the meaning of Bankruptcy Code section 1502(4); this assertion in turn rested on the contention that the Cayman Islands were the COMI for the Funds. As an alternative, the JPLs sought recognition of the Cayman proceedings as 'foreign nonmain proceedings' within the meaning of Bankruptcy Code section 1502(5).

B. Bear Stearns *recognition ruling*

The Bankruptcy Court began by noting that chapter 15 was unique in that, unlike other chapters of the Bankruptcy Code, it contained a statement of purpose. Specifically, section 1501 states that '[t]he purpose of this chapter is to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency'[9] and to achieve various objectives. These objectives include increasing cooperation between US courts and those in foreign countries, providing greater legal certainty to the business community, promoting fair and efficient administration of cross-border insolvencies, protecting and maximising the value of a debtor's assets and facilitating the reorganisation of financially distressed businesses, thereby preserving jobs and protecting investors.

Although chapter 15 affords courts tremendous flexibility and discretion in pursuing these goals, the Bankruptcy Court observed that courts nonetheless have little latitude in determining whether a foreign proceeding merits recognition as either a main or nonmain proceeding. Such a determination, the Bankruptcy Court opined, involves a straightforward application of the definitions in Bankruptcy Code sections 1502, 101(23) and 101(24). Failure to satisfy the relevant statutory criteria will result in non-recognition of the foreign proceeding.

(1) Main proceeding recognition

The key to recognition as a foreign main proceeding, the court explained, is for the debtor to establish that the foreign proceeding is pending in a country where the debtor has its 'center of main interests' or 'COMI'

Notes

8 *Sphinx*, 351 BR at 122.
9 11 USC § 1501.

(a concept that correlates generally to 'principal place of business'). The country of a debtor's registered office is presumed, under Bankruptcy Code section 1516(c), to be its COMI, absent evidence to the contrary.

Following careful review of the evidence submitted by the JPLs in support of their chapter 15 petitions, the Bankruptcy Court concluded that the Cayman Islands did not constitute the Funds' COMI, and thus the Cayman proceedings failed to qualify for recognition as foreign main proceedings. The Bankruptcy Court flatly rejected the notion that simply because no party in interest had opposed foreign main recognition, the court should rubber stamp the requested relief. The Bankruptcy Court instead concluded that the presumption that the registered office of the Funds was their COMI was rebutted by the JPLs' own evidence, which clearly established that the Funds conducted little, if any, business in the Cayman Islands. For these reasons, the Bankruptcy Court denied recognition of the Cayman proceedings as foreign main proceedings.

(2) Nonmain proceeding recognition

Next, the Bankruptcy Court considered the JPLs' alternative argument that the Cayman proceedings satisfied the requirements of a foreign nonmain proceeding under Bankruptcy Code section 1502(5). The court noted that the essential element under this section is that the debtor must have an 'establishment' in the foreign country, with the term 'establishment' defined as 'any place of operations where the debtor carries out a nontransitory economic activity.'[10] The Bankruptcy Court concluded that the Funds were unable meet this requirement because their status as exempted companies resulted in a prohibition on the Funds trading in the Cayman Islands except in furtherance of business carried on off-shore. Based on the absence of evidence to establish that the Funds were engaged in nontransitory business activities in the Cayman Islands, the Bankruptcy Court denied recognition of the Cayman proceedings as foreign nonmain proceedings.[11]

III. *In re Basis Yield Alpha Fund (Master)*

A. Background of the Basis Yield *dispute*

Basis Yield Alpha Fund ('Basis Yield'), a hedge fund organised in the Cayman Islands, suffered a significant decline in its portfolio value as a result of the sub-prime lending crisis in the United States. Following margin calls from its counterparties that Basis Yield was unable to satisfy, and the seizure or sale of its assets by those counterparties, Basis Yield's shareholders authorised its liquidation under the Cayman Islands Companies Law. Basis Yield's JPLs[12] filed a petition in the Bankruptcy Court seeking recognition of Basis Yield's liquidation in the Cayman Islands. The petition stated that Basis Yield had been incorporated in the Cayman Islands in 2005 as an exempted limited liability company pursuant to section 193 of the Companies Law and maintains a 'registered office' there. However, the petition contained no facts as to whether any of its employees, managers or assets were located in the Cayman Islands or as to the location from which its funds were managed.

In anticipation of a hearing on the merits of the recognition issue (the 'Recognition Hearing'), the Bankruptcy Court issued an order (the 'Factual Matters Order') regarding the factual matters raised in the petition and, perhaps more importantly, those on which the petition was silent. The Factual Matters Order provided that the Recognition Hearing would be an evidentiary hearing and that the JPLs were to use best efforts to submit evidence regarding a number of matters – such as the jurisdictions in which Basis Yield has offices or employees and conducts investments or back-room operations – that the court deemed arguably relevant to the determination whether Basis Yield's COMI was in the Cayman Islands.

Subsequently, however, the JPLs obtained permission from the Bankruptcy Court to file a motion for summary judgment in advance of the Recognition Hearing. Summary judgment is appropriate when the pleadings, discovery and affidavits show that there is no genuine issue of fact and that the movant is entitled to judgment as a matter of law. The movant bears the burden of showing that the undisputed facts entitle it to judgment as a matter of law, and the court is to resolve all ambiguities and draw all inferences against the moving party. In attempting to meet this burden, the JPLs elected not to produce the additional evidence requested in the Factual Matters Order, but rather to

Notes

10 11 USC § 1502(2).

11 *Bear Stearns*, 374 BR at 130. In so ruling, the Bankruptcy Court acknowledged that portions of its ruling were inconsistent with recent bankruptcy court and district court rulings in the chapter 15 cases of Sphinx, Ltd and its affiliates, but noted that those decisions had not focused on the 'establishment' requirement for recognition of foreign nonmain proceedings. *Id.* at 131.

12 By order of the Grand Court of the Cayman Islands entered after the JPLs moved for summary judgment, the JPLs in the *Basis Yield* case became 'Joint Official Liquidators.' *See Basis Yield*, 381 BR at 41 n. 4.

rely on the limited factual showing they had already made. On this evidence, the JPLs argued that the court must as a matter of law recognise the Cayman Islands proceeding as a foreign main proceeding,[13] for two reasons: first, they argued that, because Basis Yield's registered office is located in the Cayman Islands, the Cayman Islands is presumed to be the COMI under section 1516 of the Bankruptcy Code; second, they argued that no interested parties had objected and thus there was no evidence to the contrary. The court rejected both of these arguments.

B. Basis Yield *recognition ruling*

In ruling on the JPLs' summary judgment motion, the Bankruptcy Court noted that the central issue was whether the JPLs had satisfied the requirements of section 1517(a)(1) – i.e., whether they had shown that the 'foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502.' Moreover, because the JPLs moved for summary judgment granting recognition as a main proceeding, 'the Court has the related questions as to whether, on the evidence now before the Court, they have shown the propriety of such as a matter of law, and without regard to any other facts – and whether the Court has the right to consider all of the facts when the JPLs elected not to put them forth, and instead elected to rely on a statutory presumption embodied in section 1516 of the Code.'[14]

The Bankruptcy Court first noted that, although the JPLs were excused by the court from answering the Factual Matters Order in the context of the summary judgment motion, this did not mean that the JPLs were excused 'from the *consequences* of having failed to provide additional evidence.'[15] Although the Bankruptcy Code does not define COMI or set forth the evidence required to demonstrate it, the court noted that other courts, including those in *Bear Stearns* and *Sphinx*, have looked to an array of factors and that the concept generally equates with the US concept of 'principal place of business.' The court found that none of these factors were discussed in any meaningful way by the JPLs, despite the questions raised in the Factual Matters Order, and that this silence would make 'any reasonable observer wonder why.'[16] The court further found that this silence was not excused by reliance on the presumption under section 1516. As in *Bear Stearns*, although Basis Yield was registered in the Cayman Islands, it was registered as an exempted company; under Cayman Islands law this is statutorily defined as a company carrying on business outside the Cayman Islands. Thus, the very statute on which the JPLs relied raised questions as to whether Basis Yield's principal place of business was in fact the Cayman Islands.

Although the JPLs argued that the presumption was essentially irrebuttable in the absence of an objection, the Bankruptcy Court rejected this argument as well, holding that the court has the power both under section 1517 and under the Federal Rules of Evidence to satisfy itself that the requirements for recognition have been met. 'The court's power to ascertain the facts cannot be sidestepped by failures to object. Nor can it be sidestepped by elections not to plead or introduce inconvenient facts.'[17] In so holding, the court relied on the guidance of *Bear Stearns* and *Sphinx*. In addition, the court noted that 'the procedural posture in the instant case is relevant to the determination of whether a lack of objections binds the Court. A court may properly deny a motion for summary judgment, even where no opposing evidentiary matters are presented, when the movant bears the burden of proof at trial and fails to establish the absence of genuine issues of fact.'[18] The court found that the absence of objections neither relieved the JPLs of their burden nor precluded the court from concluding that genuine issues of material fact prevented a determination as a matter of law.

Following denial of the summary judgment motion, and the court's related statement of its intention to hold an evidentiary hearing, the JPLs withdrew the chapter 15 petition.

Discussion

Chapter 15 was added to the Bankruptcy Code to replace former section 304 and to incorporate into US law the Model Law on Cross-Border Insolvency, with the goal of establishing an effective system for handling cross-border insolvency proceedings.[19] Some restructuring practitioners appear to have assumed that the flexibility and discretion courts enjoyed under the prior statute would apply equally under chapter 15.

Notes

13 Although the petition sought recognition on the grounds that the Cayman proceedings were foreign main proceedings or, alternatively, foreign nonmain proceedings, the JPLs moved for summary judgment only on the grounds that the Cayman proceedings were foreign main proceedings.
14 *Basis Yield*, 381 BR at 47.
15 *Id.* at 47 n.32 (emphasis in original).
16 *Id.* at 48.
17 *Id.* at 50.
18 *Id.* at 52.
19 *Bear Stearns*, 374 BR at 126.

As the forgoing case law reflects, this is not the case. To the contrary, it is now clear that chapter 15 'imposes a rigid procedural structure for recognition of foreign proceedings as either main or nonmain and thus the jurisprudence developed under section 304 is of no assistance in determining the issues relating to the presumption for recognition under chapter 15.'[20]

In *Sphinx*, the court recognised this 'rigid procedural structure,' but applied it only in its review of whether the Cayman proceeding was a foreign main proceeding. The court closely examined the facts presented and concluded that, because the Cayman Islands were not the Sphinx Funds' COMI, foreign main recognition was not appropriate. The *Sphinx* ruling does not include a parallel exacting analysis of the requirements for foreign nonmain recognition (i.e., the existence of an establishment in the country in which the foreign proceeding is pending). Rather, based on the existence of a foreign proceeding that had been determined not to be a foreign main proceeding, the court appears to have concluded, by default (and in the absence of any objection), that the foreign proceeding *must* be a foreign nonmain proceeding.

In *Bear Stearns*, the court expanded the *Sphinx* analysis and undertook a comprehensive review of the requirements for both foreign main and foreign nonmain recognition. After concluding that the Cayman Islands were not the debtors' COMI, the court proceeded to consider whether the debtors maintained an establishment in the Cayman Islands. Observing that 'there is no (pertinent) nontransitory activity conducted locally in the Cayman Islands by the Funds,' and that the Funds were subject to the statutory limitations applicable to exempted companies, the court concluded that the Funds did not have an establishment in the Cayman Islands, and were not eligible for chapter 15 protection.

Finally, in *Basis Yield*, the court appears to have been poised for a comprehensive analysis of the factual requirements of COMI and establishment, as evidenced by the court's issuance of the Factual Matters Order. Perhaps recognising the deficiencies in their chapter 15 petitions, the JPLs in *Basis Yield* took the strategic step of seeking recognition via summary judgment, in the apparent hope that the court would not look beyond the presumption of COMI arising from the debtor's status as a company registered in the Cayman Islands. As described above, this ploy was not successful; indeed, the absence of evidence prompted the court to 'wonder why' relevant facts were deliberately omitted.

Viewed together, these chapter 15 rulings demonstrate an evolution in the courts' analysis of chapter 15 eligibility. The *Sphinx* court's analysis was detailed, but ultimately incomplete, and found to be at odds with the later *Bear Stearns* ruling. *Bear Stearns*, in turn, provided a detailed and complete analysis, setting forth a template for future analysis of foreign main and foreign nonmain recognition. By the time of the *Basis Yield* decision, both the court and the JPLs appear to have grasped fully the issues surrounding recognition, as manifested by the court's effort to flush out the relevant facts through the Factual Matters Order, as well as by the liquidators' apparent efforts to avert this analysis by moving for summary judgment.

In future cases, courts can be expected to follow the lead of the *Basis Yield* court, which noted that although the location of a debtor's registered office creates a presumption regarding the debtor's COMI, the ultimate determination of this issue 'necessarily must remain with the court, which may be satisfied with reliance on the presumption or not, consistent with its ultimate responsibility, and power, to determine that the requirements of section 1502 and 1517 are satisfied.'[21] It is clear that chapter 15 recognition will not be granted lightly, and that parties seeking refuge in chapter 15 must produce evidence to demonstrate that they have satisfied the specific statutory requirements of Bankruptcy Code section 1517.

Notes

20 *Id.* at 132.
21 *Basis Yield*, 381 BR at 55.

International Corporate Rescue

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