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John Freeze

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The Two Approaches to Center of Main Interest Timing Determination

John Freeze, J.D. Candidate 2021

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Introduction

Under Chapter 15 of title 11 of the United States Code (the “Bankruptcy Code”), a bankruptcy court may grant recognition to a “foreign main proceeding.”¹ A foreign main proceeding is “a foreign proceeding pending in the country where the debtor has the center of its main interests.”² The Bankruptcy Code offers little in the way of a definition of a foreign main proceeding, only that “the debtor’s registered office . . . is presumed to be the center of the debtor’s main interests.”³ Thus, chapter 15 provides a rebuttable presumption that a foreign debtor’s center of main interest is the location of that debtor’s registered office.⁴ “The party seeking recognition as a foreign main proceeding must prove by a preponderance of the evidence that the debtor’s COMI is in the jurisdiction where the foreign main proceeding is pending [internal citation omitted], although, as noted, chapter 15 creates a rebuttable presumption that the debtor’s registered office is its COMI.”⁵

¹ 11 U.S.C. 1520

² 11 U.S.C. 1502(4).

³ 11 U.S.C. 1516(c).

⁴ See *In re Ascot Fund Ltd.*, 603 BR 271 (Bankr. S.D.N.Y. 2019).

⁵ *Id.* at 278-279 (citing *Morning Mist Holdings Ltd. v. Kryz (In re Fairfield Sentry Ltd.*, 714 F.3d 127 (2d Cir. 2013)).

Following the commencement of a foreign bankruptcy proceeding, a foreign debtor may cease all activity in the jurisdiction of its registered office, and then locus of the debtor's activity post the initiation of the foreign proceeding may be in a different nation.⁶ Under the current standard, it is possible that a debtor's center of main interest can be found to be outside of the nation where the debtor was ascertainable by creditors due to litigation or other activity that occurred after the commencement of the foreign proceeding. Therefore, the application of the *Fairfield Sentry* approach to center of main interest temporality requires close examination of the debtor's actions to ensure that the debtor did not manipulate their center of main interests in bad faith.

Chapter 15 does not provide the exact time that a foreign debtor's center of main interest should be determined for the purpose of recognizing a foreign main proceeding. The majority approach to determining a foreign debtor's center of main interest is outlined in *In re Fairfield Sentry*, 714 F.3d 127. In *Fairfield Sentry*, the United States Court of Appeals for the Second Circuit found that the appropriate time to determine a foreign debtor's center of main interest was at the time of the filing of the chapter 15 petition. The minority approach provides that the appropriate time to determine a foreign debtor's center of main interest is as of the date of commencement of the debtor's foreign bankruptcy proceeding commenced.⁷

I. The Fairfield Sentry Approach

In *In re Fairfield Sentry*, the Second Circuit held that courts should evaluate a foreign debtor's center of main interest at the time of its filing of a chapter 15 petition, rather than at the date that the foreign proceeding commenced.⁸ The Second Circuit focused on the present tense

⁶ See *In re Ascot Fund Ltd.*, 603 B.R. at 278 (detailing that while the foreign debtor's registered office was in the Cayman Islands, that following the commencement of a Cayman liquidation proceeding the foreign debtor's only significant activity was in New York); see also *In re Creative Finance Ltd. (In Liquidation)*, 543 B.R. 498 (Bankr. S.D.N.Y. 2016).

⁷ See *In re Millennium Global Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 72 (Bankr. S.D.N.Y. 2011).

⁸ 714 F.3d 127.

of the verb “has” in section 1502(4). “Likewise, a COMI determination based on the date of the *initiation of the foreign proceeding* is not compelled by the statute. A foreign proceeding “*is pending*,” . . . only after it has been commenced. Under the text of the statute, therefore, the filing date of the Chapter 15 petition should serve to anchor the COMI analysis.”⁹ The Second Circuit held that “the present tense suggests that a court should examine a debtor's COMI at the time the Chapter 15 petition is filed.” *Id.* at 133. The Second Circuit based its interpretation of the present tense in section 1502(4) on its holding in *Bank Brussels Lambert v. Coan (In re AroChem Corp.)*, 176 F.3d 610 (2d Cir 1999). In *In re AroChem Corp.*, the Second Circuit held that Congress’ use of the present tense in a Bankruptcy Code section indicated that Congress intended the section to apply presently, and that Congress did not intend for courts to look into past actions that may be relevant.¹⁰

Additionally, the Second Circuit held that “a court may consider the period between the commencement of the foreign insolvency proceeding and the filing of the chapter 15 petition to ensure that a debtor has not manipulated its COMI in bad faith.”¹¹

II. The Millennium Global Approach

Some bankruptcy courts have determined a foreign debtor’s center of main interest as of the date that the foreign proceeding was commenced, rather than the date of the chapter 15 petition.¹²

In *In re Millennium Global*, The bankruptcy court’s approach to the text of section 1502(4) differed from the Second Circuit’s approach in *In re Fairfield Sentry*, as the

⁹ *Id.* at 134.

¹⁰ *Id.* at 624.

¹¹ *In re Fairfield Sentry*, 714 F.3d at 137.

¹² See *In re Millennium Global Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 72 (Bankr. S.D.N.Y. 2011), aff’d 474 B.R. 88 (S.D.N.Y. 2012) (holding that “Notwithstanding the authority in support of using the chapter 15 filing date as the date for making a COMI determination, use of the chapter 15 petition date is not required by the “plain words” of the statute and produces a result wholly inconsistent therewith.)

Millennium Court noted that “courts do not explain why they assume that the statute refers to the filing of the chapter 15 petition rather than the filing of the petition in the case for which recognition is sought” and that the date of filing of a chapter 15 petition is a “matter of happenstance,” finally holding that “the substantive date for the determination of the COMI issue is at the date of the opening of the foreign proceeding for which recognition is sought.”¹³ “While § 1502 is written in the present tense— “a foreign proceeding pending in the country where the debtor has the center of its main interests”—the *Millennium* court found that it referred to the date of the commencement of the foreign proceeding rather than the chapter 15 proceeding. “After all, the chapter 15 proceeding is merely ancillary to the foreign proceeding . . . According to the court’s interpretation, it is more logical that § 1502 lodges COMI in the commencement of the underlying proceeding at the heart of the liquidation than the somewhat arbitrary filing of the chapter 15 petition.”¹⁴

The *Millennium* approach was followed by the United States Bankruptcy Court for the Southern District of New York in *In re Kemsley*, 489 BR 346, 354 (Bankr. S.D.N.Y. 2013). In *Kemsley*, the debtor had been living in the United States for several years at the time of filing the chapter 15 petition.¹⁵ The *Kemsley* court found that “that the date of commencement of a foreign insolvency proceeding is the proper date for determining COMI for a foreign debtor.” because the foreign commencement date “is a fixed and readily verifiable date. In contrast, the date for filing a petition for recognition can vary greatly depending on circumstances and the diligence of the foreign representative.”¹⁶

III. Likelihood of a Foreign Debtor Manipulating its Center of Main Interests Under the *Fairfield Sentry* Approach

¹³ 458 BR at 72.

¹⁴ Jesse Halock, 3 Colum. Bus. L. Rev. 1091 (2016).

¹⁵ *Id.* at 351.

¹⁶ *Id.*

By considering a foreign debtor’s center of main interest at the date of the filing of the chapter 15 petition rather than the date of the commencement of the foreign proceeding, bankruptcy courts may be creating a window for unscrupulous foreign debtors to manipulate their center of main interests in order to forum shop. In *Fairfield Sentry*, the Second Circuit attempted to close this window by holding that “to offset a debtor’s ability to manipulate its COMI, a court may also look at the time period between the initiation of the foreign liquidation proceeding and the filing of the Chapter 15 petition.”¹⁷ However, the presence of bad faith or forum shopping may be difficult to determine for large multi-national companies who may have multiple feasible centers of main interest.

In *In re O’Reilly*, the United States Bankruptcy Court for the Western District of Pennsylvania, held that the date of the chapter 15 petition, the “presumptive date,” “can be rebutted in instances where the debtor has manipulated its center of main interests or establishment in bad faith between the time period between the commencement of the foreign insolvency proceeding and the filing of the Chapter 15 petition.”¹⁸ In *O’Reilly*, the debtor filed a chapter 15 petition for the recognition of a Bahamian bankruptcy proceeding which was rejected by the court because, among other reasons, the debtor’s center of main interests and domicile was in France.¹⁹

The window remains open for manipulation, and though the Second Circuit set a standard that may help prevent forum shopping, courts may have difficulty in determining whether a center of main interest was manipulated. Nonetheless, the incentive to forum shop will remain as long as debtors have time after the commencement of the foreign proceeding. “[B]y allowing debtors to lodge their COMI in another country by commencing a foreign proceeding and

¹⁷ 714 F.3d at 133.

¹⁸ 598 BR 784, 803 (Bankr. W.D. Pa 2019).

¹⁹ *Id.* at 805.

conducting liquidation activities, courts have increased the opportunity for forum shopping. Unconstrained by their prior operational history, debtors are virtually free to launch insolvency proceedings in the country of their choice. Accordingly, debtors are incentivized to commence proceedings in haven jurisdictions most favorable to their interests.”²⁰ The need for the look-back to prevent bad faith established in *Fairfield Sentry*, as well as the possibility for forum shopping, would be eliminated by determining center of main interest using the foreign proceeding date.

CONCLUSION

The majority approach regarding the proper date to be used for the consideration of a foreign debtor’s center of main interest for the purposes of recognizing a foreign main proceeding remains the *Fairfield Sentry* approach. Courts will consider a foreign debtor’s center of main interest based on the date of the chapter 15 filing, rather than the date of the commencement of the foreign proceeding. However, the minority approach, as outlined in *Millennium Global*, indicates a viable alternative approach that could be a clearer standard of law were it to be more widely adopted. Nonetheless, even the Second Circuit in *Fairfield Sentry* recognized the potential for gamesmanship under the majority approach, and therefore the center of main interest of a foreign debtor cannot be examined solely in the vacuum of the chapter 15 filing date. Rather, the lookback principal provided by the Second Circuit in *Fairfield Sentry* is essential to ensuring the fairness of the recognition of a foreign main proceeding.

²⁰ Jesse Halock, *Time Out: The Problematic Temporality of COMI Analysis in Chapter 15 Bankruptcy Cases in The Second Circuit* Colum. Bus. L. Rev. 1091 (2016).

