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Loredana Miranda

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Center of Main Interest for Members of a Group of Companies

Loredana Miranda, J.D. Candidate 2021

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Introduction

Under Chapter 15 of title 11 of the United States Code (the “Bankruptcy Code”), a court can recognize a foreign bankruptcy, insolvency, or restructuring proceeding (i.e., a foreign proceeding) as either a “foreign main proceeding” or a “foreign nonmain proceeding.”¹ The Bankruptcy Code defines a foreign main proceeding as “a foreign proceeding pending in the country where the debtor has the center of its main interests.”² The Bankruptcy Code does not define the “center of main interest” or “COMI.”³ Thus, bankruptcy courts have formulated different definitions and factors to determine a debtor’s COMI.⁴

Complex corporate structures have made it difficult for courts to determine a debtor’s COMI. Unlike other chapters of the Bankruptcy Code, there is no affiliate filing rule in Chapter 15.⁵ And Chapter 15 is silent as to how to determine the COMI of a group of companies.⁶

¹ See 11 U.S.C. § 1517(a)(1) (2018); see *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 126-27 (Bankr. S.D.N.Y. 2007) (stating that a court must specify if the recognition is either main or nonmain).

² 11 U.S.C. § 1502(4).

³ See *Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 133 (2d Cir. 2013).

⁴ See *id.* at 137 (stating courts are “free to develop and consider the particular factors that may be relevant”).

⁵ See Alesia Ranney-Marinelli, *Overview of Chapter 15 Ancillary and Other Cross-Border Cases*, 82 AM. BANKR. L.J. 269, 292 (2008).

⁶ See generally 11 U.S.C. § 1517.

Recently, the United States Bankruptcy Court for the Southern District of New York determined a debtor’s COMI in an integrated enterprise by examining each member individually, instead of the debtor group as a whole.⁷

This memorandum analyzes how bankruptcy courts ascertain a debtor’s COMI when the debtors are members of an affiliated group of companies. Part I explains the factors courts use to determine the COMI for a foreign debtor. Part II examines the method courts use to determine the COMI of a debtor that is a member of a group of affiliated companies.

I. A Court May Determine a Debtor’s COMI by Examining All of the Relevant Facts and Circumstances

The Bankruptcy Code does not define COMI.⁸ However, there is a statutory rebuttable presumption that “[i]n the absence of evidence to the contrary,” the COMI of a corporate entity is its registered office (i.e., place of incorporation).⁹ This presumption is used “[f]or speed and convenience in instances in which the COMI is obvious and undisputed.”¹⁰ The Court of Appeals for the Second Circuit held that the factors used to rebut the COMI presumption are “open-ended, and invite development by courts, depending on facts presented, without prescription or limitation.”¹¹

Bankruptcy courts have formulated different factors to determine a debtor’s COMI.¹² The non-exclusive factors that bankruptcy courts have used include the following: location of the debtor’s headquarters; location of those who manage the debtor; location of the debtor’s primary assets; “location of the majority of the debtor’s creditors or of a majority of the creditors who would be affected by the case”; “and/or the jurisdiction whose law would apply to most

⁷ See *In re Serviços de Petróleo Constellation S.A.*, 600 B.R. 237, 279 (Bankr. S.D.N.Y. 2019).

⁸ See *Morning Mist Holdings Ltd.*, 714 F.3d at 133.

⁹ See 11. U.S.C. § 1516(c).

¹⁰ *In re Creative Fin., Ltd.*, 543 B.R. 498, 514-15 (Bankr. S.D.N.Y. 2016).

¹¹ *Morning Mist Holdings Ltd.*, 714 F.3d at 138.

¹² See *In re Creative Fin., Ltd.*, 543 B.R. at 517.

disputes.”¹³ Some bankruptcy courts have also considered the debtor’s liquidation activities, its principal place of business, and its nerve center.¹⁴ However, these factors are “neither required nor dispositive.”¹⁵

II. Bankruptcy Courts are Determining the COMI for Members of Affiliated Group of Companies on a Per Debtor Basis

A. The United States Bankruptcy Court for the Southern District Of New York Expressly States That a Court Analyzes COMI on a Per Debtor Basis

A bankruptcy court’s determination of a debtor’s COMI becomes increasingly complex when dealing with members of an affiliated group of companies. Bankruptcy courts have the discretion to decide if they will ascertain a debtor’s COMI on an individual basis or as a group.¹⁶ In *In re Servicios de Petroleo Constellation S.A.*, the United States Bankruptcy Court for the Southern District of New York analyzed the COMI of debtors that were part of an integrated enterprise on a per debtor basis, instead of the debtor group as a whole.¹⁷ *In re Servicios de Petroleo Constellation S.A.*, is the first time a bankruptcy court has explicitly stated that “the [c]ourt’s recognition is granted on an individual debtor by debtor basis.”¹⁸ Other New York bankruptcy courts have also analyzed COMI using a per debtor approach.¹⁹

Two cases from the United States Bankruptcy Court for the Southern District of New York had previously determined a debtor’s COMI on a per debtor basis. First, in *In re Mood Media Corp.*, the court analyzed the COMI for the foreign parent company and the United States subsidiaries individually.²⁰ The debtors were composed of Mood Media Corp and “[f]ourteen

¹³ See *In re SPhinX, LTD.*, 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006).

¹⁴ See *Morning Mist Holdings Ltd.*, 714 F.3d at 137.

¹⁵ See *id.*

¹⁶ See *In re Serviços de Petróleo Constellation S.A.*, 600 B.R. 237, 279 (Bankr. S.D.N.Y. 2019).

¹⁷ See *id.*

¹⁸ See *id.*

¹⁹ See, e.g., *In re Mood Media Corp.*, 569 B.R. 556, 561 (Bankr. S.D.N.Y. 2017).

²⁰ See *id.*

direct and indirect U.S. subsidiaries of Mood Media Corp.”²¹ The bankruptcy court noted that Mood Media had its COMI in Canada, however the U.S. companies did not.²² Second, in *In re Ocean Rig UDW Inc.*, the bankruptcy court examined the foreign debtor’s recognition and held that each individual debtor had its COMI in the Cayman Islands.²³ Thus, New York bankruptcy courts are individually seeking recognition for members of affiliated groups of companies.

B. Other Bankruptcy Courts Have Also Determined a Debtor’s COMI on a Per Debtor Basis

Although other bankruptcy courts have not expressly stated such, other courts have also analyzed COMI on a per debtor basis. In *In Re Kraus Carpet*, the United States Bankruptcy Court for the District of Delaware determined the COMI of a member of a group of companies on a per debtor basis.²⁴ The bankruptcy court granted recognition as a foreign main proceeding after finding that each debtor’s COMI was Canada.²⁵ The court agreed with the debtor that the COMI of the parent company and its United States affiliate should be determined on an individual basis.²⁶

Likewise, in *In re Innua Canada Ltd.*, the United States Bankruptcy Court for the District of New Jersey independently examined the two debtors’ COMI by considering the location of their registered office, headquarters, books and records, and employees.²⁷ The bankruptcy court

²¹ *Id.* at 558.

²² See *In re Mood Media Corp.*, 569 B.R. at 561.

²³ See *Ocean Rig UDW Inc.*, 570 B.R. 687, 704 (Bankr. S.D.N.Y. 2017) (stating “[f]oreign [d]ebtors have engaged in various activities supporting their COMI in the Cayman Islands for almost a year” and “[t]he subsidiary debtors are also registered as foreign companies under the companies laws in the Cayman Islands”).

²⁴ See Final Order Granting Recognition of Foreign Main Proceeding And Certain Related Relief at 4, *In re Kraus Carpet, Inc et. al.*, No. 18-12057(KG) (Bankr. D. Del. 2018).

²⁵ See *id.*

²⁶ See Motion Of Foreign Representative For Entry Of Provisional And Final Orders Granting Recognition Of Foreign Main Proceeding And Certain Related Relief at 10, *In re Kraus Carpet, Inc et. al.*, No. 18-12057(KG) (Bankr. D. Del. 2018).

²⁷ See *Innua Can., Ltd.*, No.: 09-16362 (DHS), 2009 WL 1025090, at *6 (Bankr. D.N.J. 2009) (stating that the foreign debtors consisted of the parent company and a wholly-owned subsidiary).

held that the COMI for both foreign debtors was Canada and recognized their Canadian proceedings as foreign main proceedings.²⁸

Furthermore, the United States Bankruptcy Court for the Southern District of Florida stated in dicta that it would ascertain the COMI of members of affiliated groups of companies on a per debtor basis.²⁹ In *In re British Am. Isle of Venice Ltd.*, a creditor, asked the court “to collapse the intervening levels of corporate ownership” between the debtor and its subsidiaries when it determined the debtor’s COMI.³⁰ The court rejected the creditor’s argument and assessed the parent debtor’s COMI separately from its subsidiaries.³¹ Although the subsidiaries were not debtors, the court’s refusal to collapse the parent company with its subsidiaries indicates that the court will use a per debtor approach if the subsidiaries were debtors.³²

Conclusion

Bankruptcy courts determine the COMI for members of a group of companies on a per debtor basis, instead of the group as a whole. Complex corporate structures and lack of legislative guidance force bankruptcy courts to select between an individual or group approach to COMI determination for members of a group of companies. The United States Bankruptcy Court for the Southern District of New York was the first court to explicitly state that the court will decide a debtor’s COMI on an individual basis.³³ Other bankruptcy courts had previously used this approach, despite not expressly stating it.³⁴ Future bankruptcy courts may follow this same per debtor approach but it is not required as there is no express statement in the statute or binding

²⁸ *See id.*

²⁹ *See In re British Am. Isle of Venice, Ltd.*, 441 B.R. 713, 721 (Bankr. S.D. Fla. 2010) (recognizing the BVI proceeding as a foreign main proceeding).

³⁰ *See id.*

³¹ *See id.* at 721-22.

³² *See id.* at 716-17.

³³ *See In re Serviços de Petróleo Constellation S.A.*, 600 B.R. at 279.

³⁴ *See, e.g., In re Innua Canada Ltd.*, 2009 WL 1025090, at *6.

precedent. Each bankruptcy court can make its determination based on the facts and the unique corporate structure of the current debtors.