AMERICAN BANKRUPTCY INSTITUTE

2017 Cross-Border Insolvency Program

Cross-Border Update

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Determining COMI from the US Perspective—the Basics

Time: "[A] debtor's COMI should be determined based on its activities at or around the time the chapter 15 petition is filed." *Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 137 (2d Cir. 2013).

Activities: SPhinX Factors: "The location of the debtor's headquarters; the location of those who actually manage the debtor … ; the location of the debtor's primary assets; the 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 disputes." *In re SPhinX, Ltd.*, 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006)." These factors are a "helpful guide, but not exclusive or necessarily dispositive. *In re Fairfield Sentry*, 714 B.R. at 137. What's really important: the COMI needs to be "ascertainable by third parties." *Id.*

Determining COMI from the US Perspective—Noteworthy Cases

Sanjel

- Sanjel Group was a large, private, family-owned oilfield services group of companies.
- Assets in Canada, the US and the Middle East.
- Notwithstanding the significant operations of the Sanjel Group in the US (more than 50% of revenues) and the objections of an *ad hoc* committee of senior unsecured bondholders, the US Bankruptcy Court found the Sanjel Group's COMI was in Canada and granted a Chapter 15 Order recognizing the Canadian proceedings as "foreign main" proceedings.
- Relevant factors leading to finding of COMI in Canada included:
  - integrated nature of the Sanjel Group's business;
  - location of directors and senior management of Sanjel Corp.;
  - location of banking and financial reporting functions of the Sanjel Group;
  - supply chain strategy and direction for the Sanjel Group were centralized in Calgary; and
  - policies, procedures, operating manuals and operating practices were developed, updated and administered out of Calgary.

Ocean Rig

- Pro COMI shifting case: court looked to the location of: (i) board meetings; (ii) company officers; (iii) operations; (iv) location of assets; (v) books and records; and (vi) restructuring activities. *In re Ocean Rig UDW, Inc.*, 570 B.R. 687, 698 (Bankr. S.D.N.Y. 2017). The court also paid special attention to notice to creditors of relocation. *Id.*
- "It also does not matter that UDW is classified as "exempted" under the Cayman Companies Law, even though "exempted company status appears to limit that company's activities in the Cayman Islands." *Id.* at 705.
- But what's enough to ensure a COMI shift? We still don't know.

Determining COMI from the Canadian Perspective—the Basics

- Canada has adopted the Model Law.
- Statutory Framework: CCAA Part IV - Cross-Border Insolvencies:
  - Section 47 of the CCAA provides for mandatory recognition of a foreign proceeding (whether main or non-main) once the statutory pre-conditions are met.
  - Similar COMI determination to US. Courts look to "nerve centre".

Determining COMI from the Canadian Perspective—*CHC Helicopters*

- CHC was formed in 1947 as a British Columbia, Okanagan Valley crop-spraying company.
- 43 companies operating as *CHC Helicopters* filed voluntary petitions in the US Bankruptcy Court (Dallas) for relief pursuant to Chapter 11 of the Bankruptcy Code.
- Five of the debtor companies were Canadian entities.
- At time of filing, CHC operated in over a dozen countries, employed approximately 3,800 employees worldwide and had outstanding funded debt obligations in the aggregate amount of approximately US$1.6 billion.
- CHC was a BC-born company, perceived (at least in BC) as a local company and listed Vancouver as its head office on its website, BUT the Court decided COMI on the basis of the facts at the time of filing and with regard to issues of comity and cooperation between Canadian and US courts.

Determining COMI from the Canadian Perspective—*CHC Helicopters*

Despite initial opposition in Canada, the Canadian Court found the COMI of CHC in Texas for a variety of reasons, including:

- most senior management was located in Texas;
- most of the material strategic and corporate decisions were made in Texas;
- the business of the CHC group was operated on a consolidated basis; and
- the majority of creditors were located in the US.

Cayman Islands—*CHC Helicopters*

- *Re CHC Group Ltd*, Grant Court, 24 January 2017 (Unreported).
- CHC Group Ltd. , the group parent, is a Cayman incorporated company that wanted to obtain stay of proceedings and promote restructuring plan in Cayman.
- Proper remedy is to seek appointment of provisional liquidators under Companies Law after presentation of winding up petition against company.
- Problem: Unless authorized by articles of association or a shareholder resolution, company directors cannot cause company to present winding up petition against itself: Companies Laws.94(2) and *Re China Shanshui Group Limited*, 2015 (2) CILR 255. CHC did not have authority to do so under articles or from shareholders.
- Solution: Have a "friendly" creditor present a winding up petition, then the company makes application for appointment of provisional liquidators. CHC entity from Luxembourg holding intercompany debt presented winding up petition.

Cayman Islands—*CHC Helicopters*

- Court accepted this workaround, finding that English case *In re Emmadart Ltd.*, [1979] Ch 540, affirms that management objective is concerned with carrying on the company's undertaking, while winding up objective is concerned with its stoppage. This is the common law principle behind Companies Law s.94(2) but is not applicable with respect to an application by a company for PLs/restructuring.
- Because purpose of the CHC application was to propose a scheme of arrangement, it is not contrary to law or good practice. The Court granted the application and appointed the provisional liquidators.
- Court did not address effect of Order 4, rule 6 of the Companies Winding Up Rules, which appears to restrict a company's application for appointment of provisional liquidators to circumstances where the company itself presented the winding up petition.

Ocean Rig & COMI Shifting

- *In re Ocean Rig UDW Inc. et al*, US Bkcy Ct SDNY, 17-10736, 24 August 2017.
- *Re Ocean Rig UDW Inc. & Ors*, Grand Court, 18 September 2017 (Unreported).
- Until sometime in 2016, each company had its COMI in the Marshall Islands ("RMI"). In 2015, parent redomiciled to Cayman; subsidiaries remained incorporated in RMI. No statutory restructuring regime in RMI.
- In anticipation of maturity date on significant notes and intended restructuring efforts, companies took steps to shift COMI to Cayman Islands, with plan to seek provisional liquidation in Cayman, promote Cayman schemes of arrangement, and have proceedings and schemes recognized under Chapter 15 in the United States.
- Established connections to Cayman: opened offices, appointed Cayman resident directors and officers; held board meetings, changed contractual notices to Cayman address, gave public notice of Cayman address, opened bank accounts, maintained corporate records and held restructuring meetings.
- US court recognized Cayman provisional liquidation as foreign main proceeding. Schemes were accepted and sanctioned in Cayman and then recognized in the US.

Non-Statutory Recognition in Cayman

- *Re China Agrotech Holdings Limited*, Grand Court, 19 September 2017 (Unreported)
- China Agrotech was Cayman incorporated, listed on Hong Kong Stock Exchange and subject to liquidation proceeding in Hong Kong
- HK liquidators applied for recognition in Cayman, permission to promote a Cayman scheme of arrangement, stay of proceedings and treatment as joint provisional liquidators
- Cayman statutory recognition regime is based on jurisdiction of incorporation, not COMI – Companies Law Part XVII
- Issue was whether a common law power to recognize and assist existed and should be exercised as requested

Non-Statutory Recognition in Cayman

- Court found that common law power existed to recognize and assist foreign proceedings and liquidators where circumstances justify and subject to limitations on its use, even where appointed in a jurisdiction other than jurisdiction of incorporation.
- Power can be exercised to grant relief based on domestic substantive and procedural law, but cannot extend statutory relief where the statute does not apply –this follows *Singularis v PwC*, [2014] UKPC 36.
- Court exercised power because: (a) the HK liquidators required relief to promote parallel schemes in HK and Cayman, (b) there was no likelihood of an application for winding up order being made in Cayman, (c) company had substantial connection to HK, (d) no evidence of benefit of Cayman winding up, (e) no policy reason requiring local proceeding, (f) power to promote scheme in name of company available under Cayman law and (g) liquidators entitled to act under HK law.
- Would not exercise power to allow HK liquidators to act "as if" they were Cayman provisional liquidators or grant stay of proceedings "as if" Cayman liquidators appointed. This relief went beyond what Privy Council said is permissible in *Singularis v PwC*. But Court did direct that any actions commenced against company would be heard by same judge to allow case management functionally equivalent to a stay.

Brazil has not adopted the Uncitral Model Law

- Brazilian Bankruptcy Law (Federal Law No. 11.101/2005): Article 3. The courts of the venue of the debtor's main establishment or of the branch of a company headquartered outside Brazil are competent to ratify extrajudicial reorganization plans, grant judicial reorganizations or declare bankruptcy.
- But the Federal Government is about to propose a reform of the Bankruptcy Law to Congress. One of the proposals includes the adoption of the Model Law.
- PL 1572/2011 – New Commercial Code – also contains a chapter on cross-border insolvency.

Brazilian Cases

- OAS, *Agravo Regimental* No. 2084295-14.2015.8.26.0000/50000, Appellate Court of the state of São Paulo.
- OGX, *Agravo de Instrumento No.* 0064658-77.2013.8.19.0000, Appellate Court of the state of Rio de Janeiro.

In both cases, the Appellate Courts decided that foreign companies that are merely financial vehicles for Brazilian companies can file for judicial reorganization in Brazil together with the other companies in the same economic group.

Brazilian Cases

The courts' arguments include:

- the foreign companies only served as vehicles for the Brazilian companies to issue debt securities and raise money abroad to explore certain operational activities in Brazil;
- the foreign and national entities form a single economic group that develops a single business activity;
- the funds to pay the debts of the foreign companies come from the business activities that the Brazilian companies develop in Brazil; and
- business decisions were made in Brazil and the relationship between the Brazilian and the foreign companies was clearly one of subordination rather than of coordination.

Brazilian Cases

Arguments against allowing foreign companies to file for JR in Brazil include:

- if the debtors do not comply with the terms of the reorganization plan, the court cannot place the foreign companies into bankruptcy - creating an unacceptable legal advantage to foreign entities;
- reorganization in Brazil creates uncertainty because it would subject foreign creditors to payments in a different country and subject them to jurisdictional laws that are different from those the parties agreed upon in their agreements;
- in order to accept a Brazilian court's jurisdiction to process a foreign company's request for reorganization, it is necessary to substantively consolidate the assets of said companies; and
- Brazilian law cannot be applied and its remedies cannot be used to protect foreign companies without violating the sovereignty of each country.

Brazilian Cases

OI, judicial reorganization No. 0203711-65.2016.8.19.0001,
7th Business Court of Rio de Janeiro

- Background facts:
  - The judicial reorganization was filed by a group of companies, including two Dutch companies.
  - Suspension of payment proceeding was initiated in the Netherlands and later converted into a liquidation.
- Holding:
  - The decision to liquidate the companies in the Netherlands has to be recognized by the Superior Court of Justice if it is to produce effects in Brazil.
  - The Dutch trustee could file petitions in Brazil, but the officers of the companies would continue to represent the Dutch companies.

Section 109 and Chapter 15

- *In re Barnet*, 737 F.3d 238, 247 (2d Cir. 2013): Case couldn't be recognized because FR failed to prove that the debtor had assets, domicile, or a place of business in the US as required by § 109(a). Court held that § 109 applies to Chapter 15 by the plain meaning of statutory interpretation: § 103(a) says "(a) … this chapter [1] … appl[ies] in a case under chapter 15" and thus since § 109(a) is in chapter 1, it applied.

- *In re Bernarmara Consulting a.s.*, No. 13-13037 (Bankr. D. Del. Dec. 17, 2013) (Bankr. Judge Gross): Court refused to apply the reasoning from Barnet, reasoning that the requirements of § 109(a) do not apply to Chapter 15. "Section 1502 defines Debtor as an entity that is the subject of a foreign proceeding. And there was nothing in Section 1502 which reflects upon a requirement that Debtor have assets."

- *In re Forge Grp Power Pty Ltd*, No. 17-cv-02045 (N.D. Cal. Apr. 12, 2017): "When a Chapter 15 is initiated because the person in charge of the proceeding in another country delivers a retainer check to a lawyer who is going to be involved in the Chapter 15, that is not a sufficient identification of property that I believe Congress had in mind."

Section 1509(f)

1509(b): If a FR obtains recognition, then: (1) FR has capacity to sue and be sued; (2) FR may apply directly to a US court for relief; and (3) all US courts must grant comity and cooperation.

1509(f): Notwithstanding anything above, if the FR doesn't get recognition or doesn't even try to get recognition, the FR can still exercise "any right ... to collect or recover on a claim which is the property of the debtor."

So what happens if the FR seeks relief in a US court without obtaining recognition first?

Compare Varga v McGraw Hill Fin. Inc., No. 652410/2013, 2015 WL 4627748, at *13 (N.Y. Sup. Ct. July 31, 2015) (Lack of Chapter 15 recognition did not affect standing in a fraud case because "Plaintiffs did not bring this case with the express purpose of assisting or facilitating their insolvency proceedings.") *and Orchard Enter. NY, Inc. v. Megabop Records, Ltd.*, 2011 US Lexis 22896 (S.D.N.Y. Mar. 4, 2011) (comity denied because foreign liquidators did not obtain recognition).

Petersen Energia Inversora, SAU v. Argentine Republic, No. 15-cv-2739 (LAP), 2016 WL 4735367, at *10 (S.D.N.Y. Sept. 9, 2016): The legislative history of § 1509(f) indicates that it is intended to be a "limited exception" and provides an "account receivable" as an example of "a claim which is property of the debtor." H.R. REP. 109-31, pt. 1, at 110-11 (2005). The exception, however, encompasses those claims of the debtor that existed prior to the bankruptcy or are independent of the bankruptcy and that, therefore, do not involve the cooperation and comity of United States courts with a foreign bankruptcy proceeding.

Walter Energy Canada

- Walter US entities and Walter Canada entities commonly owned by Walter US (parent).
- The Walter US group filed voluntary petitions for relief under Chapter 11 of the US Bankruptcy Code in July 2015 in the US Bankruptcy Court in Birmingham.
- The Walter Canada entities were not included in the Chapter 11 proceedings.
- In December 2015, the Walter Canada group sought protection under the CCAA .
- The Canadian proceedings were not recognition proceedings, given the Canadian entities were not subject to the US proceedings.

Section 363 and Chapter 15

- Section 1520: "(a) Upon recognition of a foreign proceeding that is a **foreign main proceeding** … (2) sections 363 …apply to a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States t the same extent as in Chapter 7 or 11 proceedings. ..."
- Section 1521: "(a) Upon recognition of a foreign proceeding that is a foreign proceeding, whether main or nonmain ...The court may . . grant any appropriate relief, including—(5) entrusting the administration of all or part of the debtor's assets within the territorial jurisdiction of the United States to the foreign representative …."
- *In re Fairfield Sentry Ltd*, 768 F.3d 239 (2d Cir. 2014) (and again 690 Fed. Appx. 761 (2d Cir. May 22, 2017)):

  > Congress specifically directed courts, "[i]n interpreting [Chapter 15], … [to] consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions." But, "Chapter 15 does impose certain requirements and considerations that act as a brake or limitation on comity." The express statutory command that, in a Chapter 15 ancillary proceeding, the requirements of section 363 "apply … *to the same extent*" as in Chapter 7 or 11 proceedings, 11 U.S.C. § 1520(a)(2) (emphasis added), is one such limitation. (internal citations omitted).
- **What about nonmain proceedings?**

What is a "core" proceeding in a Chapter 15 case?

11 U.S.C. § 157(b)(2)(P)

(2) Core proceedings include, but are not limited to –

…

(P) recognition of foreign proceedings and other matters under chapter 15 of title 11.

11 U.S.C. § 1521

(a) Upon recognition of a foreign proceeding, whether main or nonmain, where necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including—

…

(7) granting any additional relief that may be available to a trustee, …

In re Bluberi Gaming Technologies, Inc., 554 B.R. 841 (Bankr. N.D. Ill. 2016)

- Engaged in the development, sale and deployment of electronic gaming machines to casinos .
- Licensed proprietary software to AGS LLC
- Soon after the commencement of the CCAA proceedings, Canadian court approved a sale of substantially all of Bluberi's assets.
- Commenced chapter 15 cases. As part of the order granting recognition, at the request of the Foreign Representative, Court made section 365 of the United States Bankruptcy Code applicable to Bluberi's chapter 15 cases.
- After recognition was granted, AGS filed *Motion to Compel Performance of Bluberi Gaming Technologies Inc. Pursuant to 11 U.S.C. § 365(n)(4)*, relating to AGS's efforts to obtain the source code of the Bluberi gaming software licensed and operated by AGS so that AGS would be able to replace Bluberi as the servicer.

In re Bluberi Gaming Technologies, Inc., 554 B.R. 841 (Bankr. N.D. Ill. 2016)

11 U.S.C. § 365(n)(4)

Unless and until the trustee rejects such contract, on the written request of the licensee the trustee shall—

(A) **to the extent provided in such contract or any agreement supplementary to such contract**—

(i) perform such contract; or

(ii) provide to the licensee such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law) held by the trustee; and

...

(B) not interfere with the rights of the licensee **as provided in such contract, or any agreement supplementary to such contract**, to such intellectual property (including such embodiment), including any right to obtain such intellectual property (or such embodiment) from another entity.

In re Bluberi Gaming Technologies, Inc., 554 B.R. 841 (Bankr. N.D. Ill. 2016)

Two separate bases for jurisdiction:

- Consideration of whether or not to apply section 365(n)(4) is a matter of bankruptcy law that arises nowhere other than within the context of a bankruptcy case.
- The parties consented to the. court's jurisdiction

In re Bluberi Gaming Technologies, Inc., 554 B.R. 841 (Bankr. N.D. Ill. 2016)

Prerequisites to source code access as provided in the contract,:

- When needed for repair if Bluberi failed to give explanation to undertake repairs;
- Access given to employees with "need to now" basis only;
- Required to execute affidavit that, after use, no copies retained

Motion denied because AGS failed to establish a contractual right to performance sought under section 365(n)(4) of the Bankruptcy Code

"Here, the Definitive Agreement is unambiguous. The rights to access the source code set forth in Section 14 [of the Definitive Agreement] do not allow for AGS to access the code for just any reason. Instead, AGS's access rights are limited to those expressly set forth. Those rights do not include an unfettered right of access or access for the purpose of transitioning the Service Agreement."

In re ICP Strategic Credit Income Fund Ltd., 568 B.R. 596 (S.D. N.Y. 2017)

- Appeal of dismissal on *in pari delicto* grounds, of complaint by Joint Official Liquidators of debtor funds against law firm DLA Piper LLP (US) alleging claims for aiding and abetting fraud, aiding and abetting breach of fiduciary duty and fraudulent trading under the Cayman Islands Companies Law.

- Claims related to financial transactions orchestrated by ICP Asset Management and its President resulting in transfers of $36 million of debtor funds to cover financial obligations owed by Triaxx, another investment fund managed by ICP. DLA represented ICP and Triaxx in connection with the transactions.

In re ICP Strategic Credit Income Fund Ltd., 568 B.R. 596 (S.D. N.Y. 2017)

- Bankruptcy court dismissed and liquidators appealed to district court. DLA Piper argued that district court should treat bankruptcy court decision as proposed findings of fact and conclusions of law (reviewed by district court de novo matters to which a party has objected) rather than final order (for which findings of fact reviewed for clear error and conclusions of law de novo) because the bankruptcy court lacked jurisdiction to decide "non-core" matters in the proceeding.

- District court declined to do so "as it is clear that the Bankruptcy Court had jurisdiction over any non-core claims by virtue of DLA Piper consenting to its jurisdiction" by removing the litigation from state court because it was related to the bankruptcy case and the moved to dismiss in the bankruptcy court, "therefore cho[osing] Bankruptcy Court as the forum in which they wished to litigate the case" constituting "implicit consent."

Third-Party Releases in Chapter 15

- Restructurings through, e.g., Schemes of Arrangement in UK and former Commonwealth countries, may utilize non-consensual releases by creditors of the debtor of non-debtor entities.
- In non-chapter 15 US bankruptcy cases, third-party releases may be limited or prohibited entirely.
- Tension with chapter 15 cases, where recognition may include comity to foreign court to enforce third-party releases?
- *In re Millennium Lab Holdings, II, LLC*
    - Opt-Out Lenders v. Millennium Lab Holdings II, LLC, No. 16-110-LPS, 2017 WL 1032992 (D. Del. Mar. 20, 2017)
    - Opinion, Case 15-12284-LSS [Docket No. 476] (Bankr. D. Del. Oct. 3, 2017)

Investment Fund Redemption Creditors

Pearson v Primeo Fund, [2017] UKPC 19

- Important case for investment fund insolvencies.
- Dispute over (a) effect of redemption provisions in company's articles of association and Companies Law and (b) priority of redemption creditors in winding up.
- Board found that upon shares being redeemed in accordance with articles, shareholder becomes creditor for the amount of redemption price payable – payment before liquidation is not required and the period allowed for the company to make payment does not affect redemption.
- Board confirmed that redemption creditors are subordinate to ordinary creditors by operation of Companies Law s.49(g).