

In re Creative Finance Ltd: Chapter 15 Case Dismissed

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A bankruptcy judge in New York court recently dismissed a case filed under chapter 15 of the U.S. Bankruptcy Code because the debtors did not have their center of main interests or business operations in the jurisdiction where the initial, foreign case was filed, the British Virgin Islands (BVI). *In re Creative Finance Ltd. (In Liquidation)*, No. 14-10358, 2016 WL 156299 (Bankr. S.D.N.Y. Jan. 13, 2016).

The debtors' operations were in England, Spain, and Dubai. They filed for liquidation in the BVI because that was their place of incorporation. But the liquidator appointed in the case did too little work there to justify recognition under chapter 15. Therefore, Bankruptcy Judge Robert E. Gerber of the Southern District of New York dismissed the case.

This is the latest case in Southern District New York to consider factors required for non-US entities to utilize chapter 15 in cross-border restructuring efforts that originate outside the US.

Background Facts

The debtors, Creative Finance Ltd. and Coxsmorex Ltd. (Debtors), were foreign exchange trading companies. One of their creditors, Marex Financial Ltd. (Marex), sued the Debtors in the High Court of Justice in England, Queens Bench Division Commercial Court (English Court). The parties' contracts were governed by the laws of England and Wales. Disputes were to be resolved in England.

On July 2013, Mr. Justice Field of the English Court issued a draft judgment in favor of Marex and against the Debtors for more than US \$5 million, plus costs. The draft prohibited the parties from taking any action pending issuance of the formal judgment. The formal judgment and order (English Judgment) were issued on July 26 and the Debtors were to pay by August 8. The Debtors neither paid nor appealed.

Instead, between the announcement of the English Judgment and the payment due date, the Debtors transferred more than US \$9.5 million from accounts in England to accounts in Gibraltar and Dubai. Judge Gerber said "[t]he inference is inescapable is that . . . these transfers were orchestrated . . . in a blatant attempt to avoid payment of the English Judgment." 2016 WL 156299, at *4.

The Debtors' only other significant assets were unsecured claims of US \$171 million they held in a chapter 11 case in the Southern District of New York, *In re Refco Inc.*, Case No. 05-60006, 2006 WL 3409088 (S.D.N.Y. Nov. 16, 2006). In August 2013, the Debtors received a \$1.7 million interim distribution in that case, but those funds also disappeared.

Marex tried to collect on the English Judgment. It obtained judgments in New York State Court recognizing and requiring enforcement of the English Judgments. It also filed but later withdrew a liquidation case against the debtors in the BVI.¹

In December 2013, the Debtors filed the BVI case and a liquidator was appointed. The Debtors had done no business for years and never had operations in the BVI. The liquidator held a creditors' meeting and a creditors' committee was appointed consisting solely of insiders. But the liquidator did not obtain the Debtors' ledgers or journals, secure bank

¹ Judge Gerber's opinion says Marex withdrew that case because it did not want to share recovery on its judgments with insiders of the Debtors that would likely file claims in the liquidation proceeding. 2016 WL 156299, at *5.

records, find out what happened to the \$9.5 million, pay taxes, bring causes of action, or conduct any investigation. 2016 WL 156299, at *3 and 8.

On February 19, 2014, the liquidator filed a chapter 15 case in the U.S. Bankruptcy Court for the Southern District of New York and sought recognition of the BVI proceeding as either a foreign main proceeding or a foreign nonmain proceeding. Judge Gerber noted that the case was filed to enable the liquidator to obtain the benefit of the Bankruptcy Code's automatic stay. The stay would preclude Marex from seeking to collect additional distributions in the *Refco* case to satisfy its judgments. *Id.* at 19.

Marex filed a motion to dismiss the case under Bankruptcy Code section 305, arguing that the case was filed in bad faith. Judge Gerber agreed that the Debtors had acted in bad faith, observing that "the Debtors . . . were guilty of bad faith in numerous respects." 2016 WL 156299, at *11. But he made his ruling dismissing the case "wholly apart from the Debtors' bad faith." 2016 WL 156299, at *14. Since the BVI case was neither a foreign main nor a foreign nonmain proceeding, Judge Gerber held that it did not merit recognition under chapter 15.

Analysis

Chapter 15 requires that the foreign (non-U.S.) case where recognition is sought must satisfy a threshold test: a debtor must have its center of main interests (COMI) or an establishment where the initial case is filed.

Judges in the Southern District of New York and the appellate court, the U.S. Court of Appeals for the Second Circuit (Second Circuit), have identified many factors relevant to consideration of COMI. But the key concern is where "the debtor conducts its regular business, so that the place is ascertainable by third parties." *Morning Mist Holdings Ltd. v. Kryz (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 129 (2d Cir 2013).²

The Bankruptcy Code defines "establishment" as "any place of operations where the debtor carries out a nontransitory economic activity." 11 U.S.C. § 1502(2). Put simply, an establishment is a "local place of business." 2016 WL 156299, at *17 (citations omitted).

In *Fairfield Sentry*, the Second Circuit held that the key date for determining if recognition should be granted is when the chapter 15 petition is filed, not when the original non-U.S. case was filed. This means a debtor can file the foreign proceeding on one date and do enough work in that jurisdiction to change its COMI before it files a chapter 15 petition. But, as Judge Gerber noted, the Second Circuit's opinion says seven times that courts must also ensure that a debtor's COMI has not been "manipulated." *Id.* at *16.

In earlier cases (see footnote 2), the chapter 15 petition was filed just after the initial, foreign case. But, in *Creative Finance*, the chapter 15 case was filed two months after the BVI case. Even so, Judge Gerber said the work the liquidator did was insufficient to demonstrate that – when the chapter 15 was filed – the BVI had become the Debtors' COMI or that the Debtors had an establishment there. The BVI was a "letterbox" jurisdiction when the original case was filed and remained so when the chapter 15 case was filed. As a result, Judge Gerber dismissed the chapter 15 case.

² Judge Gerber's decision discusses prior chapter 15 cases that set forth factors relevant to COMI. 2106 WL 156299, at *15-16.



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