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Bankruptcy Update

New York Bankruptcy Court Issues Ruling on Recognition of Foreign Proceedings

by [Jonah Wacholder](#) and [Daniel A. Lowenthal](#) on August 22, 2019

Chapter 15 of the Bankruptcy Code, added in 2005, provides a route for debtors to obtain US recognition of their insolvency proceedings in other countries. A foreign proceeding can be recognized under chapter 15 as either a “foreign main proceeding” or a “foreign nonmain proceeding.” 11 U.S.C. § 1517. Recognition as a foreign main proceeding entitles a debtor to certain rights, such as the automatic stay of actions against the debtor that would normally be imposed in a bankruptcy case filed in the United States. 11 U.S.C. § 1520. To obtain recognition of a foreign proceeding as a foreign main proceeding, the foreign proceeding must be pending in the country where the debtor has the “center of its main interests” (usually abbreviated “COMI”). The precise meaning of this somewhat elusive phrase is still being worked out by judicial decision. On August 12, 2019, the Bankruptcy Court for the Southern District of New York issued another entry in the body of case law concerning this provision, ruling that an investment fund organized under Cayman Islands law, and involved in a liquidation proceeding there, had its COMI in the Cayman Islands rather than New York.

The debtor, Ascot Fund Ltd. (“Ascot Fund”), is an investment fund organized under Cayman Islands law. Substantially all of its assets were invested in Asset Partners LP (“Asset Partners”), a Delaware limited liability partnership, which in turn invested substantially all of its assets in Bernard L. Madoff Investment Securities, LLC (“BLMIS”), the vehicle for the Madoff Ponzi scheme. In the fallout after the Ponzi scheme collapsed, the New York Attorney General sued the companies’ founder, J. Ezra Merkin, for causing investors in the two Ascot businesses, among others, to lose money in connection with the Madoff scheme. A receiver was appointed for Ascot Partners. This action was settled in 2012 (the “Merkin Settlement”), and eligible investors, including investors in the Ascot Fund, had the option of taking a distribution from the settlement in exchange for release of certain claims. In a second action, the trustee for the liquidation of BLMIS brought fraudulent transfer claims against Ascot Fund and Ascot Partners, settling in 2018, with Ascot Partners receiving an allowed customer claim of around half a billion dollars in exchange for a \$280 million payment to the trustee. As part of its allowed customer claim, Ascot Partners received a payment of \$320.6 million, as well as an entitlement to receive an equal proportionate share of future distributions.

Both the Cayman liquidation proceeding and the chapter 15 petition rose out of a dispute as to how to distribute these funds to Ascot Fund and its shareholders. Contrarian Funds, LLC (“Contrarian”), a Delaware limited liability company, controls hfc Limited, an Ascot Fund shareholder. Contrarian contends that distributions to Ascot Fund shareholders should be

reduced to the extent a particular shareholder received a distribution from the earlier Merkin Settlement. In the face of this dispute, in October 2018 Ascot Fund entered a voluntary liquidation and transferred its management to two independent liquidators. Preferring to litigate in New York rather than Cayman, Contrarian then filed suit in New York in December 2018, seeking a ruling from a New York court on the appropriate distribution methodology and to place Ascot Fund into temporary receivership. In response, Ascot Fund put its liquidation proceeding under Cayman court supervision in January 2019, and the court granted the official liquidators the right to bring a chapter 15 petition in the United States, which was filed in February 2019. hfc Limited (henceforth, the “Objector”) objected to granting the petition. The Court held a brief trial and then issued its ruling on Monday.

As previously discussed, for a foreign proceeding to be recognized under the Bankruptcy Code, it must be a “foreign main proceeding” or a “foreign nonmain proceeding.” Here, Ascot Fund sought recognition of the Cayman proceeding as a “foreign main proceeding,” which required it to show that its COMI was in Cayman. The sole dispute over the petition was whether Ascot Fund’s COMI was in Cayman or instead in New York.

Under section 1516(c) of the Bankruptcy Code, a debtor’s registered office, which for Ascot Fund was in Cayman, is presumed to be its COMI in the absence of evidence to the contrary. Under *Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127 (2d Cir. 2013) (“*Fairfield Sentry*”), the leading Second Circuit case on the meaning of the “COMI” requirement, “the COMI lies where the debtor conducts its regular business, so that the place is ascertainable by third parties.” *Id.* at 130. *Fairfield Sentry* also held that COMI is assessed as of the time of the chapter 15 petition, but with a lookback period until the time of the filing of the foreign proceeding to keep the debtor from manipulating its COMI. *Id.* at 133. In addition, *Fairfield Sentry* provides a non-exhaustive list of factors for courts to consider in determining the location of a COMI: “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.” *Id.* at 137 (internal quotation marks omitted). Applying the framework of *Fairfield Sentry*, the Court walked through several of these factors to find that Ascot Fund’s COMI was in the Cayman Islands.

The Court noted that, both before and after the liquidation process, Ascot Fund was managed from the Cayman Islands, with its pre-liquidation Board being based there and its current joint liquidators also actively managing the business’s affairs from an office there. Ascot Fund received certain administrative services from Esera Fund Services, which maintains Ascot Fund’s register of shareholders in the Isle of Man, but the Court rejected the Objector’s argument that this was important to the COMI analysis, noting that the Objector was not contending that Ascot Fund’s COMI was the Isle of Man, nor that these administrative services were relevant to Ascot Fund’s New York activities. The Objector also argued, referencing earlier case law, that Ascot Fund’s activity in the Cayman Islands was essentially ministerial, but the Court held that the active management of the joint liquidators from the Cayman Islands distinguished the cases. It also noted that, while some COMI cases involve suspicion of forum-shopping by the debtor, here the debtor had entered liquidation in the place where its headquarters had always been, while it was Contrarian that had sought to litigate the issue in New York based on its own preference of forum. The Court thus held that the Objector had failed to provide evidence to defeat the

presumption that the Cayman Islands, as the location of Ascot Fund's office, was also its COMI. Nonetheless, the Court considered the other factors as well.

The Court then discussed the governing law and the expectations of the creditors (here, the shareholders), noting that Ascot Fund had consistently presented itself as a Cayman Islands company with articles of association and shareholder subscription agreements governed by Cayman law. While Delaware or New York law might govern the distribution from Ascot Partners to Ascot Fund, distributions from Ascot Fund are governed by Cayman law. These factors, the Court held, also cut strongly in favor of the Cayman Islands being Ascot Fund's COMI. The shareholders were located in a range of different places, and this factor thus was neutral.

The Court held that Ascot Fund's sole asset, its limited partnership interest in Ascot Partners, was located either in Delaware, where Ascot Partners was formed, or in New York, where its Receiver was located. Either way, this factor thus cut against Ascot Fund's COMI being in the Cayman Islands. The Objector argued that the asset's location was a key piece of evidence "ascertainable by third parties." The Court rejected this argument, reasoning that, at the time when the initial investments were made into Ascot Fund, the possibility of its assets being located in New York was not at all readily ascertainable, while the fund documents gave an ascertainable situs of the Cayman Islands. The Court thus granted the chapter 15 recognition petition.



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