

Insolvency and Restructuring Update

Suntech Ruling Provides a Roadmap for Chapter 15 Eligibility

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Introduction

In an opinion entered on November 17, 2014, Judge Stuart M. Bernstein of the United States Bankruptcy Court for the Southern District of New York held that Suntech Power Holdings Co., Ltd. was eligible to be a chapter 15 debtor by virtue of a bank account opened in the U.S. specifically for the purposes of establishing U.S. jurisdiction under the Second Circuit's controversial *Barnet* decision,¹ and that Suntech's center of main interest ("COMI") was the Cayman Islands despite conducting no business in the Cayman Islands prior to its filing of a winding-up proceeding there. Under chapter 15, COMI is important for establishing whether the foreign proceeding is the "main" or a "non-main" proceeding, and certain relief, such as the automatic stay, is automatically available upon recognition of a foreign main proceeding. The court rejected arguments made by Solyndra Residual Trust that Suntech had manipulated venue and COMI. Judge Bernstein's ruling highlights that the technical eligibility requirements for a chapter 15 filing can be met with appropriate pre-filing planning by many foreign debtors that wish to avail themselves of the U.S. court system for a proper purpose.

Case Background

Suntech is a holding company and the parent of a group of companies that develops and manufactures photovoltaic modules and cells. Suntech was incorporated in the Cayman Islands, but it has historically listed the location of its principal executive offices in China. Its principal American subsidiary, Suntech America, is incorporated in Delaware, registered to do business in California, and based in San Francisco.

Suntech's financial difficulties arose principally from its March 2013 default on \$575 million U.S. bonds. Among its other liabilities are litigation claims, including a \$1.5 billion antitrust suit brought by Solyndra in the Northern District of California.

In September 2013, Suntech negotiated with a group of bondholders to restructure its debt through a scheme of arrangement in the Cayman Islands and, if necessary, a chapter 15 proceeding. The consenting bondholders specifically rejected implementation through an insolvency proceeding in China. In November 2013, a Suntech director who was owed board fees filed a winding-up petition in the Cayman Islands, and the Cayman Island's court placed Suntech into a provisional liquidation proceeding and appointed joint provisional liquidators ("JPLs") to oversee the wind-down.

The JPLs were authorized to take possession of Suntech's assets, borrow money, manage any transactions outside the ordinary course of business, propose a compromise or arrangement with Suntech's creditors, and seek relief under chapter 15. The JPLs changed Suntech's principal address from China to the Cayman Islands, opened a Cayman Islands bank account, took physical possession of Suntech's subsidiaries' stock certificates, held several board meetings in the Cayman Islands, and generally began to wind up Suntech's affairs.

Meanwhile, a second group of bondholders had initiated lawsuits against Suntech to enforce their bonds in the S.D.N.Y. district court and filed an involuntary chapter 7 case against Suntech in the S.D.N.Y. bankruptcy court. Ultimately, Suntech and these bondholders resolved the involuntary bankruptcy case by entering into a Restructuring Support Agreement ("RSA") that would dismiss the involuntary bankruptcy in exchange for the JPL's filing of a chapter 15 case and being granted chapter 15

recognition. The JPLs were obligated to file the chapter 15 within four weeks despite having no assets or operations in the U.S. To establish jurisdiction in New York in contemplation of the chapter 15 filing, the JPLs attempted to open a bank account on Suntech's behalf. Having limited time, Suntech was unable to open a bank account through traditional means, so was forced to have a bankruptcy professional deposit \$500,000 from Suntech in one of its own New York accounts for the benefit of Suntech.

Solyndra's Objections

Solyndra objected to Suntech's chapter 15 filing, arguing that the JPLs manipulated in bad faith both the venue and COMI, and cross-moved to transfer venue to the Northern District of California. Solyndra claimed that the JPLs opened a New York bank account to improperly obtain venue in the Southern District of New York. Instead, Solyndra contended, venue was proper in the Northern District of California—the venue in which Solyndra's litigation was pending—because Suntech had operations in San Francisco. Solyndra also alleged that the JPLs manipulated Suntech's COMI from China to the Cayman Islands.

The Bankruptcy Court's Ruling

Chapter 15 Eligibility and Venue

Judge Bernstein first determined that Suntech was eligible to be a debtor under section 109(a) of the Bankruptcy Code, which requires a debtor to have a U.S. residence, domicile, place of business, or property.² In doing so, the court followed the December 2013 *Barnet* decision, in which the Second Circuit surprised many bankruptcy commentators and practitioners by finding that section 109(a) applies to chapter 15 debtors. Judge Bernstein held that “[t]he establishment of the [bank] account prior to the commencement of the chapter 15 proceeding was sufficient to render [Suntech] eligible.” The court was not swayed by Solyndra's contention that the bank account was not Suntech's but rather Suntech's bankruptcy professional's. The court acknowledged that New York law created a presumption that the titleholder of the bank account was its owner. Suntech successfully rebutted this presumption, however, by showing that the parties understood the account to be Suntech's and that Suntech was the party that actually exercised control over the account.

Judge Bernstein rejected Solyndra's allegation that the JPLs acted improperly to achieve eligibility as a chapter 15 debtor. Citing Judge Shelley C. Chapman's recent chapter 15 eligibility decision on remand in the *Barnet* case, the court held that chapter 15 eligibility simply requires property in the U.S. without “an inquiry into the circumstances surrounding the debtor's acquisition of property.”³ The court rooted its decision in the policy that “to prevent an ineligible foreign debtor from establishing eligibility to support needed chapter 15 relief [would] contravene the purposes of the statute to provide legal certainty, maximize value, protect creditors and other parties in interests and rescue financially troubled businesses.”

Judge Bernstein similarly rejected Solyndra's cross-motion to transfer venue, which was based in his view on Solyndra's mistaken belief that Suntech itself, as opposed to one of its indirect subsidiaries, had any operations or property in California. The court ruled that the Southern District of New York was the proper venue based on Suntech's sole asset in the U.S., its \$500,000 bank account.

COMI

Turning to the issue of Suntech's COMI, Judge Bernstein found that on the date of its chapter 15 filing, Suntech's COMI was the Cayman Islands. Courts in the Second Circuit test COMI on the date of the filing, but when COMI has been alleged to have been manipulated, courts will consider the time period between initiation of the foreign insolvency proceeding and the chapter 15 filing. The COMI analysis is flexible and fact-specific and looks to several factors, none of which are required or dispositive.

The court noted Suntech's presumptive COMI was the Cayman Islands, where it was incorporated. However, prior to the commencement of the provisional liquidation in the Cayman Islands, Suntech conducted no activities there and instead maintained its principal executive offices in China. The court therefore found that at the time the Cayman Islands winding-up was initiated, China was Suntech's COMI. The provisional liquidation, however, shifted management and oversight of Suntech to the JPLs and notified creditors and other stakeholders of that shift. In addition to largely managing the winding-up in the Cayman Islands, the JPLs also borrowed money on Suntech's behalf and took physical possession of Suntech's assets in the form of the stock certificates of its subsidiaries. The court noted that there was an implication that certain of the JPLs' actions were done intentionally to shift COMI away from China. However, Judge Bernstein found that overall, the JPLs' actions were in furtherance of the legitimate goal of efficiently winding up Suntech and had the effect of shifting COMI to the Cayman Islands as of the date of the chapter 15 filing.

Future Implications

The Suntech decision provides a roadmap for foreign debtors wishing to avail themselves of the U.S. chapter 15 process. If the decision is followed by other bankruptcy courts, debtors that are otherwise ineligible for chapter 15 would have the ability to locate a relatively small amount of assets in the U.S., overcoming the technical jurisdictional requirements of chapter 15 (at least as interpreted by the Second Circuit in *Barnet*). Moreover, the court has joined a growing trend that takes a pragmatic approach to determining COMI.

¹ *Drawbridge Special Opportunities Fund LP v. Barnet (In re Barnet)*, 737 F.3d 238 (2d Cir. 2013). For a discussion on *Barnet*, please see our article "Did the Second Circuit Alter the Chapter 15 Architecture?" in *Global Distress Signal*, Spring 2014, 6-7.

² 11 U.S.C. § 109(a).

³ *In re Octaviar Admin. Pty Ltd.*, 511 B.R. 361, 373 (Bankr. S.D.N.Y. 2014).

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