Supreme Court declines recognition of Chapter 11 proceedings

October 01 2015 | Contributed by Lennox Paton

The Supreme Court of the Bahamas recently dismissed an application seeking various orders in aid of bankruptcy proceedings commenced in the District of Delaware, United States, concerning various Bahamian companies placed into Chapter 11.

Facts

On June 29 2015 the first applicant, US company North Shore Mainland Services Inc and 14 Bahamian companies (the Baha Mar companies) filed for Chapter 11 Bankruptcy. The Baha Mar companies are responsible for the development of a resort in Nassau, Bahamas. The resort is approximately 97% complete and funded by the Export Import Bank of China (CEXIM), which lent $2.5 billion towards the development of the project and is a secured creditor.

North Shore was authorised to act as foreign representative and, along with the Baha Mar companies, applied to the Bahamian Supreme Court seeking recognition of and assistance in the Chapter 11 proceedings by extending and giving effect to the bankruptcy court order in the Bahamas, or by making ancillary orders staying all legal proceedings in the Bahamas against the debtors and seeking various directions to aid the foreign bankruptcy proceedings.

CEXIM, among others, opposed the application for recognition on the grounds that:

- the foreign representative's application was misconceived in seeking to ask the court to recognise the foreign insolvency proceedings as opposed to the authority of the foreign representative appointed in the foreign proceedings;
- the application was procedurally flawed as to the manner in which the proceedings seeking recognition were commenced in non-compliance with the Foreign Proceedings (International Cooperation) Liquidation Rules 2012;
- the common law inherent jurisdiction to grant recognition which may have existed in the Bahamas was abrogated by virtue of the passing of the Companies Winding Up Amendment Act 2011;
- if the common law powers of recognition and the provision of judicial assistance survived at all, the relief sought could not be granted; and
- the alternative relief sought for recognition under the statute could not succeed, as Part VII A – which provides for international cooperation – could not apply to the proceedings.

Supreme Court decision

The Supreme Court held that the applicants could not seek to grant a stay of proceedings in the Bahamas emanating from Section 362 of the US Bankruptcy Code. The section in the Bahamian statute which provides for international cooperation also stipulates that an ancillary order shall not affect the rights of a secured creditor to take possession of and realise or otherwise deal with property of the debtor over which the creditor has a security interest. To this extent, the CEXIM

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attorneys argued that to grant a stay would be contrary to public policy and to the statute, as the court can act only within the limits of its own inherent powers. Even if the court recognised the US insolvency proceedings, it could not grant assistance in the terms sought because it had no inherent power to order assistance in the nature of what was being sought by the applicants, which would be tantamount to an injunction and amount to interference with the lenders proprietary rights.

The Bahamas has not designated a list of relevant foreign countries to which the statutory enactment to grant aid to foreign representatives as defined would extend; thus, the issue arose as to whether the relevant statutory enactment could be relied on for assistance by the foreign representative.

The court had an opportunity to consider the recent Privy Council decision in *Singularis Holdings Ltd v Pricewaterhouse Coopers* ([2014] UKPC 36) and the principle of modified universalism, but concluded that co-existence of both the common law and statute would undermine the statutory framework and render the entire application otiose. In circumstances where the legislature has circumscribed the court's powers of recognition and assistance to relevant countries, the court has no residual power to grant recognition or assistance to non-relevant countries.

The court held that the only insolvency proceedings which could give true effect to the principle of modified universality would be unitary insolvency proceedings in the Bahamas; and it cannot be that the mere submission to a jurisdiction, no matter how inappropriate, would suffice to afford recognition where it offered an attractive restructuring regime.

It was further determined that there is no equivalent to Chapter 11 under Bahamian law by which breathing space can be created or new capital can be injected on terms acceptable to any reasonable lender. The court held that:

> "*the Applicants admitted to forum shopping and though they probably could not be faulted for doing that, despite the attractiveness of the laws of our neighbours it is not for the Court to advance matters which are the exclusive purview of the legislature.*"

Comment

Since the date of the judgment, the government has applied to wind up the Baha Mar companies and the court has appointed provisional liquidators over the companies. Further, the US court has dismissed the Chapter 11 proceedings in relation to the Bahamian companies on the basis, among other things, that the creditors would have expected the Bahamian courts to have jurisdiction over the insolvency proceedings. Finally, Baha Mar has withdrawn its appeal of the first-instance decision refusing recognition.

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