

Chapter 15 protection available to Cayman investment company

The US Bankruptcy Court for the District of Delaware has recognised the liquidation of a Cayman company; Saad Investments Finance Company (No5) Limited, an SPV established to operate as an investment company, as a "foreign main proceeding" under Chapter 15 of the US Bankruptcy Code. Tim Clipstone and Jennifer Deacon, attorneys with Harnes, report on why this is such an important decision for the Cayman Islands.

Chapter 15 of the Bankruptcy Code adopts the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law), which seeks to harmonise worldwide procedural rules for the recognition of foreign insolvencies, and seeks to promote consistency of approach and the facilitation of effective measures for co-ordinating and conducting cross border insolvencies. The Model Law has been adopted throughout the world, and notably in Australia, Canada, the BVI, Japan, and the UK.

The decision in SIFCO5

is particularly significant as it marks a clear departure from the approach of the Bankruptcy Court for the Southern District of New York, when refusing to grant recognition as a Main Proceeding in the well known cases of Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd, and Basis Yield Alpha Fund (Master), which all involved Cayman based office holders appointed over Cayman companies, and which turned on whether or not it could be properly said that the Cayman Islands were the petitioners' centre of main interest, or COMI, where this was not immediately apparent from the petitioners' operating history and individual factual circumstances.

The Bankruptcy Code provides for recognition of Main Proceedings only if such proceedings are pending in the same jurisdiction as the petitioner's COMI, and will recognise "foreign non main proceedings" where the proceedings are in a jurisdiction in which the debtor has an "establishment" (Non-Main Proceedings). Recognition as Main or Non-Main Proceedings has clear and immediate consequences, with generally much greater protection being obtained in the US by foreign insolvency proceedings being recognised as Main Proceedings. For instance, recognition as the latter triggers an auto-



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matic stay of any proceedings in the US relating to the debtor or its assets.

The Bankruptcy Code does not provide a definition of COMI but instead presumes that a petitioner's COMI is its country of incorporation unless there is evidence to the contrary. Consequently, substantial discretion is afforded to the Judge determining the matter and each case is necessarily decided on the basis of its own particular facts and circumstances (but recognising the international origin of the process and the need for consistency of application of similar statutes adopted by foreign jurisdictions). In Bear Stearns and Basis Yield, the New York Courts looked at the operating history of the companies and set a high evidential hurdle for foreign

liquidators of offshore companies to clear in order to prove that the location of the Company's COMI was in the Cayman Islands. The erection of this hurdle attracted much criticism, with many commentators suggesting that the recognition process in the US had been made more complex and time-consuming than was intended when Chapter 15 was adopted. Further, that any delay experienced as a result of a more cumbersome process, may well place jeopardy assets rather than protect assets thus running contrary to Chapter 15's intended aim of protecting the interests of all parties.

In the judgment, handed down on 4 December 2009, Judge Gross accepted that there was sufficient economic activity taking place

in the Cayman Islands as at the date that the petition for recognition was filed to establish that its COMI was in the Cayman Islands due to a number of factors, which include:

The management and administration of SIFCO5 was being conducted by Cayman based liquidators, Kinetic Partners (Cayman) Limited ("Kinetic"), who were solely responsible for the company;

SIFCO5's registered office was at Kinetic's Cayman offices;

SIFCO5 held a significant number of assets in Cayman; and

The company was involved in litigation presently being conducted there.

Judge Gross concluded that the evidence submitted on behalf of SIFCO5 was "very

heavily weighted toward the Cayman Islands...and that the liquidation of SIFCO5 in Cayman... is certainly a proceeding that should be recognised by this Court as a foreign main proceeding".

These factors clearly resemble those described by Judge Drain in *Re Sphinx* as being factors which may be relevant to a determination of COMI: the location of the debtors headquarters, the location of the management team, the location of the primary assets, the location of a majority of a debtor's creditors or majority of creditors who would be affected by the case and/or the jurisdiction whose law would apply to most disputes.

Judge Gross' interpretation of the correct point of time to determine the location of a debtor's COMI, i.e. at the time that the recognition petition is filed and not by reference to the debtor's operational history is important in the context of international cross border insolvency proceedings and particularly for Cayman Islands' entities. At this time, a foreign appointed office holder will have undoubtedly taken "control" of a debtor, otherwise there could be no application for recognition and absent other compelling evidence or argument that recognition as a Non-Main Proceeding is more appropriate, the test for establishing COMI is likely to have been satisfied. Alternatively,

another ground for denying such recognition will need to be properly engaged before doing so. At this stage, the Court retains significant discretion as to what further relief, if any, it decides to grant to a debtor, and where the factual circumstances of the debtor may properly be taken into account. This approach furthers the goals of value maximisation, certainty, predictability, and harmonisation which the Model Law intended to achieve.

In summary, the Delaware Court's decision in SIFCO5 provides some welcome relief to the liquidators of offshore companies with valuable assets situated in the United States. Prior to the decision those liquidators may have considered that, following the previous approach of the New York Courts, recognition was effectively barred and expensive Chapter 7 or Chapter 11 proceedings were the only other options available. Recognition of SIFCO5 proves that this is not the case and that Chapter 15 recognition is available in the US in appropriate cases.

Tim Clipstone and Jennifer Deacon: "Recognition as Main or Non-Main Proceedings has clear and immediate consequences, with generally much greater protection being obtained in the US by foreign insolvency proceedings being recognised as main proceedings."