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ARTICLE

Assistance for Foreign Representatives

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Liquidators are often faced with realising assets that are located in jurisdictions in which their appointment is not recognised and/or their powers are limited. William Tacon and Richard Fogerty of Zolfo Cooper (formerly Kroll) faced this issue when they were appointed Joint Official Liquidators of Condor Insurance Limited (Condor), by Order of the Eastern Caribbean Supreme Court in the High Court of Justice, Nevis Circuit, on 18 May 2007 (the Foreign Proceeding).

Together with similar foreign laws, chapter 15 of the US Bankruptcy Code is intended to create a uniform system for recognition of foreign insolvency proceedings and co-operation of courts and administrators in insolvencies involving debtors that have assets in multiple jurisdictions. Section 1501 of the US Bankruptcy Code explains that the purpose of chapter 15 is to promote 'greater legal certainty' and to provide a 'fair and efficient administration of cross-border insolvencies that protects the interests of all creditors'. A foreign representative initiates a chapter 15 proceeding by filing an application for recognition. On recognition of a foreign proceeding, chapter 15 allows a bankruptcy court to grant, with certain specified exceptions, '[a]ny ... relief that may be available to a trustee' under the US Bankruptcy Code.

Richard Fogerty and William Tacon are accustomed to dealing with companies that have cross-border operations and therefore, given that Condor's assets were predominantly held in the US, they recognised the importance of obtaining recognition of the Foreign Proceeding in the US. Following advice from their counsel, Baker & McKenzie LLP, the liquidators filed a chapter 15 petition commencing a chapter 15 case ancillary to the Foreign Proceeding and seeking recognition of the Foreign Proceeding as a 'foreign main proceeding', as defined in section 1502(4) of the US Bankruptcy Code.

In August 2007, the United States Bankruptcy Court for the Southern District of Mississippi (the Bankruptcy Court) ordered that the Foreign Proceeding be granted recognition as a foreign main proceeding.

Whilst recognition was obtained in respect of the *Condor* matter and other cases such as SPhinx Limited, Trade and Commerce Bank and BanCredit Cayman Limited, it is important to note that chapter 15 relief is not available to all offshore entities. Bankruptcy Judge Burton R. Lifland's decision to deny chapter 15 relief to two Cayman-incorporated hedge funds which were managed in the United States by Bear Stearns was extensively reported on. According to that decision, where an offshore entity does not have a true business 'establishment' in its state of incorporation but files an insolvency proceeding there, a US bankruptcy court has no discretion i.e. it cannot recognise the foreign proceeding as either a 'foreign main proceeding' or a 'foreign non-main proceeding'. The decision drew on the plain language of section 1502(5) of the US Bankruptcy Code which authorises chapter 15 relief only if the foreign proceeding is pending where the debtor has an 'establishment'.

Although the *Bear Stearns* decision appeared to make it harder for foreign representatives to obtain chapter 15 relief, that ruling may be limited to the specific facts of that matter. Perhaps a slightly greater business presence in the country of incorporation could have changed the resultant ruling. This position was supported when the United States Bankruptcy Court for the Southern District of New York (the NY Bankruptcy Court) ruled in favour of a petition filed by the liquidators' of Fairfield Sentry Ltd which was seeking recognition of the fund's British Virgin Islands-based insolvency proceedings. The *Fairfield* ruling appears to lessen the evidentiary burden imposed by cases such as Bear Stearns and allows greater reliance on the presumption that an entity's centre of main interests (COMI) will be deemed to be the location of the entity's registered office.

In October 2007, following a Motion filed by the Liquidators, the Bankruptcy Court, relying on the broad discretion to grant '[a]ny ... relief that might be available to a trustee' ordered that section 108 of the Bankruptcy Code be applied to the *Condor* chapter 15 proceeding. This section 108 relief was important to the Liquidators as it provided more protection to the estate by allowing the Liquidators to initiate claims for an extended/defined period of time.

Section 108(a) of the Bankruptcy Code allows a trustee to commence an action on behalf of the debtor within the period allowed by state law for such an action or within two years after the order for relief, whichever is later. Use of section 108 in chapter 15 cases has not

been without controversy. Because there is no 'order for relief' in a chapter 15 case, some have argued that section 108 relief cannot be granted. In *In re BanCredit Cayman Limited* (in liquidation, foreign debtor), where Richard Fogerty was also liquidator, the NY Bankruptcy Court refused to grant section 108 relief to the foreign liquidators at the outset of the case. In essence, the NY Bankruptcy Court found that granting such relief would be premature given that the affected parties against whom foreign representatives might seek to assert claims had not received notice of the motion or a chance to argue the motion. The NY Bankruptcy Court further found that nothing in chapter 15 expressly authorized section 108 relief and that the term 'order for relief' is not expressly specified in chapter 15. Whereas, in *In re Condor Ins. Ltd.*, the court used the date the foreign main proceeding was recognised as the chapter 15 equivalent to the entry of an order for relief. Whether section 108 relief can be granted is currently at issue in *Fairfield Sentry Limited, et al.*, which is pending in the NY Bankruptcy Court. In *Fairfield*, the liquidators have sought to remedy what appears to be the primary concern expressed by the court in *BanCredit*, having asserted that they have provided notice to prospective defendants. The decision in *Fairfield Sentry Limited* may prove instructive as to the steps a foreign liquidator needs to take in order to avail itself of section 108 relief.

With chapter 15 and section 108 relief in place, foreign representatives are afforded time and protection in order to commence discovery and continue their investigations. However, whilst chapter 15 allows a bankruptcy court to grant a wide range of relief to foreign representatives, relief available under sections 522, 544, 545, 547, 548, 550 and 724(a) of the Bankruptcy Code are specifically excluded. These sections are often referred to as avoidance powers.

In the *Condor* matter, the Liquidators sought to use Nevis law rather than US bankruptcy law to avoid transfers from the Company to another entity, which was controlled by the same individuals as the Company. The Bankruptcy Court dismissed the case, finding that the Liquidators could not rely on Nevis law to bring an avoidance action in a chapter 15 case, and the US District Court upheld that ruling.

The decision was then appealed to the 5th Circuit Court of Appeals, which reversed the lower court rulings. The 5th Circuit first relied on its statutory interpretation of chapter 15, explaining that, while chapter 15 denies a foreign representative avoidance powers, it does not necessarily deny the use of foreign avoidance law. Furthermore, if Congress wished to preclude the use of foreign law, 'it could have stated so; it did not'.

The 5th Circuit further found that denying a foreign representative the ability to use the laws of the foreign jurisdiction would be contrary to the international origins of chapter 15. Based on the stated purpose of chapter 15 and its legislative history, the 5th Circuit found that, while the use of foreign avoidance law is not specifically addressed, the chapter should be read broadly to allow a bankruptcy court to grant that power in order to advance the goals of comity to foreign jurisdictions. Finally, the 5th Circuit stated that its holding was supported by case law interpreting section 304, the predecessor of chapter 15, which Congress intended would apply unless contradicted by a provision of chapter 15.

The 5th Circuit ruling is significant because it establishes that a bankruptcy court has jurisdiction over an avoidance claim, arising under foreign law, in a chapter 15 case. This ruling broadens the range of possible relief for foreign representatives in foreign bankruptcy proceedings. The scope of the bankruptcy court's jurisdiction to hear foreign avoidance actions may be further defined in the *Fairfield* matter. Recently, the foreign representatives of Fairfield Sentry Ltd have instituted adversary proceedings asserting avoidance claims under BVI law against the recipients of various redemption payments made by Fairfield Sentry Ltd or co-debtor Fairfield funds to their members. The Fairfield funds had invested in managed accounts established with Bernard L. Madoff Investment Securities LLC (BLMIS) and had based the redemption payments on the values of those investments as represented by BLMIS from time to time. However, redemption transactions for the most part took place outside of the United States and virtually all of the defendants in the redemption actions are foreign defendants. Recently, in *In re JSC BTA Bank*, it was held that the bankruptcy court's jurisdiction under chapter 15 was limited to property of the debtor located within the territorial jurisdiction of the United States. This would be consistent with the overall purpose of chapter 15 which is to assist a foreign court. In *JSC BTA Bank*, the bankruptcy court found that an arbitration proceeding pending in Switzerland was not subject to the automatic stay, and distinguished between the global reach and extraterritorial effects of the automatic stay in plenary bankruptcy cases brought under chapter 11 or chapter 7 of the Bankruptcy Code from the shared jurisdictional model in chapter 15 which are intended to be merely adjuncts of a foreign main proceeding. Thus, while a liquidator may be able to use foreign avoidance powers in a chapter 15 case, it remains undecided, and is probably unlikely, whether that jurisdiction would extend to claims against foreign parties whose assets are outside the US.

Notwithstanding the aforementioned uncertainties in relation to non US assets, the 5th Circuit *Condor* ruling may lead to foreign representatives in other insolvency proceedings analysing whether the Bankruptcy Code's avoidance powers, or avoidance powers of a foreign jurisdiction will be more advantageous to their estate. In addition, the impacts of initiating chapter 7, 11 or 15 may be more carefully analysed. The Bankruptcy Code's avoidance statutes are available to a foreign company in a chapter 7 or 11 case, and the

automatic stay is given extraterritorial effect in cases under those chapters.

The *Condor* matter has been widely discussed and is seen as a pivotal case when considering the assistance that could possibly be available to foreign representatives.

In re Condor Ins. Ltd.

William Tacon and Richard Fogerty of Zolfo Cooper (formerly Kroll) were appointed Joint Official Liquidators (the Liquidators) of Condor Insurance Limited (Condor), by Order of the Eastern Caribbean Supreme Court in the High Court of Justice, Nevis Circuit (the Bankruptcy Court), on 18 May 2007 (the Foreign Proceeding).

In August 2007, following receipt of the Liquidators' chapter 15 petition, the United States Bankruptcy Court for the Southern District of Mississippi ordered that the Foreign proceeding be granted recognition as a foreign main proceeding.

In November 2007, the Liquidators filed a Complaint in the Bankruptcy Court against Condor Guaranty Inc. and Petroquest Resources Inc. seeking the return of the Company assets that were transferred out of the Company in, or around, November 2006 (the Complaint).

As a result of the Liquidators' ongoing investigations and following their review of certain discovery documentation, an Amended Complaint was filed on 21 April 2008. The Amended Complaint added several defendants to the Complaint, namely Tyghe Williams, Intercontinental Development and Investment Corporation, Ross N. Fuller, Stockton Fuller & Company, Inc., Harvey Milam and T. Alan Owen. The Amended Complaint also identifies additional assets that were transferred out of the Company prior to the winding up order being granted.

The defendants lodged a 'Motion to Dismiss', in response to the Complaint/Amended Complaint, which was based on three key issues, being:

- Which Condor entity is subject to the winding up Order issued by the Nevis Court;
- Whether the Bankruptcy Court can apply Nevis Law; and
- Whether the Bankruptcy Court has jurisdiction over Condor Guaranty Inc., as it is a Bahamian registered entity.

The defendants subsequently agreed to drop the first issue, and the remaining two issues were heard by the Bankruptcy Court on 18 June 2008.

Having considered the pleadings of each party, the Bankruptcy Court concluded that it did not have jurisdiction over the suit, and, on appeal, the District Court for the Southern District of Mississippi affirmed this. The Liquidators' appealed the decisions to the 5th Circuit Court of Appeal and oral arguments took place on 2 December 2009.

In March 2010, the 5th Circuit Court of Appeals reversed the previous decisions and confirmed that the Liquidators could rely on Nevis law to bring avoidance actions in the chapter 15 case.

International Corporate Rescue

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