



February 2010 Updater

Current developments in Cayman's legal and regulatory environment

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Feedback welcome.

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Chapter 15 protection granted over US assets of Cayman Islands fund in liquidation

Case

In re: Saad Investments Finance Company (No.5) Limited ("SIFCO5"), Case No. 09 -13985 (KG)

Summary

- The United States Bankruptcy Court for the District of Delaware (the "US Court") has granted a revised order recognising a foreign proceeding (the "Order") for Chapter 15 protection over the US assets of a Cayman Islands exempted company in liquidation (In re Saad Investments Finance Company (No.5) Limited, "SIFCO5", Case No. 09-13985 (KG)).
- The decision marks a departure from the previous approach of other US bankruptcy courts which have either denied or restricted the availability of Chapter 15 protection to Cayman exempted companies.
- This development is likely to be viewed positively by investors in, those providing administration and management services to, and the receivers and liquidators of, these Cayman vehicles.

What is Chapter 15 protection?

Chapter 15 is a chapter added to the US Bankruptcy Code in 2005. The purpose of Chapter 15 is to provide effective mechanisms for dealing with cross-border insolvency cases involving debtors, assets, claimants and other interested parties. This purpose is achieved through a number of statutory objectives, which include (i) establishing greater legal certainty for trade and investment; (ii) providing for the fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested entities, including the debtor; and (iii) affording protection and maximising the value of the debtor's assets (11 U.S.C. § 1501).

Chapter 15 is generally invoked in an ancillary proceeding to a primary proceeding brought in another country. In this case, the primary proceeding, in which SIFCO5 is the subject of official liquidation, is taking place in the Cayman Islands (Cause No. 390 of 2009); the Order granting Chapter 15 protection was made in an ancillary proceeding brought before the US Court.

In the context of an ancillary proceeding, the court is authorised to issue an order recognising the foreign proceeding as either a "foreign main proceeding" (a proceeding pending in a country where the debtor's center of main interests, or "COMI", are located) or a "foreign non-main proceeding" (a proceeding pending in a country where the debtor has an establishment but not its COMI) (11 U.S.C. § 1517). Absent evidence to the contrary, the debtor's registered office is presumed to be the debtor's COMI. Immediately upon the recognition of a foreign main proceeding, the US court will grant certain protections automatically (including an automatic stay of proceedings) (11 U.S.C. § 1520).

Facts

SIFCO5 is a privately owned investment company incorporated as an exempted company under Cayman Companies Law.

Barclays Bank plc, a shareholder in SIFCO5, petitioned the Grand Court of the Cayman Islands on 19 August 2009 for a winding up order over the company. Provisional liquidators were appointed on 7 September 2009 and, on 18 September 2009, an order was granted to wind-up SIFCO5 and appoint joint official liquidators (the "Joint Official Liquidators").

On 11 November 2009, the JOLs, as the debtor's foreign representatives, filed a petition with the US Court under Chapter 15 seeking recognition of SIFCO's Cayman liquidation and winding up proceeding as a "foreign main proceeding". It was asserted on the JOLs' behalf that recognition of the Cayman liquidation under Chapter 15 and the resulting application of the automatic stay, would

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afford them the opportunity to evaluate and realise value of SIFCO5's US assets in an orderly manner.

A number of factors were raised by the JOLs to support the contention in the US proceedings that SIFCO5's COMI was in the Cayman Islands. These included that:

- SIFCO5's registered office was, and had always been, in the Cayman Islands;
- SIFCO5's statutory books and records were, and had always been, located in the Cayman Islands;
- SIFCO5's management and administration was now being conducted by the JOLs from the Cayman Islands pursuant to the powers vested in them by the Cayman Court;
- Other than tasks being performed on the JOLs' instruction and under their direction in other jurisdictions, there was no activity being conducted in respect of SIFCO5's management, administration or operations anywhere apart from the JOLs' activities in the Cayman Islands;
- The estimated value of SIFCO5's investments in Cayman Islands funds was significantly greater than the estimated value of its assets in any other country;
- SICL, one of SIFCO5's two equity holders, was itself subject to liquidation and other proceedings in the Cayman Islands; and
- Barclays Bank plc, the other equity holder of the debtor, had commenced the winding up proceedings in the Cayman Islands.

Decision

In its Order dated 17 December 2009, the US Court recognised the Cayman proceeding as a foreign proceeding. Further, based on the above factors, the US

Court found that SIFCO5's COMI was in the Cayman Islands. Consequently, the Cayman liquidation of SIFCO5 was recognised as a "foreign main proceeding" with the resultant automatic protections (including a stay) under Chapter 15. In addition, the Order:

- a) enjoined parties to the litigation from
 - (i) commencing any actions or proceedings in the US against the JOLs, SIFCO5 or its assets situated in the US, or (ii) from enforcing any judgment or award against SIFCO5 or its assets; and
- b) established the JOL as the exclusive representatives of SIFCO5 in the US with exclusive authority to administer its assets and affairs in the US.

Comment

The US Court's finding that the COMI of SIFCO5 was the Cayman Islands is one based on the specific facts and circumstances of the case. That said, the decision may well prove to be a watershed in signalling the increased availability of Chapter 15 in cross-border insolvency proceedings as a mechanism for protecting a debtor's US assets.

CFATF Report shows Cayman's strong compliance culture

The Caribbean Financial Action Task Force ("CFATF") is the regional affiliate of the Financial Action Task Force ("FATF") and consists of thirty states of the Caribbean Basin which have agreed to implement common countermeasures to address the problem of criminal money laundering. The main objective of the CFATF is to achieve effective implementation of and compliance with recommendations to prevent and control money laundering and to combat the financing of terrorism.

The Cayman Islands is a founding member of the CFATF and the recommendations of the third round 2007 evaluation have recently been published.

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The assessment was based on the FATF forty recommendations on money laundering and nine special recommendations on terrorist financing ("FATF 40+9") and was prepared using the latest FATF methodology. The full report is available from the CFATF website www.cfatf.org and is based on the position as it was in 2007.

Since that time the Cayman Islands has implemented and fast tracked the CFTAF recommendations by making changes to primary legislation i.e. the Proceeds of Crime Law, 2008 replaced the former Proceeds of Criminal Conduct Law, the Misuse of Drugs Law and the Terrorism Law. In addition, the Money Laundering Regulations and Guidance Notes on the Prevention and Detection of Money Laundering were updated. Upgrades were also made to the anti-corruption regime by way of the Anti-Corruption Law, 2008.

Through these actions the Cayman Islands has substantially implemented the CFATF recommendations.

International Monetary Fund Report demonstrates Cayman's high regulatory standards

The International Monetary Fund (IMF) has released the report of its 2009 assessment of the supervision and regulation of the Cayman Islands financial sector. The report is based mainly on information obtained during the IMF's March 2009 inspection and subsequent consultations with the Cayman Islands Monetary Authority (CIMA).

The inspection purpose was to review developments in Cayman's supervisory and regulatory framework since the first IMF assessment in October 2003 and assesses (i) CIMA's powers, resources, and risk management framework; (ii) the supervision and regulation of banking, insurance, and investment funds and securities (including the role of the Cayman Stock Exchange), and (iii) commentary on the private sector pension system.

Given the global financial crisis, a major new focus of the mission was risk identification and mitigation. The recommendations emphasize these aspects as part of the strengthening of Cayman's regulatory and supervisory system, whilst recognising that it has important elements of an effective crisis management framework.

The IMF findings show that Cayman is in line with the best international standards and has a solid regulatory regime.

Noting the Cayman Islands "substantial progress" in implementing the recommendations, the IMF also identified specific areas of progress, where, in most cases, policy action has either already been implemented or is underway, these are:-

- (i) changes to legislation, rules and guidance to meet international standards;
- (ii) an increase in CIMA's independence, resources and efficiency; and
- (iii) increased transparency of the investment funds sector arising from the implementation of CIMA'S electronic reporting system and the high implementation of the International Organization of Securities Commission's (IOSCO) Principles.

The report also makes recommendations for enhancements in 10 areas but acknowledges that these recommendations are broadly consistent with the priorities already identified by the authorities.

These recommendations can be found in the full report at www.imf.org.

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