

# A tale of two proceedings: US Bankruptcy Court declines to exercise otherwise proper jurisdiction over *Baha Mar Resort* insolvency case

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The US is often the chosen venue for reorganisation of a company with cross-border elements given the various tools available to the insolvent entity under the US Bankruptcy Code. Courts within the US have found proper jurisdiction under US law over companies with only minimal contacts with the US, or minimal property within US borders. Nonetheless, there are circumstances in which a US Bankruptcy Court may decline to exercise its jurisdiction, as highlighted in the recent US bankruptcy filing by the owners and operators of the Bahamian based 'Baha Mar Resort'.

In the increasingly global market involving cross-border transactions, complex insolvency issues are bound to arise – including where the insolvency proceeding should be initiated. That analysis is in itself complex, requiring assessment of the widely divergent remedies available to financially distressed companies in various regimes and jurisdictions.

Chapter 11 of the US Bankruptcy Code<sup>1</sup> ('Chapter 11') has long been viewed as one of the leading cross-border restructuring statutes, offering the insolvent relief not otherwise available in other jurisdictions. The tools available in Chapter 11 to reach a consensual, or non-consensual, reorganisation of a commercial enterprise are unparalleled. The US insolvency regime is unique in providing that debt held by entire classes of creditors can be reduced without the holders' consent through cramdown, or that assets can be transferred free and clear of liens even over the objection of a lienholder, all while management stays in control of the company without the oversight or involvement of a trustee, receiver or liquidator.

Major participants in global transactions, perhaps not surprisingly, frequently seek to avail themselves of the benefits of Chapter 11, even in the face of tenuous and recently manufactured contacts with the US. In practice, US Bankruptcy Courts have demonstrated a willingness to keep the proverbial jurisdictional

'door' open, permitting those parties with relatively insignificant property within the US borders to qualify as Chapter 11 debtors. Indeed, the Bankruptcy Code establishes a relatively low threshold for jurisdiction, enabling any entity that 'resides or has a domicile, place of business or property in the United States' to commence a proceeding under Chapter 11. At least one US court has indicated that the statutory language means what it says – having *any* 'property' in the US, whether 'a dollar, a dime or a peppercorn', is enough for a foreign-based debtor to access the Chapter 11 system.<sup>2</sup> Once that jurisdictional hook is established, the Bankruptcy Code then affords the US Bankruptcy Court with worldwide in rem jurisdiction over all assets of the insolvent entity, 'wherever located and by whomever held'.<sup>3</sup>

Balancing this open-door policy, US statutes also recognise, at least implicitly, that just because a US Bankruptcy Court can exercise jurisdiction, that does not mean that it should. The general jurisdictional grant afforded to US federal courts provides that, despite having jurisdiction, courts should 'abstain' from exercising that jurisdiction 'in the interests of justice'.<sup>4</sup> The US Bankruptcy Code contains similar provisions, providing that a US Bankruptcy Court may refrain from exercising jurisdiction otherwise present if 'the interests of creditors and the debtor would be

better served by dismissal or suspension of a bankruptcy proceeding'.<sup>5</sup> Another Bankruptcy Code provision indicates that a US Bankruptcy Court 'shall' dismiss a Chapter 11 case 'for cause', which some US courts have interpreted to include a lack of 'good faith'.<sup>6</sup>

US Bankruptcy Courts located in key US forums such as New York, Delaware, Florida and Texas have each had the opportunity to consider whether their court had jurisdiction over a Chapter 11 case initiated by a non-domestic corporation, and if so, whether the court should nonetheless decline to exercise that jurisdiction based on consideration of other pertinent factors.<sup>7</sup> Each of those courts evidenced a willingness to permit the Chapter 11 reorganisation of a debtor with limited US-based assets or operations to proceed despite the company and its creditors having less tenuous connections to one or more other countries.<sup>8</sup>

After a series of instances suggesting that US Bankruptcy Courts considered their jurisdiction to be virtually limitless, at least one such court has made clear that the ability of a non-US-based company to restructure its balance sheet through a US-based bankruptcy is not a certainty merely because a debtor demonstrates technical compliance with the text of Section 109 of the Bankruptcy Code. The entry of an order by the US Bankruptcy Court for the District of Delaware ('Delaware Bankruptcy Court') dismissing the well-publicised Chapter 11 cases involving ownership and control over the Bahamian resort known as 'Baha Mar' suggests that there are limits to the US courts' hospitality to non-domestic players and also suggests some amount of uncertainty in forum-selection within the global restructuring regime.<sup>9</sup>

The decision of the Delaware Bankruptcy Court involved consideration of a variety of factors that were arguably unique to the case before it at the time the dismissal motion was presented. When the Baha Mar resort broke ground in 2011,<sup>10</sup> it was described as the 'most significant single phase resort under development in the western hemisphere', consisting of almost 1,000 acres on Cable Beach, Nassau. The project was slated to open in 2014, and was to include four hotels, a Las-Vegas style casino, the Bahamas' largest convention centre, a waterpark, a 30,000 foot spa, over 30 restaurants, retail shopping, and an 18-hole Jack Nicklaus signature golf course (the 'Resort'). Once constructed, it was to be one of the largest resorts in the Caribbean and was anticipated to generate more than 5,000 new jobs with an annual payroll of over US\$130m, representing roughly 12 per cent of the Bahamas' gross domestic product.

After earlier financing fell through, the development of the Resort was primarily funded by a US\$2.45bn secured debt facility provided by The Export-Import

Bank of China (CEXIM). Construction was managed by CCA Bahamas Ltd (CCA), a subsidiary of China State Construction Engineering Corp Ltd (CSCEC), a state-owned enterprise of the People's Republic of China. Construction delays ensued as did contentious disputes between Baha Mar Ltd (BML), the developer of the Baha Mar Resort, and CCA as the general contractor, with BML holding CCA in breach of the primary construction contract. The original target completion date of November 2014 passed, as did the extended opening date of 27 March 2015. Meanwhile, CEXIM refused to lend, given the seemingly troubled state of the Resort project. At the same time, even though the Resort was not generating revenue, the Baha Mar companies employed in excess of 2,400 individuals, with a monthly payroll exceeding US\$7.5m.

Facing a severe financial and operational crisis with no relief in sight, the entities that owned and operated various aspects of the Resort filed for Chapter 11 relief under the US Bankruptcy Code, in the Delaware Bankruptcy Court on 29 June 2015. Just prior to that filing, several of the related companies opened seven bank accounts in the US in the name of the Baha Mar entities. Fifteen debtors were before the Delaware Bankruptcy Court in the jointly administered Chapter 11 case, all of which were Bahamian companies,<sup>11</sup> except for the lead debtor, Northshore Mainland Services, Inc ('Northshore'), which was a Delaware corporation (collectively, the 'Debtors'). The Debtors made it clear in early pleadings that they attributed the filing to the failure of CCA to complete the Resort project on time and the resultant 'liquidity crunch'. The Debtors also alleged that CEXIM set 'unattainable' conditions for the release of close to US\$112m in funding that should have been available under a pre-existing loan agreement.

During the same time period of the filing, BML commenced a multimillion dollar lawsuit against CSCEC in the UK seeking damages stemming from the construction disputes. In addition, as was required by the terms of post-petition financing arranged by the Debtors with Granite Ventures I Ltd, a Bahamian company owned and controlled by the developer, BML, the 14 Bahamian Debtors filed an application with the Supreme Court of the Commonwealth of the Bahamas (the 'Bahamian Supreme Court') requesting recognition of the Chapter 11 cases and a stay of all legal proceedings in the Bahamas involving the Debtors (except proceedings brought by the Government of the Bahamas) pending the completion of the Chapter 11 cases ('Recognition Petition'). While that action was pending, the Delaware Bankruptcy Court entered an interim order authorising the Debtors to borrow up to US\$30m to fund Resort-related expenses and costs of the bankruptcy.

The Bahamian Attorney-General, CEXIM, CCA and Cable Bahamas (a Bahamian utility company and creditor) all filed objections to the Recognition Petition. The Prime Minister of the Bahamas, Perry G Christie, was vocal in his adversity to use of the US Bankruptcy Courts to remedy the Resort's financial issues, delivering a televised address regarding the 'Baha Mar negotiations and proceedings', stressing 'the completion of the Baha Mar Resort is a matter of the upmost national importance' that has 'enormous economic and employment implications for the Bahamas'. In furtherance of its interests in maintaining control over the Resort, the Bahamian Attorney-General also initiated a winding up proceeding in the Bahamian Supreme Court, seeking appointment of provisional liquidators under the Companies (Winding Up Amendment) Act of 2011. Ultimately, in an oral ruling on 22 July 2015, Justice Ian Winder of the Bahamian Supreme Court denied the Debtors' request to recognise the Delaware proceedings or to enforce the 'automatic stay' of collection actions in The Bahamas.<sup>12</sup> Noting the place of incorporation and domicile of the Debtors and the centre of the main interest of the Resort, many creditors, and the employees being in Nassau, in his written opinion, Justice Winder stated that 'there can be no reason to subordinate local proceedings to proceedings in a locale with such limited connection to the subject companies.' This ruling resulted in a default occurring under the Debtors' debtor-in-possession loan, again limiting the Debtors access to much-needed funding.

Several thousand miles away in Delaware, CCA and CEXIM combined forces, and filed motions with the US Bankruptcy Court seeking dismissal of the Chapter 11 cases, accusing the Debtors of forum shopping and improper litigation tactics to impose US bankruptcy law for the Debtors' sole benefit. Among other bases, the dismissal motions argued that the Chapter 11 filing should be dismissed under US Bankruptcy Code Section 1112(b)(1) 'for cause' or under or US Bankruptcy Code Section 305(a) as 'the interests of creditors and the debtor would be better served by such dismissal'.<sup>13</sup> The primary arguments made in favour of dismissal were that the Bahamas' overwhelming interest in the Resort far 'outweighed the minimal connection between the debtors and the United States', particularly given that most of the Debtors' creditors were located in the Bahamas. CCA and CEXIM argued, in part, that the only assets of the Debtors located in the US were various bank accounts opened shortly before the petition date, and containing only nominal amounts. CCA and CEXIM further noted the lack of any meaningful connection of the Debtors to the US, the chosen forum. The Debtors countered that the Chapter 11 cases were properly filed in the US, and

further that *reorganisation* under the Bankruptcy Code would be more beneficial to both the Debtors and the majority of their creditors than *liquidation* under the Winding Up Act enacted under Bahamian law.

A hearing in Delaware Bankruptcy Court on the motions to dismiss was scheduled and held on 17 August 2015. Following that hearing but before Judge Carey issued his decision, on 4 September 2015, the Bahamian Supreme Court appointed joint provisional liquidators for seven of the Bahamian Debtors. The powers given to the liquidators included to 'preserve the Debtors' assets while promoting a scheme/plan of compromise'. On 15 September 2015, the Delaware Bankruptcy Court issued a written decision granting the motions to dismiss as to each Debtor other than Northshore.

Notably, the Delaware Bankruptcy Court had no problem concluding, summarily and based on ample precedent, that it had jurisdiction over the Debtors. The statutory predicate for jurisdiction was ownership of property in the US, and the Debtors had established that many of them did indeed have such 'property' as of the bankruptcy petition date, which, no matter how insignificant comparatively to the assets of the Debtors, rendered the Debtors eligible to file their Chapter 11 cases. The Delaware Bankruptcy Court further found that there was no basis to dismiss the cases for 'bad faith' under the US Bankruptcy Code, given that it was clear that the Debtors were experiencing a 'rapidly worsening' liquidity problem, and their strategic decision to use the rights and protections of the Bankruptcy Code to reorganise, rather than liquidate under Bahamian procedure, was not an improper 'tactical' move for purposes of Section 1112.<sup>14</sup> This ruling is also in line with well-settled US law.

Judge Carey nonetheless concluded that, despite the proper initiation of the cases in the US, dismissal of the cases was appropriate under principles of abstention embodied in Section 305(a) of the Bankruptcy Code.<sup>15</sup> Before he reached that conclusion, Judge Carey identified various factors that US Bankruptcy Courts typically consider to 'gauge the overall best interests' of the debtor and creditors, such as:

- (1) the economy and efficiency of administration;
- (2) whether another forum is available to protect the interests of both parties or there is already a pending proceeding in [another] court;
- (3) whether federal proceedings are necessary to reach a just and equitable solution;
- (4) whether there is an alternative means of achieving an equitable distribution of assets;
- (5) whether the debtor and creditors are able to work out a less expensive out-of-court arrangement which better serves all interests in the case;
- (6) whether a non-federal insolvency has proceeded so far in those proceedings that it would be costly

and time consuming to start afresh with the federal bankruptcy process; and

- (7) the purpose for which bankruptcy jurisdiction has been sought.<sup>16</sup>

He then carefully evaluated those factors against the record before him, ultimately concluding that in a matter that was ‘truly an international case with the main contestants hailing from Wilmington, Delaware, to Beijing, China, to Nassau, The Bahamas’, the interests of creditors and the Debtors would be better served in a reorganisation conducted by the court with the most at stake in, and with the closest nexus to, the reorganisation of the troubled Resort.<sup>17</sup> In doing so, Judge Carey of the Delaware Bankruptcy Court indicated that he was not overly swayed that the ‘important economic interest of the Government of The Bahamas in the future of the [Resort]’ was a crucial factor, characterising that interest as ‘no more important than the right of a company incorporated in the United States to have recourse to relief in a United States Bankruptcy Court’.<sup>18</sup> The Delaware Bankruptcy Court also pointed out that the ‘Debtors’ preference for restructuring under the Bankruptcy Code was understandable and entitled to some weight’, as ‘Chapter 11... with all stakeholders participating... would be an ideal vehicle for the restructuring of [the] family of related companies’ – but under different circumstances.<sup>19</sup>

Judge Carey was troubled by the fact that the Debtors had proposed a plan that would only invite further dispute in multiple forums, stating that he might ‘consider denying the Dismissal Motions’ if the Court was convinced that such action would bring CCA, CEXIM and the Government of the Bahamas back to the bargaining table, but that the evidence did not reflect that such negotiations would happen in ‘short order’.<sup>20</sup> Also a critical part of Judge Carey’s reasoning was his own assessment of the ‘expectation of the parties’ that had transacted with the Debtors. In the *Northshore* case, the contractual venue provisions varied, with some being governed by laws of the US and English or British Columbia law, with others, such as the debenture, being subject to Bahamian law. Ultimately, in determining to abstain from exercise of his jurisdiction, Judge Carey agreed with Bahamian Judge Winder that ‘many stakeholders... would expect that any insolvency proceedings would likely take place in The Bahamas, the location of [the] major development Project’.<sup>21</sup> Judge Carey based his holding on his observation that:

In business transactions, particularly now in today’s global economy, the parties, as one goal, seek certainty. Expectations of various factors—including the expectations surrounding the question of *where*

ultimately disputes will be resolved—are important, should be respected, and not disrupted unless a greater good is to be accomplished.<sup>22</sup>

Since the Debtors had not presented evidence that the parties expected that the ‘main’ insolvency proceeding would take place in the US, Judge Carey was not able to perceive any ‘greater good to be accomplished by exercising jurisdiction over these chapter 11 cases’.<sup>23</sup> The contemporaneously pending proceeding before the Bahamian Supreme Court also convinced the Delaware Bankruptcy Court that abstention was proper based on principles of ‘comity’, or recognition by and deference of the US Bankruptcy Court to the ‘foreign bankruptcy proceeding’ pending within the Bahamas, particularly given that there was no evidence demonstrating that ‘the Bahamian laws contravene the public policy of the United States’.<sup>24</sup> Importantly, however, the Bankruptcy Court did not extend its ruling to the Chapter 11 proceeding of Northshore since that entity, as a US corporation, would have had the expectation that its financial difficulties would be addressed in the US.

Despite professed good intentions by all, following issuance of Judge Carey’s decision and dismissal of all Cases other than of Northshore, the ‘greater good’ appears not to have been achieved for any of the key players. The Resort is yet to open to the public, and its 2,200 hotel rooms remain empty. It has been reported that Sarkis Izmirlian is still in negotiations with CEXIM regarding whether that entity should compensate the Debtors for damages resulting from CEXIM’s failure to complete construction on schedule, and for workmanship issues. Meanwhile, CEXIM has reported that it is in talks with other China-based investors that might be willing to provide additional financial support to the Resort project. Prime Minister Christie has stated that he is hopeful that the Resort will open by 2018 and finally contribute to the Bahamian economy, as had been promised and anticipated since 2005. Deloitte Touche has been appointed as CEXIM’s receiver for the Resort, but Prime Minister Christie has recently reiterated his optimism for the project and referenced several bidders who have applied to be involved. For now, the ‘most significant resort’ in the Caribbean remains idle, a Bahamian Supreme Court order has authorised the termination of 2,026 employees and work at the as yet uncompleted Resort project remains stalled.

In any event, the *Northshore* decision likely has more significance because it chronicles in detail the financial failure of a large-scale and high-profile international project than for establishing new or surprising jurisprudential benchmarks regarding the scope of United States Bankruptcy Court jurisdiction or authority. Judge Carey carefully, and appropriately,



did not retreat from the now well-established principle that a debtor's ownership of any property in the US is enough to give rise to a US Bankruptcy Court's jurisdiction over a Chapter 11 case. He also held true to the precept that a financially distressed and liquidity challenged debtor's desire to reorganise rather than liquidate does not amount to bad faith, nor does filing a Chapter 11 case in order to carry out that desire constitute an effort to attain an improper tactical advantage simply because it disadvantages a subset of creditors desiring to litigate in a different court or country.

Rather, the *Northshore* decision makes clear that a country's courts can, and probably should, defer to insolvency proceedings that are pending in another jurisdiction in which brick and mortar companies that are projected to be responsible for a double digit percentage of the home country's GDP are located. Judge Carey indicated that he might not have deferred to the Bahamian courts if retaining the case was deemed likely to result in prompt, negotiated resolution and would not be contrary to the expectations of parties-in-interest. Given the current status of the still-stalled Resort project, the parties might have been better off with that result. As a matter of law and comity, however, Judge Carey's decision to abstain from exercising jurisdiction over an insolvency case involving 1,000 acres of beachfront property located in Nassau and a multi-hotel resort that was projected to employ thousands of local Bahamians, and permit a competing insolvency case to proceed in the courts of the country in which that beach, and the jobs, are located, followed well-established principles in the US Bankruptcy Code and was the result that at least some of the parties to the cases should have anticipated.

#### Notes

- 1 Codified at 11 USC Section 101, et. seq.
- 2 *In re McTague*, 198 BR 428, 432 (Bankr WDNY 1996).
- 3 11 USC Section 541(a).
- 4 28 USC Section 1334(c)(1).

- 5 11 USC Section 305(a).
- 6 11 USC Section 1112(b).
- 7 *See eg. In re Marco Polo Seatrade BV*, Case No 11-13634 (Bankr SDNY); *In re Overseas Shipholding Group, Inc*, Case No. 12-20000 (Bankr D Del.); *In re Scrub Island Development Group, Inc*, Case No 13-15285 (Bankr MD Fla.); *In re Omega Navigation Enterprises, Inc*, Case No 11-35926 (SD Texas).
- 8 US-based counsel holding a retainer in its US-based account has been found to be a sufficient basis for jurisdiction. *In re Global Ocean Carriers Ltd*, 251 BR 31 (D Del 2000); *In re Yukos Oil Co*, 321 B.R. 396 (Bankr SD Tex 2005).
- 9 *In re Northshore Mainland Services, Inc*, 537 BR 192 (Bankr D Del 2015).
- 10 The Resort had its inception in 2005 when Sarkis Izmirlian (the CEO of the developer), at the request of the Prime Minister of the Bahamas, made a proposal to revitalise Cable Beach in Nassau.
- 11 The Debtors organised under the laws of the Commonwealth of The Bahamas were: Baha Mar Enterprises Ltd; Baha Mar Entertainment Ltd; Baha Mar Land Holdings Ltd; Baha Mar Leading Company Ltd; Baha Mar Ltd; Baha Mar Operating Company Ltd; Baha Mar Properties Ltd; Baha Mar Sales Company Ltd; Baha Mar Support Services Ltd; BML Properties Ltd; BMP Golf Ltd; BMP Three Ltd; Cable Beach Resorts Ltd; and Riviera Golf Ventures Ltd.
- 12 'Having heard counsel for the applicant and counsel for the several respondents', Justice Winder began, 'and having considered the affidavit material filed on behalf of the parties, I refuse the application for an order recognising the plenary insolvent proceedings underway in the District of Delaware and provision of assistance by extending and giving effect to the automatic stay arising through Section 362 United States bankruptcy law.'
- 13 Bankruptcy Code Section 1112(b) provides that 'after notice and a hearing, the court shall convert a case . . . to a case under Chapter 7 or dismiss a case . . . , whichever is in the best interests of creditors and the estate, for cause.'
- 14 *In re Northshore Mainland Services, Inc*, 537 BR 192, 202-03 (Bankr D Del 2015).
- 15 Pursuant to Bankruptcy Code Section 305(a)(1), a court 'may dismiss a case under this title or may suspend all proceedings in a case under this title, at any time, if... the interests of creditors and the debtor would be better served by such dismissal or suspension' and, as the court noted, granting a motion to abstain is a form of 'extraordinary relief' that nonetheless 'may be proper where, as here, the debtor is an entity formed under the laws of, or doing business in, a foreign country.' 537 BR at 203 (quoting *In re Stillwater Asset Backed Offshore Fund, Ltd*, 485 B.R. 498, 509 (Bankr SDNY 2013)).
- 16 537 BR at 203-04.
- 17 *Ibid.* at 205.
- 18 *Ibid.* at 205-06.
- 19 *Ibid.* at 206.
- 20 *Ibid.*
- 21 *Ibid.*
- 22 *Ibid.* (emphasis in original).
- 23 *Ibid.*
- 24 *Ibid.* at 208.

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