Cole Schotz P.C.

Bankruptcy & Restructuring Law

New York Bankruptcy Court Permits Discovery Requests in Chapter 15 Case Despite Potentially Conflicting Cayman Islands Law

By **Jacob S. Frumkin** on May 14, 2018

POSTED IN BANKRUPTCY, BANKRUPTCY LITIGATION, RECENT DEVELOPMENTS

On April 17, 2018, the U.S. Bankruptcy Court for the Southern District of New York (the "Court") issued a decision requiring CohnReznick LLP ("CohnReznick") to produce documents requested by the foreign representatives (the "Foreign Representatives") in the chapter 15 case of Platinum Partners Venture Arbitrage Fund (International) Limited (in Official Liquidation) (the "International Fund"). **In re Platinum Partners Value Arbitrage Fund L.P. (in Official Liquidation)**, No. 16-12925, 2018 WL 1864931 (Bankr. S.D.N.Y. Apr. 17, 2018). In doing so, the Bankruptcy Court rejected CohnReznick's arguments that it did not need to comply with the requests because (i) Cayman Islands law precludes the production of the requested documents; and (ii) the underlying subpoena impermissibly sought "pre-suit discovery" regarding potential claims that fell within the scope of the arbitration provision of CohnReznick's engagement agreement.

Procedural History

In August 2016 the International Fund, Platinum Partners Value Arbitrage Fund L.P. (in Official Liquidation) (the "Master Fund"), and Platinum Partners Value Arbitrage Intermediate Fund L.P. (in Official Liquidation) (the "Intermediate Fund" and, together with the International Fund and the Master Fund, the "Funds") were placed into liquidation by order of the Grand Court of the Cayman Islands. *Platinum Partners*, 2018 WL 1864931, at *2. In a Cayman liquidation proceeding, liquidators are appointed to "collect, realise, and distribute" the liquidating

entity's assets and are empowered to investigate the "promotion, business, dealings and affairs" of such entity, including the causes of its failure. *Id.*, at *3. Prior to the liquidators' appointment, the Funds were managed by Platinum Management (NY) LLC, which is headquartered in New York.

On October 18, 2016, the joint liquidators of the International Fund and the Master Fund filed petitions under chapter 15 of title 11 of the United States Code (the "Bankruptcy Code") seeking recognition of the Cayman liquidation proceedings as "foreign main proceedings." *Platinum Partners*, 2018 WL 1864931, at *3. On November 22, 2016, the Court entered an order (the "Recognition Order") recognizing the Cayman proceedings as foreign main proceedings. *Id.* The Recognition Order authorized the Foreign Representatives to conduct discovery "within the territorial jurisdiction of the United States concerning the assets, affairs, rights, obligations or liabilities of the Funds, the Funds affiliates and the Funds," including "upon written request, obtaining turnover of any and all documents . . . that are property of, concern or were made or issued on behalf of the Funds . . . ." *Id.* A chapter 15 petition subsequently was filed by the Intermediate Fund, and on October 12, 2017, the Court entered an order recognizing the Intermediate Fund's liquidation proceeding as a foreign main proceeding. The Funds' chapter 15 cases are being jointly administered for procedural purposes only. *Id.*

In connection with their investigation of the Funds, the Foreign Representatives informally sought certain documentation from CohnReznick, which had been retained by the Funds to provide audit services for calendar years 2014 and 2015. *Platinum Partners*, 2018 WL 1864931, at *4. Although CohnReznick produced copies of certain original documents that it maintained were property of the Funds, it did not provide other documentation in its audit file, including work papers, engagement documents and invoices, on the basis that such documents were not the Funds' property. *Id.* As a result, on August 31, 2017, the Foreign Representatives served a subpoena on CohnResnick relating to its "auditing, accounting, or other services for, on behalf of or in relation to any Fund," to which CohnReznick served written objections. *Id.* After the parties were unable to consensually resolve the objections, the parties both filed letters with the Court and, ultimately, the Foreign Representatives filed a motion to compel production pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure (the "2004 Motion"). *Id.*

The Court's Decision

Prior to addressing CohnReznick's argument, the Court reviewed Chapter 15 generally and other provisions of the Bankruptcy Code pertaining to discovery. First, the Court noted that upon recognition of a foreign main proceeding, at the request of a foreign representative, a bankruptcy court can authorize discovery "concerning the debtor's assets, affairs, rights, obligations or liabilities." *Platinum Partners*, 2018 WL 1864931, at *5; *see also* 11 U.S.C. § 1521(a)(4) and (a)(7). Second, the Court observed that, consistent with the principles of comity, chapter 15 provides bankruptcy courts with "broad, flexible, and pragmatic rules" to fashion relief that is largely discretionary. *Platinum Partners*, 2018 WL 1864931, at *5. Finally, the Court discussed section 542(e) of the Bankruptcy Code, which allows a court to order an accountant to turn over documentation relating to the debtor's property or financial affairs, and Bankruptcy Rule 2004, which allows a party in interest, such as a foreign representative, to subpoena documents relating to the "acts, conduct, or property or to the liabilities and financial conduction of the debtor." *Id.* at *6.

CohnReznick's first main argument was that Cayman law does not permit the discovery of audit work papers or materials that are not a debtor's property and, if the Court were to grant the 2004 Motion, its interests and the interests of comity would not be protected. *Platinum Partners*, 2018 WL 1864931, at *7. The Court dismissed this argument somewhat summarily, agreeing with the Foreign Representatives that the Cayman law was "unsettled" because Cayman courts have not clearly defined what portions of audit work papers constitute a debtor's property. *Id.* at *8. Moreover, the Court noted that "it is well-established that comity does not require that the relief available in the United States be identical to the relief sought in the foreign bankruptcy proceeding; it is sufficient if the result is comparable and that the foreign laws are not repugnant to our laws and policies." *Id.* at *10. In limiting CohnReznick's reliance on comity principles, the Court cautioned that "requiring this Court to ensure compliance with foreign law prior to granting relief sought pursuant to chapter 15 would require the Court to engage in a full-blown analysis of foreign law each and every time a foreign representative seeks additional relief in the United States, which may result in differing interpretations of U.S. law depending on where the foreign main proceeding was pending." *Id.* at *11. Accordingly, the Court found that it was specifically authorized to order the requested discovery under section 1521 of the Bankruptcy Code. *Id.* at *11-*12.

CohnReznick's second main argument was that the arbitration clause in its engagement agreement precluded the Foreign Representatives from seeking pre-litigation discovery because the pending discovery dispute was a "dispute, controversy, or claim" relating to

CohnReznick's accounting services that was required to by resolved by arbitration and not by a court of law. *Platinum Partners*, 2018 WL 1864931, at *13. The Foreign Representatives disagreed, arguing that they were merely seeking information essential to their investigation and that, in the absence of a pending "proceeding," CohnReznick had no contractual right to limit the relief available under the Bankruptcy Code. *Id.* at *14. The Court agreed with the Foreign Representatives, stating that interpreting the arbitration clause so broadly that it eliminated the Foreign Representative's right to seek discovery under section 1521 would run counter to one of the significant objectives of chapter 15 – "provid[ing] judicial assistance to foreign representatives in gathering information which will enable them to comply with their duties." *Id.* Indeed, the Court noted that "chapter 15 proceedings cannot be held hostage by an arbitration clause when there is no dispute pending." *Id.*

Conclusion

Although CohnReznick's reliance on Cayman law had some support in its submissions, the Court declined to deviate from the "broad, flexible, and pragmatic rules" governing the relief available to foreign representatives in chapter 15 cases. Accordingly, parties seeking to thwart efforts by a foreign representative to carry out his or her duties on the basis of conflicting foreign law should be cognizant that such efforts may be unsuccessful unless the requested relief truly is contrary to the public policy of the foreign jurisdiction or does not sufficiently protect the debtor's creditors and other parties in interest. *See* 11 U.S.C. §§ 1521 (a) and (b), 1522.

Related Posts

The Supreme Court Clarifies the Scope of Section 546(e)'s Safe Harbor for Securities Related Transactions in Merit Management Group, LP v. FTI Consulting, Inc.

Virginia is for Lovers … And Chapter 11?

The Bankruptcy and Construction Junction: Making Your Texas Mechanic's Lien Function Better in Bankruptcy

A Degree Too Far: NY Bankruptcy Court Denies Debtors' Request For Bankruptcy Rule 2004 Examination in Connection with Third-Party Litigation

Some Upside to Being Upside-Down: The Fifth Circuit Provides Undersecured Creditors an Additional Front on which to Contest Preference Claims