

COMMONWELATH OF THE BAHAMAS
IN THE SUPREME COURT
Commercial Division

2021/COM/com/00063

IN THE MATTER OF Part VIIA of the Companies Act Ch. 308

AND IN THE MATTER OF

- (1) Atelier Design e Planejamento de Moveis Ltda (“Atelier”)**
- (2) Colezzi Industria e Comercio de Moveis Ltda (“Colezzi”)**
- (3) Diamante Duna Participacoes Ltda (“Diamante Duna”)**
- (4) EMP Montagem e Instalacao de Moveis Ltda (“EMP”)**
- (5) Euromobile Montagem de Moveis Planejados Ltd (“Euromobile”)**
- (6) Indian Ebony Comercio de Moveis do Brasil Ltda (“Indian Ebony”)**
- (7) Italian Comercio de Moveis Ltda (“Italian”)**
- (8) Libia Comercio de Moveis Ltda Epp. (“Libia”)**
- (9) Madagascar Administracao e Participao Ltda (“Madagascar”)**
- (10) Nogueira Alva Participacoes Ltda (“Nogueira Alva”)**
- (11) Palladio Tec Comercio de Moveis e Eletrodomesticos Ltda (“Palladio”)**
- (12) SIM Sistema Integrado de Moveis Ltda (“SIM”)**
- (13) Via Movel Comercio de Moveis Ltda (“Via Movel”) (collectively the “Millo Group”) (In Official Liquidation Under Supervision of The 9th Civil Court of Sao Bernardo do Campo, Sao Paulo, Brazil)**

**AND IN THE MATTER OF THE FOREIGN PROCEEDINGS
(INTERNATIONAL CO-OPERATION) LIQUIDATION RULES, 2012**

Before: The Honourable Madam Senior Justice Indra H. Charles

Appearances: Mr. Wilfred P. Ferguson Jr. of Lennox Paton for the Petitioner

Hearing Date: 26 May 2022

Recognition of a Foreign Representative – Section 254 of the Companies (Winding Up Amendment) Act, No. 53 of 2011 - Rule 4 of the Foreign Proceedings (International Co-operation) Rules, 2012 – Schedule (Rule 3) of the Foreign Proceedings (International Co-operation) (Relevant Foreign Countries) Liquidation Rules, 2016 – Brazil designated ‘relevant’ country

By a Petition filed 7 December 2021 and an Amended Petition annexed to the Notice of Motion filed 20 May 2022, the Petitioner applies to be recognized as a Foreign Representative in The Bahamas with the right to act on behalf or in the name of the Millo

Group of Companies (In Official Liquidation) (“the Millo Group”). The application is supported by the Verifying Affidavit of the Petitioner filed 7 December 2021 and the Affidavit of Foreign Law filed 7 December 2021. The application is made pursuant to section 254(1)(a) of the Companies (Winding Up Amendment) Act, No. 53 of 2011.

The Millo Group of Companies were incorporated in Sao Paulo, Brazil and are subject to the Brazilian Court’s supervised bankruptcy issued by Judge Rodrigo Gorga Campos in the 9th Civil Court of Sao Bernardo do Campo, Brazil. The Petitioner was appointed by the Brazilian Court as Judicial Administrator on 16 November 2017 and maintained his position on 21 November 2018. Upon application for bankruptcy, some of the Millo Group companies declared that they did not have any bank accounts despite being companies with operations and sales. Two of the companies were owned by Bahamian entities prior to being sold. According to the Central Bank of Brazil records, each of the Bahamian company sent a wire transfer to Nogueira Alva, one of the Millo Companies. These transfers suggest that the Bahamian entities had bank accounts of value outside of Brazil.

The Petitioner deposed that if he is recognized to act in The Bahamas jointly with a qualified insolvency practitioner on behalf of the Millo Group, this would allow for an application for disclosure of information by the Bahamian companies and this information may assist in the maximization of recovery efforts of resources that may have been diverted from the payment of creditors.

HELD: Granting the applications by the Petitioner (i) for leave to file the Amended Petition annexed to the Notice of Motion filed 20 May 2022 pursuant to Order 20 Rule 6 of the Rules of the Supreme Court 1978 and (ii) to be recognized as a Foreign Representative pursuant to Section 254(1)(a) of the Companies (Winding Up Amendment) Act 2011.

1. By Schedule (Rule 3) of the Foreign Proceedings (International Co-operation) (Relevant Foreign Countries) Liquidation Rules 2016, Brazil is designated a “relevant” country.
2. Pursuant to section 254(1)(a) of the Companies (Winding Up Amendment) Act, 2011, the Petitioner is recognized as a foreign representative for the purposes of acting in The Bahamas on behalf of the Millo Group of Companies: **In the matter of Caledonian Bank Limited (in Official Liquidation under Supervision of The Grand Court of The Cayman Islands) 2015/COM/com/00034 distinguished.**

RULING

Charles Sr J: Introduction

- [1] There are two applications before the Court namely:
- (i) An application by the Petitioner, Fernando Celso De Aquino Chad (“Mr. Chad”) for leave to file an Amended Petition annexed to the Notice of Motion filed 20 May 2022; and
 - (ii) An application that Mr. Chad be recognized as a Foreign Representative with the right to act in The Bahamas on behalf of or in the name of any of the companies in the Millo Group of Companies (In Official Liquidation) pursuant to Section 254(1)(a) of the Companies (Winding Up Amendment) Act, No. 53 of 2011 (“the CWUAA”).
- [2] The applications are supported by the Verifying Affidavit of Mr. Chad filed 7 December 2021 and the Affidavit of Foreign Law filed 7 December 2021.
- [3] On 26 May 2022, this Court granted the application for (i) leave to file the Amended Petition annexed to the Notice of Motion filed 20 May 2022 and (ii) Mr. Chad to be recognized as a Foreign Representative pursuant to Section 254(1)(a) of the CWUAA. I promised a written ruling. I do so now.

Background

- [4] The Millo Group of Companies (In Official Liquidation) (“the Millo Group”) consist of thirteen (13) individual companies all incorporated in Brazil. The name, date and place of incorporation of these companies are: Atelier incorporated on 20 April 2011 at Sao Paulo, Brazil; Colezzi incorporated on 21 September 2015 at Sao Jose Dos Pinhais, Paraná, Brazil; Diamante Duna incorporated on 13 February 2013 at Sao Paulo, Brazil; EMP incorporated on 12 November 2009 at Mairipopra, Sao Paulo, Brazil; Euromobile incorporated on 25 May 2011 at Sao Paulo, Brazil; Indian Ebony incorporated on 4 May 2011 at Sao Paulo, Brazil; Italian incorporated

on 1 June 2009 at Sao Paulo, Brazil; Libia incorporated on 17 October 2011 at Sao Paulo, Brazil; Madagascar incorporated on 22 June 2009 at Sao Paulo, Brazil; Nogueira Alva incorporated on 13 February 2013 at Sao Caetano do Sul, Sao Paulo, Brazil; Palladio incorporated on 24 September 2002 at Bento Gonçalves, Rio Grande do Sul, Brazil; SIM incorporated on 7 November 2007 at Sao Paulo, Brazil and Via Model incorporated on 4 September 2007 at Sao Paulo, Brazil.

- [5] Each of the thirteen companies served a different function and capacity for the Millo Group which was one of the largest sellers of custom-made furniture throughout the State of Sao Paulo in Brazil. During the years 2014 through 2017, Brazil suffered an economic crisis that took a toll on the furniture industry and, as a result, the Millo Group applied jointly for a judicial reorganization in the 9th Civil Court of Sao Bernardo do Campo, Sao Paulo.
- [6] As I understand it, under Brazilian law, judicial reorganization is the main rescue procedure in Brazil for a company to restructure its business and debt. It is similar in its effect to Chapter 11 bankruptcy proceedings in the United States of America.
- [7] On 16 November 2017, Judge Rodrigo Gorga Campos (“Judge Campos”) granted the Order for judicial reorganization of the Millo Group and appointed Mr. Chad as the judicial administrator. On 21 November 2017, Mr. Chad executed a judicial administrator’s commitment agreement in acceptance of the appointment. On 21 November 2018, Judge Campos determined that the Millo Group did not comply with the judicial determinations for regular processing of the judicial reorganization and that the companies demonstrated a total absence of commercial activity. As a result, Judge Campos ruled that the judicial reorganization be converted to a full court supervised bankruptcy. Mr. Chad maintained his position as the judicial administrator.
- [8] Around the time of the bankruptcy hearing, ownership of eleven of the thirteen companies in the Millo Group were transferred to Mr. Willias de Oliveira Sousa and Mr. Wilton de Oliveira Sousa for what appears to be no consideration. Additionally

in bankruptcy filings in Brazil, both Mr. Willias and Mr. Wilton declared that they did not have any other assets other than their interest in the bankrupted companies.

- [9] At the time of the bankruptcy proceedings in Brazil, the declared value of the debt of the Millo Group was estimated to be BRL 92,028,119.25 (approx. USD \$28,131,111.83). Further, some of the companies in the Millo Group declared that they did not have any bank accounts despite being companies with previous operations and sales.
- [10] Diamante Duna and Nogueira Alva, two of the companies in the Millo Group were owned by Bahamian companies namely Arctium Investment Limited and Arum Investments Limited. On 31 October 2017, the companies' shares were transferred to Mr. Willias and Mr. Wilton. Mr. Wagner Cassiano da Silva was the legal representative in Brazil of the Bahamian companies, a shareholder in two companies of the Millo Group (Italian and Libia) and the Financial Controller of an additional two companies within the Millo Group (Indian Ebony and Atelier).
- [11] According to the records of the Central Bank of Brazil, Arctium and Arum each sent a wire transfer to Nogueira Alva. Additionally, there is a history of lending and borrowing among some of the thirteen companies within the Millo Group. The 30 September 2017 balance sheet of the Millo Group states that Indian Ebony owed EMP the amount of BRL 2,564,145.45 and Libia BRL 3,651,315.17. Indian Ebony had pending loans that it had extended to Nogueira Alva in the amount of BRL 2,177,056.46 and Diamante Dunna in the amount of BRL 27,454.73. SIM owed Atelier the amount of BRL 5,969,709.34.

Law on the Recognition of a Foreign Representative

- [12] The provisions of Sections 253 - 255 of the CWUAA set out the law relating to international co-operation and the recognition of a foreign representative in The Bahamas. The sections provide:

“253. Definitions.

In this Part –

"debtor" means a foreign corporation or other foreign legal entity subject to a foreign proceeding in the country in which it is incorporated or established;

"foreign proceeding" means a judicial or administrative proceeding in a relevant foreign country, including an interim proceeding, pursuant to a law relating to liquidation or insolvency in which proceeding the property and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation, rehabilitation, liquidation or bankruptcy of an insolvent debtor;

"foreign representative" means a trustee, liquidator or other official appointed in respect of a debtor for the purposes of a foreign proceeding;

"relevant foreign country" means a country, territory, or jurisdiction designated as a relevant foreign country in rules made under section 252 by the Liquidation Rules Committee for the purposes of this Part.
[Emphasis added]

254. Ancillary orders.

(1) Upon the application of a foreign representative the court may make orders ancillary to a foreign proceeding for the purposes of -

- (a) recognising the right of a foreign representative to act in The Bahamas on behalf of or in the name of a debtor and, in the court's discretion, to do so jointly with a qualified insolvency practitioner;**
- (b) enjoining the commencement or staying the continuation of legal proceedings against a debtor;**
- (c) staying the enforcement of any judgment against a debtor;**
- (d) requiring a person in possession of information relating to the business or affairs of a debtor to be examined by and produce documents to its foreign representative;**
- (e) ordering the turnover to a foreign representative of any property belonging to a debtor; and**
- (f) granting such other relief as it considers appropriate.**
[Emphasis added]

(2) An ancillary order may only be made under subsection (1)(d) against-

- (a) the debtor itself; or
 - (b) a person who was or is a relevant person as defined in section 198(1).
- (3) An ancillary order shall not affect the right of a secured creditor to take possession of and realize or otherwise deal with property of the debtor over which the creditor has a security interest.
- (4) The court shall not make an ancillary order that is contrary to the public policy of The Bahamas.

255. Criteria upon which the court's discretion shall be exercised.

- (1) In determining whether to make an ancillary order under section 254, the court shall be guided by matters which will best assure an economic and expeditious administration of the debtor's estate, consistent with
 - (a) the just treatment of all holders of claims against or interests in a debtor's estate wherever they may be domiciled;
 - (b) the protection of claim holders in The Bahamas against prejudice and inconvenience in the processing of claims in the foreign proceeding;
 - (c) the prevention of preferential or fraudulent dispositions of property comprised in the debtor's estate;
 - (d) the distribution of the debtor's estate amongst creditors substantially in accordance with the order prescribed by Part VII;
 - (e) the recognition and enforcement of security interests created by the debtor;
 - (f) the non-enforcement of foreign taxes, fines and penalties; and
 - (g) comity.
- (2) In the case of a debtor which is registered under section 174, the court shall not make an ancillary order under section 254 without also considering whether it should make a winding up order under Part VII in respect of its local branch."

[13] The Millo Group of companies were incorporated in Brazil and are subject to the Brazilian Court's supervised bankruptcy issued by Judge Campos. It therefore satisfies the definition of "debtor" and "foreign proceeding" pursuant to section 253 of the CWUAA. Mr. Chad was appointed by the Brazilian court as judicial

administrator on 16 November 2017 and maintained his position on 21 November 2018 which satisfies the definition of a “foreign representative”.

[14] Schedule (Rule 3) of the Foreign Proceedings (International Co-operation) (Relevant Foreign Countries) Liquidation Rules, 2016 (“the FPLR 2016”) sets out the designation of relevant foreign countries. Of the 142 countries listed as “relevant” countries, “Brazil” is one of them.

[15] The procedure for making an application pursuant to section 254(1)(a) is set out in Rule 4 of the Foreign Proceedings (International Co-operation) Rules 2012 (“FPLR 2012”) which provides as follows:

“4. Application for declaratory order.

(1) An application by a foreign representative made under section 254(1Xa) of the Act for a declaratory order recognizing his right to act on behalf of a debtor shall be made by petition in accordance with RSC Order 9.

(2) A petition presented under this rule is required to be served only on such persons as the Court may direct.

(3) A petition under this rule shall state -

- (a) particulars of the debtor's incorporation;**
- (b) the nature and place of the debtor's business;**
- (c) the court or other authority by which the foreign representative was appointed;**
- (d) the powers and duties of the foreign representative under the law of the place of his appointment; and (e) the reasons for seeking a declaratory order.**

(4) A petition under this rule shall be verified by an affidavit sworn by the foreign representative.

(5) A certified copy of the order of the court or other authority by which the foreign representative was appointed shall be exhibited to the verifying affidavit.

(6) A petition under this rule shall be supported by an affidavit of foreign law which explains the powers and duties of the foreign representative under the law of the place of his appointment.

(7) A declaratory order granted under this rule shall be in Form 1 and shall be gazette”.

- [16] The present application complies with the requirements of section 4 of the FPLR 2012 in that Mr. Chad has presented the application in accordance with RSC Order 9. Further, the application is verified by the Affidavit sworn by the foreign representative which exhibits a certified copy of the Court’s Order by which Mr. Chad was appointed. This application is also supported by an Affidavit of Foreign Law which sets out the powers and duties of Mr. Chad under Brazilian law.
- [17] Additionally, in the interest of comity between The Bahamas and Brazil, Mr. Chad ought to be recognized as a foreign representative in The Bahamas with the right to act on behalf or in the name of the Millo Group. The principle of comity was emphasized by Osadebay J (Ag) [as he then was] in **Re Commodore International Ltd** [1994] BHS J. No. 72 who, at para. 27, quoted extensively from Judge Burton Lifland, Bankruptcy Judge in the United States Bankruptcy Court of New York in the case of **In the Matter of George Clifford Culmer, G.A.D. Johnstone and John Forsyth Smith as Joint Official Liquidators of Banco Ambrosiano Overseas Limited No 82B.11808 (17 December 1982)**.

“....Comity has historically been defined as:

The recognition which one nation allows within its territory to the legislative executive or judicial acts of another nation having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws. *Hilton v Guyot*, 159 U.S. 113, 164 (1895).”

- [18] The present case can be easily distinguishable from the facts of **In the matter of Caledonian Bank Limited (in Official Liquidation under Supervision of The Grand Court of The Cayman Islands)** 2015/COM/com/00034. Moree J (ag) [as he then was] considered a similar application but refused the liquidators of Caledonian Bank (in official liquidation under the supervision of the Grand Court

of the Cayman Islands) recognition in The Bahamas, where assets in the region of \$16 million were held.

[19] At paragraph 23 of the Judgment, Moree J (Ag) stated:

“In my view, neither the Cayman Proceedings nor the Cayman Liquidators (“the Petitioners”) fall within the statutory definition of such terms in section 253. Accordingly, the statutory regime under sections 253 – 256 is not currently available to the Petitioners as the Cayman Islands has not been designated a relevant foreign country by the Liquidation Rules Committee for the purposes of Part VIIA. This means that the Petitioners are not, in the language of those sections, “foreign representatives” as they were not appointed Liquidators of Caledonian Bank for the purposes of “...a judicial or administrative proceeding in a..” country designated by the Liquidation Rules Committee as “a relevant foreign country..”. On the same reasoning, the Cayman Proceedings are not “foreign proceedings” within the definition of that term in section 253 of the Bahamian Act. For this reason I am of the view that the declarations sought in the Prayer of the Amended Petition cannot be granted under section 254(1)(a) of the Bahamian Act.”[Emphasis added]

[20] In the present case, Mr. Chad satisfies the criteria under the CWUAA as well as the FPLR 2012 and FPLR 2016. The just treatment of all holders of claims against or interests in the Millo Group of Companies wherever they may be domiciled will be served by the recognition of Mr. Chad in The Bahamas because his purpose is to realize and collect money and/or to take possession of property belonging to the Millo Group of Companies as part of the liquidation process taking place in Brazil. Mr. Chad is not aware of any claim holders in The Bahamas against the Millo Group and the information sought by Mr. Chad will aid his efforts in the liquidation to uncover and prevent any fraudulent dispositions of property that may have taken place to avoid the payment of creditors.

[21] The statutory power of Mr. Chad in Brazil as explained in the Affidavit of Foreign Law is similar to the powers and functions of a liquidator under section 205 of the Fourth Schedule of the CWUAA.

[22] Of assistance is the case of **In the matter of Bernard L. Madoff Investment Securities LLC** 2010 (1) CILR 231. Jones J. in the Cayman Grand Court granted the petition for recognition in the Cayman Islands of the trustee in bankruptcy of Bernard Madoff Investment Securities LLC. Mr. Picard was appointed as trustee for the liquidation of the business of BLMIS with all the duties and powers of a trustee as prescribed in the US Securities Investor Protection Act 1970. His powers and duties were broadly equivalent to those of an official liquidator appointed under Part V of the Companies Law (2009 Revision).

[23] At paragraph 6 of the Judgment, Jones J stated thus:

“In my judgment there is no doubt that, as a matter of Cayman law. Mr. Picard is entitled to be recognized as the sole person having the right to act on behalf of BLMIS in this jurisdiction and I make a declaration accordingly.”

[24] Sections 240 - 242 of the Cayman Companies Law (2009 Revision) are similar to sections 253 – 255 of the Bahamas CWUAA.

[25] This point was acknowledged by Moree J (Ag) at paragraph 18 of **Caledonian Bank** where he stated:

“...Under section 240 – 243 of the Cayman Act the courts of the Cayman Islands have the power to make ancillary orders to foreign bankruptcy proceedings in terms similar but not identical to the provisions of sections 253 – 256 of the Companies Winding Up Amendment Act 2011.”

Conclusion

[26] For all of the reasons mentioned above, the Court exercises its discretion under section 254 of the CWUAA in recognizing Mr. Chad as a foreign representative for the purposes of acting in The Bahamas on behalf of or in the name of the Millo Group of Companies.

[27] Last but not least, I owe a great depth of gratitude to Mr. Ferguson Jr. for his comprehensive submissions and immeasurable assistance to the Court.

Dated this 8th day of August 2022

**Indra H. Charles
Senior Justice**