

## Foreign reorganization enforced in New York on international comity grounds

18 March 2019

In a recent decision, *EMA GARP Fund v. Banro Corporation*, No. 18 CIV. 1986 (KPF), 2019 WL 773988 (S.D.N.Y. 21 February 2019), District Judge Katherine Polk Failla of the U.S. District Court for the Southern District of New York enforced a foreign reorganization plan in the United States on the basis of international comity, notwithstanding that no application for recognition and enforcement had been made under Chapter 15 of the U.S. Bankruptcy Code. Banro Corp. Inc., a public corporation headquartered in Canada, underwent a restructuring proceeding in Ontario under the Companies' Creditors Arrangement Act (CCAA). The approved reorganization plan extinguished the interests of the company's equity holders (including stockholders' securities law claims against the company) and provided releases for the company and its directors and officers. Stockholders of the company chose not to participate in the CCAA proceeding and instead brought securities law claims against the company and its CEO in New York.

Judge Failla dismissed the suit by granting international comity and deference to the CCAA proceeding, applying dual standards to find (i) that the CCAA proceeding was procedurally fair and (ii) that dismissal of the suit would not violate U.S. laws or public policy. Judge Failla referenced the long (albeit pre-Chapter 15) history in the Second Circuit, as well as U.S. Supreme Court precedent, of granting comity to foreign bankruptcy proceedings. In response to the stockholder plaintiffs' assertion that the company had not sought recognition of the CCAA reorganization in the United States under Chapter 15, the court stated that such was "irrelevant to this Court's comity determination" and the "[d]efendants were under no obligation to file anything in U.S. courts in order to earn for the Canadian court 'the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation.'"

The court also noted that the equities of the matter did not favor the plaintiffs as they had the opportunity to participate in the CCAA proceeding but elected not to do so. This was characterized as inappropriate forum shopping. Judge Failla stated that "[p]laintiffs cannot complain of prejudice that flows from their strategic decision not to participate," and held that permitting the claims to go forward would "defeat the purpose of granting comity."

As is often the case where courts have discretion, such as in extending comity to foreign bankruptcy proceedings, the equities and the facts matter. Nevertheless, this recent decision is important as a determination as a matter of law that a federal court can grant comity to and enforce a foreign bankruptcy reorganization on the basis of common law comity principles, notwithstanding that no Chapter 15 case had been commenced.

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