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Seeing Double?

Two Judges, Two Lawsuits, Two Types of Bankruptcy — But a Single Vision for Comity in Cross-Border Insolvencies

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The recent decision in *In re National Bank of Anguilla (Private Banking Trust) Ltd.*[1] may cause readers to do a double-take. First, it is co-authored by two bankruptcy judges: Hon. **Stuart M. Bernstein** and Hon. **Martin Glenn**. Second, it arises from two separate lawsuits filed by a foreign representative for two separate foreign debtor entities, each of which is subject to its own administration proceeding in Anguilla. Third, each of the Anguilla foreign debtors is subject not only to one U.S. chapter 15 case, but also a second U.S. chapter 11 case. These tandem facts are tough to wrangle, but they also provided an opportunity for the New York bankruptcy court to explain a coordinated vision for the application of international comity principles in cross-border insolvencies.

Background

The U.S. proceedings began unremarkably enough. The administrator for two Anguilla banks subject to administration proceedings in Anguilla filed chapter 15 cases for those entities in the U.S. The bankruptcy court recognized the administrator as the banks' "foreign representative" and the Anguilla administration proceedings as "foreign main proceedings." However, the normalcy of the background facts ends there — and an unusual litigation history begins.

Before filing the U.S. chapter 15 cases, the foreign representative commenced actions in Anguilla against a number of entities, challenging certain transactions relating to the failure of the banks. In those actions, the foreign representative alleged that the banks' parent entities, their directors and their regulator breached their duties by upstreaming depositors' funds to the parent entities when the banks were insolvent.

The foreign representative sought declaratory, equitable and monetary relief in order to restore the alleged wrongfully upstreamed funds to the banks for the benefit of the banks' depositors. However, the foreign representative did not assert claims under Anguilla's fraudulent-transfer statutes, likely in part because those statutes did not recognize the constructive fraudulent-transfer theories that were most likely to be applicable to the transactions.

At the time that the foreign representative filed the chapter 15 cases for the Anguilla banks, he was looking for a way to enhance his claims relating to the upstreaming transactions, but chapter 15 alone could not accomplish that goal. While the filing of the chapter 15 cases for the banks allowed the foreign representative to seek and receive certain protections in the U.S., one thing the chapter 15 filings did not allow was for the foreign representative to commence U.S. avoidance actions under chapter 5 of the U.S. Bankruptcy Code. Section 1521(a)(7) of the U.S. Bankruptcy Code expressly prohibits a foreign representative from commencing such actions in the context of a chapter 15 case.[2]

Therefore, the foreign representative, wanting to commence those U.S. avoidance actions in order to recover the same funds that were the subject of the Anguilla actions, filed chapter 11 cases for the Anguilla banks after (and in addition to) filing the chapter 15 cases. While this layering of chapter 15 and 11 cases is uncommon, it is expressly authorized by statute.

Section 1511 permits a foreign representative to commence a plenary chapter 11 case for a foreign debtor whose foreign proceeding has been recognized as a foreign main proceeding, and § 1523(a) provides that a foreign representative has standing in such a case to initiate chapter 5 avoidance actions. In addition, although the debtors were banks, they were permitted to file chapter 11 cases in the U.S. for the same reason they were permitted to file chapter 15 cases: They were not domestic U.S. banks and did not have a U.S. branch or agency that would disqualify them from chapter 11 under § 109 of the U.S. Bankruptcy Code.[3]

The debtors also satisfied the requirement that they have property in the U.S., apparently based on the unearned portion of the retainer paid to their legal counsel and the avoidance claims that they sought to assert to recover funds held at U.S. banks.[4] These facts combine to create an unusu-

1 580 B.R. 64 (Bankr. S.D.N.Y. 2018).

2 11 U.S.C. § 1521(a)(7) ("Upon recognition of a foreign proceeding ... the court may ... grant any appropriate relief, including ... granting any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a).").

3 Section 109(b)(3)(B), made applicable to chapter 15 debtors by § 1501(c), provides that a foreign bank cannot be a debtor if it has a branch or agency in the U.S. *See Flynn v. Wallace (In re Irish Bank Resolution Corp. Ltd. (In Special Liquidation))*, 538 B.R. 692, 696 (D. Del. 2015).

4 11 U.S.C. § 1528 ("After recognition of a foreign main proceeding, a case under another chapter of [title 11] may be commenced only if the debtor has assets in the United States."); *see also Drawbridge Special Opportunities Fund LP v. Barnet (In re Barnet)*, 737 F.3d 238, 247 (2d Cir. 2013); *In re Avanti Commc'ns Grp. PLC*, 582 B.R. 603, 612 (Bankr. S.D.N.Y. 2018) ("In a controversial ruling, the Second Circuit applied the requirements of section 109(a) to eligibility to file a chapter 15 case.").

al situation: Banks (which are not usually U.S. debtors) being subject to multiple U.S. bankruptcy cases, including "plenary" chapter 11 cases, even though they have few U.S. assets.

Having commenced chapter 11 cases for the debtors, the foreign representative subsequently commenced actions in the U.S., including U.S. avoidance claims and other causes of action, covering some of the ground that was already the subject of the litigation commenced against the same defendants in the Anguilla courts several months before. Specifically, the foreign representative asserted claims for intentional and constructive fraudulent transfer and breach of fiduciary duty with respect to the upstreamed funds. The defendants in the U.S. avoidance actions moved to dismiss them on various grounds, including personal jurisdiction, subject-matter jurisdiction, *forum non conveniens*, international comity, Foreign Sovereign Immunity Act defenses, extraterritoriality and the act-of-state doctrine.

Since the chapter 15 and 11 cases of the two Anguilla banks were assigned to different New York bankruptcy judges, both Judges Bernstein and Glenn were called upon to decide whether the U.S. avoidance actions should be allowed to proceed or, in the alternative, whether the complementary principles of international comity and *forum non conveniens* should cause the New York court to defer to the courts in Anguilla. The tandem origins of the two disputes led to the resolution of those disputes by Judges Bernstein and Glenn in an uncommon single decision authored by both judges jointly.

The U.S. Bankruptcy Court Stays — but Does Not Dismiss — the U.S. Actions

Due to the pending insolvency proceedings and litigation in Anguilla, the U.S. bankruptcy court elected to stay the foreign representative's U.S. avoidance actions based on principles of international comity and the related doctrine of *forum non conveniens*. In determining to stay the proceedings based on international comity, the U.S. court applied the doctrine of comity among courts, pursuant to which a court can decline to exercise jurisdiction over a matter when a related case is pending in a foreign court.[5] The doctrine is motivated by "the proper respect for litigation in and the court of a sovereign nation, fairness to litigants, and judicial efficiency."[6]

Applying these considerations, the U.S. court determined that deference to the main insolvency proceedings in Anguilla warranted staying the U.S. actions. First, no party had questioned that the Anguilla insolvency proceedings were procedurally fair, and that the Anguilla court had an interest in the "equitable and orderly distribution" of the banks' property.[7] Second, the U.S. court concluded that the foreign representative, in commencing the U.S. actions, was effectively trying to "reach around" the Anguilla insolvency proceedings in order to avoid the stay that had been imposed by the Anguilla court.[8] The U.S. court further noted that the foreign representative admitted that he filed the U.S. actions in order to assert constructive fraudulent-transfer claims that had no counterpart and could not be asserted under Anguilla law.[9]

Despite its findings regarding comity and *forum non conveniens*, the U.S. court reasoned that on balance, a stay pending the outcome of the Anguilla litigation was more appropriate than dismissing the U.S. actions outright.

The U.S. court separately concluded that deference to the related Anguilla litigation justified a stay of the U.S. actions. The U.S. court found that the Anguilla litigation involved the same subject matter and parties as the U.S. actions; therefore, resolution of that litigation would prove highly instructive to — if not dispositive of — the foreign representative's U.S.-law claims.[10] While Anguilla law might not recognize constructive fraudulent-transfer claims and might be less favorable to the foreign representative than U.S. law in some respects, the court found that fact to be irrelevant to its determination that Anguilla was an adequate forum for the litigation.

According to the U.S. court, both forums allowed the foreign representative to essentially seek the same remedy: return of the upstreamed funds to the debtor banks, even if not through precisely the same causes of action.[11] Finally, the U.S. court concluded that while the facts alleged by the foreign representative implicated conduct in both Anguilla and the U.S., Anguilla had a stronger interest in the subject matter of the case based on its interest in having disputes involving its banking system resolved in its courts.[12]

For many of the same reasons that it stayed the U.S. actions based on comity principles, the U.S. court concluded that the doctrine of *forum non conveniens* also warranted the stay. *Forum non conveniens* is "a discretionary device permitting a court in rare instances to dismiss a claim even if the court is a permissible venue with proper jurisdiction over the claim" and is animated by many of the same concerns as comity.[13] Principal among the U.S. court's considerations in determining to stay the U.S. actions on this basis was its conclusion that the foreign representative's choice of the U.S. as a forum was not entitled to deference because it was, according to the court, "an exercise in forum-shopping" in an attempt to circumvent the obstacles that he faced to the pursuit of his claims in Anguilla.[14]

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5 This doctrine is distinct from the doctrine of comity among nations, which can apply to limit the reach of the Bankruptcy Code's avoidance provisions to transactions that are connected with a foreign state. *Nat'l Bank of Anguilla*, 580 B.R. at 93.

6 *Nat'l Bank of Anguilla*, 580 B.R. at 94 (quoting *Royal & Sun Alliance Ins. Co. of Canada v. Century Int'l Arms Inc.*, 466 F.3d 88, 94 (2d Cir. 2006).

7 580 B.R. at 95-96.

8 *Id.* at 96.

9 *Id.* at 97.

10 *Id.* at 99.

11 *Id.* at 100.

12 *Id.* at 102.

13 *Id.* at 84.

14 *Id.* at 86.

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ate than dismissing the U.S. actions outright. The U.S. court also noted that depending on the outcome of the Anguilla proceedings, it might be appropriate for the foreign representative to return to the court to seek resolution of any claims in the U.S. actions that "are not resolved by the Anguilla courts and are not precluded by recognition and enforcement of judgments in Anguilla."[15]

Presumably, those "unresolved" claims might include the constructive fraudulent-transfer claims that appear to have been a motivating factor behind the foreign representative's U.S. litigation strategy from the outset. Upon such a return, the U.S. court cautioned that the foreign representative would still have to address the defendants' other arguments for dismissal, including questions of jurisdiction.

Conclusion

Faced with potentially competing litigation in the U.S. and Anguilla, Judges Bernstein and Glenn employed international comity and related doctrines to put the U.S. avoidance actions on hold, but did not dismiss them outright. They entered this decision effectively to let the separate, and earlier-filed, Anguilla litigation run its course, while at the same time preserving the potential causes of action filed in the U.S. litigation. This decision is as deferential as it is pragmatic: It both looks to the Anguilla courts to resolve issues that are, in the first instance, Anguilla issues, and maintains the possibility that U.S. litigation could be necessary to round out the legal rights of the litigation parties if the Anguilla courts are unable to tie up all loose ends.

This result seems balanced on its surface, neither allowing the U.S. litigation to proceed nor dismissing it outright. However, it also seems to allow the foreign representative the potential for "multiple bites at the apple" by litigating in Anguilla first and preserving any incremental claims in the U.S. for a second round. In that respect, the result also seems to increase the uncertainty for both parties.

For the defendants, it is unclear not only what claims might be asserted against them, but also in what courts they might have to defend themselves. For the foreign representative, it is unclear whether a true "second chance" will exist in the U.S. due to potential preclusion and jurisdiction issues. For both parties, the decision could require difficult strategic judgments regarding the assertion of claims and defenses in Anguilla, because those judgments may or may not have later effects in subsequent U.S. litigation.

Accordingly, cases that arose from a background of prismatic complexity appear to have resulted, perhaps unavoidably, in a decision that, while focused in its single vision for international comity, does not truly resolve basic questions of what types of claims should proceed in what courts in cross-border insolvencies. In the end, the decision seems to leave both plaintiffs and defendants unclear on what to expect — other than knowing where they will be litigating first. abi

15 *Id.* at 92.