Foreign Debtors' Forum Shopping Warranted Stay of U.S. Avoidance Litigation

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Even if a U.S. court has jurisdiction over a lawsuit involving foreign litigants, the court may conclude that a foreign court is better suited to adjudicate the dispute because either: (i) it would be more convenient, fair, or efficient for the foreign court to do so (a doctrine referred to as "*forum non conveniens*"); or (ii) the U.S. court concludes that it should defer to the foreign court as a matter of international comity. Both of these doctrines were addressed in a ruling recently handed down by the U.S. Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"). In *In re National Bank of Anguilla (Private Banking Trust) Ltd.*, 580 B.R. 64 (Bankr. S.D.N.Y. 2018), the court, on grounds of *forum non conveniens* and comity, stayed litigation commenced in a chapter 11 case by two Anguillan banks to avoid fraudulent transfers in deference to the banks' Anguillan administration proceedings and litigation pending in an Anguilla court involving the same issues. The court concluded that the debtors, whose Anguillan administrations it had previously recognized under chapter 15, had engaged in forum shopping by filing the avoidance litigation in the U.S. after: (i) commencing chapter 11 cases for that purpose; and (ii) commencing litigation in Anguilla with the same parties regarding the same transactions and nucleus of facts.

Forum Non Conveniens

The doctrine of *forum non conveniens* permits a court to dismiss litigation even if the court is a proper venue with jurisdiction over the claims asserted. Application of the doctrine to dismiss a case is committed to a court's broad discretion, which may be deployed "when considerations of convenience, fairness, and judicial economy so warrant." *Magi XXI, Inc. v. Sato della Citta del Vaticano*, 714 F.3d 714, 729 n.6 (2d Cir. 2013).

Courts in the Second Circuit apply a three-step process to determine whether an action should be dismissed under the doctrine. The court must: (i) determine the degree of deference to give the plaintiff's choice of forum; (ii) determine whether an adequate alternative forum exists; and (iii) balance the private interests of the parties in pursuing litigation in the competing forums against any public interests at stake. *See Iragorri v. United Techs. Corp.*, 274 F.3d 65, 73–74 (2d Cir. 2001).

A plaintiff's choice of forum is presumed to be adequate, and the defendant bears a heavy burden in seeking to have a case dismissed on the ground of *forum non conveniens*.

A court will accord less deference to a plaintiff's choice of forum if it appears that the selection was motivated by forum shopping, because it "is much less reasonable to presume that the choice was made for convenience." *Id.* at 71. Other factors that courts consider in determining the degree of deference include: (i) the convenience of the plaintiff's residence in relation to the chosen forum; (ii) the proximity of the chosen forum to witnesses or evidence; (iii) the defendant's amenability to suit in the chosen forum; (iv) the availability of suitable legal assistance; and (v) other matters pertaining to convenience or expense. *Id.* at 72.

Comity

A court may also choose not to exercise jurisdiction on the basis of principles of international comity. "Comity" is "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).

International comity has been interpreted to include two distinct doctrines: (i) "legislative," or "prescriptive," comity; and (ii) "adjudicative comity," or "comity among courts." *Maxwell Comm'n Corp. v. Societe Generale (In re Maxwell Comm'n Corp.)* , 93 F.3d 1036, 1047 (2d Cir. 1996).

The former "shorten[s] the reach of a statute"—one nation will normally "refrain from prescribing laws that govern activities

connected with another state when the exercise of such jurisdiction is unreasonable." *Official Comm. of Unsecured Creditors of Arcapita Bank B.S.C.(C) v. Bahrain Islamic Bank (In re Arcapita Bank B.S.C.(C))*, 575 B.R. 229, 237 (Bankr. S.D.N.Y. 2017).

Adjudicative comity is an act of deference whereby the court of one nation declines to exercise jurisdiction in a case that is properly adjudicated in a foreign court. *Id.* at 238. U.S. courts generally extend comity whenever a foreign court has proper jurisdiction and "enforcement does not prejudice the rights of United States citizens or violate domestic public policy." *CT Inv. Mgmt. Co., LLC v. Cozumel Caribe, S.A. de C.V. (In re Cozumel Caribe, S.A. de C.V.)*, 482 B.R. 96, 114 (Bankr. S.D.N.Y. 2012).

Because a foreign nation's interest in the equitable and orderly distribution of a foreign debtor's assets is an interest deserving respect and deference, foreign bankruptcy proceedings are one category of foreign litigation that generally mandates dismissal of parallel U.S. district court litigation under adjudicative comity. *Royal and Sun Alliance Ins. Co. of Canada v. Century Int'l Arms* , 466 F.3d 88, 92–93 (2d Cir. 2006).

In this context, deference to the foreign court is warranted "so long as the foreign proceedings are procedurally fair and . . . do not contravene the laws or public policy of the United States." *Cozumel Caribe*, 482 B.R. at 114. Courts examine a number of factors in assessing procedural fairness, including:
(1) whether creditors of the same class are treated equally in the distribution of assets; (2) whether the liquidators are considered fiduciaries and are held accountable to the court; (3) whether creditors have the right to submit claims which, if denied, can be submitted to a bankruptcy court for adjudication; (4) whether the liquidators are required to give notice to the debtor's potential claimants; (5) whether there are provisions for creditors meetings; (6) whether a foreign country's insolvency laws favor its own citizens; (7) whether all assets are marshalled before one body for centralized distribution; and (8) whether there are provisions for an automatic stay and for the lifting of such stays to facilitate the centralization of claims.
Finanz AG Zurich v. Banco Economico S.A., 192 F.3d 240, 249 (2d Cir. 1999).

Bank of Anguilla

National Bank of Anguilla (Private Banking & Trust) Ltd. and Caribbean Commercial Investment Bank Ltd. (collectively, the "debtors") were Anguillan offshore banks (i.e., banks that operated within Anguilla but served only non-Anguillan customers).

Severely stressed by the 2008 financial crisis, the debtors' parent banks were placed into conservatorship in 2013 by the regulator of Anguilla's banking system, which replaced the parent banks' boards with conservator directors pending the preparation of rescue plans.

Concluding that certain funds had been commingled between the debtors and their parent banks, the conservator directors directed the debtors to transfer approximately $23 million to U.S. accounts maintained by the parent banks. In addition, from 2013 to 2016, the directors caused the parent banks to transfer more than $210 million to the Anguillan bank regulator.

The regulator placed the parent banks into receivership in 2016 and transferred their banking operations and deposits to a newly formed bank owned by the government of Anguilla.

The Anguilla High Court (the "Anguilla Court") entered an order in February 2016 placing the operations of the debtors under administration.

In May 2016, the debtors sued the parent banks and the successor bank in the Anguilla Court, alleging that the conservator directors and the bank regulator had breached their fiduciary duties by directing the transfers to the parent banks. The Anguilla Court dismissed the action because the receivership stayed litigation against the parent banks, the debtors failed to join the conservator directors as parties, and it was unclear whether the directors were immune from suit as government employees.

Certain of the debtors' depositors raised the same allegations in separate litigation commenced in June 2016. An appeal of the Anguilla Court's ruling that the defendants were not immune from suit was still pending as of January 2018.

The administrator filed separate petitions on behalf of the debtors in May and October 2016 in the Bankruptcy Court, seeking recognition of the Anguillan administrations under chapter 15 of the Bankruptcy Code. Different bankruptcy judges

entered orders recognizing the administrations as "foreign main proceedings" in June and November 2016.

Post-recognition, each debtor separately filed a chapter 11 case and commenced an adversary proceeding against its parent bank, the successor bank, and the bank regulator (collectively, the "defendants"). Both of the complaints asserted claims: (i) to avoid and recover the funds upstreamed from the debtors to the parent banks and ultimately to the successor bank as actual or constructive fraudulent transfers under the Bankruptcy Code, New York law, and Anguillan law; and (ii) to impose liability on the bank regulator for breach of fiduciary duty, gross negligence, and aiding and abetting breach of fiduciary duty.

The chapter 11 filings were necessary to implement this strategy because, pursuant to section 1521(a)(7) of the Bankruptcy Code, a foreign representative in a chapter 15 case may not assert avoidance claims under section 544 or 548 in a chapter 15 case, but can assert such claims in a case under another chapter if the debtor is eligible for relief. In addition, Anguillan law does not recognize causes of action to avoid constructive fraudulent transfers, although it does recognize claims for avoidance of transfers made with the intent to defraud creditors.

In March 2017, the debtors filed an application in the Anguilla Court for judicial review of the circumstances surrounding the transactions effected in connection with the resolution plans for the parent banks. The Anguilla Court stayed the review proceedings pending the resolution of the U.S. adversary proceedings.

The defendants moved to dismiss the adversary proceedings on the ground of *forum non conveniens*. According to the defendants, the debtors were forum shopping by asserting their claims in U.S. courts for the purpose of asserting constructive fraudulent transfer claims that could not be brought under Anguillan law. The debtors countered that many of the transfers at issue occurred in New York and that the Anguilla Court sanctioned the U.S. litigation by authorizing the foreign representatives to commence foreign proceedings on the debtors' behalf and by staying the review proceedings pending the outcome of the U.S. adversary proceedings.

Certain of the defendants also argued that the court should dismiss the adversary complaints: (i) under principles of comity; (ii) under the Foreign Sovereign Immunities Act; (iii) for lack of personal jurisdiction; (iii) because the avoidance provisions of the Bankruptcy Code do not apply extraterritorially; and (iv) for failure to adequately state a claim for avoidance under sections 544 and 548 of the Bankruptcy Code.

The Bankruptcy Court's Ruling

The two bankruptcy judges presiding over the debtors' chapter 11 and chapter 15 cases issued a joint opinion directing that, under the doctrines of *forum non conveniens* and comity, the adversary proceedings be stayed in favor of the Anguillan administrations and pending adjudication of the disputes in the Anguilla Court.

According to the bankruptcy judges, the debtors' choice of forum was not entitled to any deference because it was an exercise in forum shopping—i.e., it was motivated by the desire to find a forum in which the debtors could assert claims that did not exist under Anguillan law, had been stayed by the Anguilla Court, or had been appealed.

The judges found, among other things, that: (i) the debtors were incorporated in Anguilla and conducted no significant operations in the U.S.; (ii) the defendants and the key witnesses, many of whom were not within the Bankruptcy Court's subpoena power, were incorporated or resided in Anguilla or the eastern Caribbean; (iii) the majority of the evidence was located or accessible in Anguilla, but not in the U.S.; (iv) the defendants were amenable to suit, and had in fact already been sued, in Anguilla; and (v) the Anguilla Court had a greater interest in adjudicating a dispute involving Anguillan entities and issues of Anguillan law.

In addition, the bankruptcy judges concluded that the Anguilla Court was an adequate alternative forum despite the absence of a cause of action under Anguillan law to avoid constructively fraudulent transfers because, among other things, the Anguilla Court could grant the same remedy if the debtors prevailed on similar claims which were recognized under Anguillan law.

The bankruptcy judges accordingly ruled that the adversary proceedings would be stayed, rather than dismissed, under the doctrine of *forum non conveniens*. A stay was more appropriate than dismissal, the court explained, because there might still be issues to resolve after the Anguilla Court ruled in the pending litigation.

The court also held that staying the adversary proceedings was appropriate as a matter of comity. Deference to the

debtors' Anguillan administrations was appropriate, the court explained, in the absence of any assertion that the administrations were procedurally unfair. Likewise, numerous factors supported deference as a matter of comity to the Anguilla Court litigation. These included: (i) the similarities between the issues and the parties; (ii) the fact that two of the three Anguillan lawsuits were filed before the adversary proceedings; (iii) the adequacy and competency of the Anguilla Court; (iv) inconvenience of the Bankruptcy Court to the defendants; and (v) Anguilla's overriding interest in adjudicating the issues.

Because the court stayed the adversary proceedings, it declined to address the remaining issues raised by the motions to dismiss.

Outlook

An indispensable feature of cross-border bankruptcy law is the ability of foreign debtors to access U.S. bankruptcy courts for the purpose of safeguarding their U.S. assets from local creditors and otherwise enlisting the U.S. bankruptcy court's assistance for the debtor's foreign bankruptcy proceeding. As noted, chapter 15 expressly permits the representative of a foreign debtor to commence a case on the debtor's behalf under another chapter of the Bankruptcy Code after the court recognizes the debtor's foreign bankruptcy proceeding. This gives the representative access to many of the powers of a bankruptcy trustee, including the ability to prosecute certain claims under U.S. federal or state law that may not exist under foreign law.

Bank of Anguilla illustrates that, although a U.S. bankruptcy court may have jurisdiction in a cross-border bankruptcy case, it may decline to exercise such jurisdiction in circumstances where the court concludes that the foreign debtor's U.S. filings amount to forum shopping. *Bank of Anguilla* also demonstrates that access to the powers of a U.S. bankruptcy trustee may be restricted if adjudication of the claims in a foreign court is more appropriate.

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