

Recent Ruling Highlights Purpose Behind Ch. 15

Friday, May 30, 2008 --- The recent decision by the United States Bankruptcy Court for the Southern District of New York (the “Bankruptcy Court”) in *In re Oversight and Control Commission of Avanzit, S.A.*, 2008 WL 1758810 (Bankr. S.D.N.Y. Apr. 18, 2008), highlights a new twist on a familiar story — the race between a foreign debtor and its creditors to assets located in the U.S., especially where the asset in question represents a significant asset of the foreign debtor.

As the Avanzit decision makes clear, U.S. bankruptcy courts can and will look to the purpose behind Chapter 15 and the Model Law on Cross Border Insolvency (upon which Chapter 15 is closely patterned) to ensure a result that is consistent with the goals Chapter 15 is trying to advance for both foreign debtors here in the U.S., as well as for U.S. debtors that may be the subject of a cross-border proceeding outside of the U.S.

The principal players in *In re Avanzit* are (i) Avanzit S.A., a Spanish company that is the subject of a suspension de pagos (suspension of payments) proceeding in Spain, (ii) BNPP Paris Andes S.A. (“BNPP”), a Peruvian bank that maintained a U.S. dollar correspondent account in New York with its parent, BNP Paribas (the “New York Account”), and (iii) the oversight committee (the “Oversight Committee”) appointed in Avanzit’s Spanish insolvency proceeding as part of its convenio (plan of reorganization).

Avanzit and BNPP are parties to two contracts, a Credit Transfer Agreement, under which BNPP acquired certain contractual credits from Avanzit for a purchase price of \$25 million, and a Time Deposit Account Opening Agreement, pursuant to which Avanzit deposited with BNPP the same \$25 million into the New York Account.

Five months after Avanzit commenced its foreign insolvency proceeding in Spain, BNPP terminated the Credit Transfer Agreement and set off the \$25 million in the New York Account.

Litigation ensued between the parties in both Peru and Spain regarding BNPP’s right to set off the \$25 million. The Spanish civil court agreed to dismiss the action commenced in Spain by Avanzit in favor of a declaratory action commenced by BNPP in Peru.

In response, the Oversight Committee obtained entry of an order in the Spanish bankruptcy court: (i) declaring that the Oversight Committee was the authorized foreign representative of Avanzit; (ii) declaring that Avanzit remained subject to the Spanish proceeding; and (iii) authorizing the Oversight Committee to commence a Chapter 15 case in the United States

on behalf of Avanzit to investigate the facts surrounding the \$25 million deposit and to attempt to recover same for distribution according to Spanish law.

On Nov. 29, 2007, the Oversight Committee filed a Chapter 15 petition with the Bankruptcy Court, which sought, inter alia, recognition of the Spanish proceeding as a “foreign main proceeding” and entry of an order authorizing the Oversight Committee to obtain discovery in respect of Avanzit’s U.S. assets.

BNPP opposed recognition and moved to dismiss the Chapter 15 case.

In support of its opposition, BNPP contended that following approval of Avanzit’s convenio in the Spanish proceeding, such proceeding no longer qualified as a “foreign proceeding” under section 101(23) of the Bankruptcy Code and thus, was no longer “pending” as required by section 1502.

The Bankruptcy Court granted recognition of Avanzit’s Spanish insolvency proceeding as a “foreign main proceeding” and denied BNPP’s motion to dismiss.

In doing so, the Bankruptcy Court first looked at the definition of “foreign proceeding” under section 101(23) of the Bankruptcy Code, which defines a “foreign proceeding” as “a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.”

The Bankruptcy Court focused on the phrase “assets and affairs of the debtor” being “subject to control or supervision” by the foreign court in light of BNPP’s argument that under Spanish law, once the convenio was approved by the Spanish court, Avanzit’s assets and business were no longer subject to the jurisdiction of the Spanish court.

The Bankruptcy Court disagreed with this argument for three reasons. First, the Bankruptcy Court found that the Spanish proceeding was still ongoing and that the Spanish court retained jurisdiction over Avanzit and its assets since distributions to creditors had not yet been made.

Next, the Bankruptcy Court determined that the result sought by BNPP – that an order of confirmation results in a foreign proceeding not being subject to recognition in the U.S. – runs contrary to the primary objective of Chapter 15 of encouraging cooperation between domestic and foreign courts because, as the Bankruptcy Court explained, the goals of Chapter 15 would be frustrated “if ‘foreign proceeding’ was interpreted in a manner that cut off assistance at a time when cooperation, certainty, fairness, asset values and financial relief were most needed, simply because the debtor successfully prosecuted its reorganization case.”

Finally, the Bankruptcy Court disagreed with BNPP's interpretation of "foreign proceeding" because it would likely affect a U.S. debtor's ability to have its Chapter 11 case recognized overseas once its U.S. Chapter 11 reorganization plan had been confirmed.

The Bankruptcy Court also refused to accept BNPP's contention that recognition was improper because the Spanish insolvency proceeding was no longer "pending," a requirement that BNPP argued was necessary pursuant to section 1502.

Section 1502(4) defines foreign main proceeding as "a foreign proceeding pending in the country where the debtor has the center of its main interests." The Bankruptcy Court disagreed with this construction of section 1502, concluding that the word "pending" refers to the situs, not status, of the foreign proceeding.

In reaching this result, the Bankruptcy Court noted that this result was consistent with Article 2(b) of the Model Law, which specifically refers to location (providing that a foreign main proceeding means a foreign proceeding taking place in the state where the debtor has the center of its main interests) and was consistent with relevant U.S. bankruptcy decisions, all of which have held that a Chapter 11 case was still pending notwithstanding the entry of a confirmation order.

One point highlighted in Avanzit is that Chapter 15, which recently celebrated its two and one-half year anniversary, remains very much in the development phase.

Accordingly, it is likely that bankruptcy courts will continue to be guided by the legislative history to Chapter 15 and the Model Law (which has now been adopted by 15 countries) in interpreting the provisions of Chapter 15 to ensure results that promote and are consistent with the objectives Chapter 15 is attempting to advance.

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