The proliferation of global commerce means that many companies' assets and creditors can now be found all over the globe. The unique challenges posed by such unprecedented expansion are not limited to the terms of a cross-border transaction and the relationship among the players. For example, lawmakers throughout the world have been called upon to devise a workable framework of rules to govern insolvency or bankruptcy proceedings involving companies that do business and have assets or creditors in several different countries. Competing parochial concerns of different nations make the development of such regulations extremely difficult. Still, recently enacted laws such as the European Union Regulation on Insolvency Proceedings (2002) indicate that encouraging progress is being made in this arena.

Underpinning efforts to come up with a workable regulatory scheme on an international basis is an acknowledgment that no viable framework is possible without cooperation among sovereign nations, and more specifically, cross-border recognition of judicial orders and decrees – a concept sometimes referred to as "comity." This concept has long been a part of U.S. law. In the realm of bankruptcy and insolvency, it is manifested in the existence of special "ancillary" bankruptcy proceedings. Bankruptcy Code section 304 provides that the duly appointed representative of a foreign company that is the subject of a bankruptcy or insolvency proceeding abroad may commence a limited bankruptcy case in the U.S. for the purpose of protecting and, where appropriate, repatriating that debtor's assets to the host country.
An ancillary proceeding acts as an alternative to an ordinary bankruptcy case, which can also be filed by a foreign debtor so long as it has a place of business or assets in the U.S. Its principal goal is to prevent the piecemeal dissipation of a foreign debtor's U.S. assets by way of seizure, levy or other debt collection device in connection with proceedings commenced by local creditors in domestic courts. An ancillary proceeding assists the accredited representative of a foreign debtor's estate in marshalling the debtor's U.S. assets and arranging for their repatriation abroad for administration in a pending foreign bankruptcy or insolvency proceeding. In many situations involving a foreign debtor, an ancillary case is more cost effective and expeditious than a full-blown bankruptcy case.

The relief most commonly sought in connection with an ancillary bankruptcy petition is an injunction preventing the commencement or continuation of litigation, or the enforcement of a judgment against a foreign debtor and/or its assets in the U.S. Bankruptcy courts may also order that a foreign debtor's U.S. assets be turned over to the foreign representative, or order other "appropriate relief."

Relief from a U.S. bankruptcy court in aid of a foreign proceeding is not automatic. At the outset, the representative of the foreign debtor must be properly accredited as such. Next, the court must be satisfied that the foreign proceeding is a legitimate judicial or administrative proceeding commenced in the debtor's home country for the purpose of "liquidating an estate, adjusting debts by composition, extension or discharge, or effecting a reorganization." Finally, in deciding whether to grant injunctive, turnover or other appropriate relief, a U.S. bankruptcy
court is obliged to consider "what will best assure an economical and expeditious administration" of the foreign debtor's estate, consistent with each of the following factors:

(1) just treatment of all holders of claims against or interests in the estate;

(2) protection of claim holders in the U.S. against prejudice and inconvenience in the processing of claims in the foreign proceeding;

(3) prevention of preferential or fraudulent dispositions of the foreign debtor's assets;

(4) distribution of proceeds of the foreign debtor's estate substantially in accordance with the order prescribed by the Bankruptcy Code;

(5) comity; and

(6) if appropriate, the provision of an opportunity for a fresh start for any individual foreign debtor.

These factors and the other statutory prerequisites to ancillary relief apply only to representatives of foreign debtors. Other rules govern who can and cannot file an ordinary bankruptcy case. Thus, a company that cannot qualify as a debtor in an ordinary bankruptcy case may nevertheless be eligible for relief as a foreign debtor under section 304. A ruling recently handed down by a New York district court clarifies that there is a distinction between eligibility for relief under section 304 and cases brought under other sections of the Bankruptcy Code.

**The JugoBanka Decision**

In 2003, the Agency for Deposit Insurance, Rehabilitation, Bankruptcy and Liquidation of Banks (the "Agency") was the foreign administrator of two failed Yugoslavian banks and the liquidator of their New York branches. In connection with its efforts to liquidate the assets of the New York branches, the Agency learned that the N.Y. Superintendent of Banks (the "Superintendent"), which had putative control over the assets, intended to transfer them to domestic creditors in preference to foreign creditors.
The Agency responded by filing an ancillary bankruptcy case in New York seeking to block the transfers so that the assets could be repatriated to Serbia and Montenegro where bankruptcy proceedings had been commenced against the banks. The bankruptcy court dismissed the section 304 petition. It did so not because the Agency failed to qualify as a representative of a foreign debtor or because the foreign proceeding was somehow illegitimate. Instead, the bankruptcy court dismissed the Agency's section 304 case because the banks were not eligible for bankruptcy relief under section 109 of the Bankruptcy Code, which provides in substance that a bank cannot file for bankruptcy protection under any chapter of the Bankruptcy Code.

The district court reversed that determination on appeal. Acknowledging that a foreign bank may not commence principal liquidation or reorganization proceedings under the Bankruptcy Code by itself, the court held that a qualified foreign representative of a foreign bank may commence ancillary bankruptcy proceedings in the United States. Section 109, the district court emphasized, has no bearing whatsoever on a foreign debtor's eligibility for relief under section 304 of the Bankruptcy Code. It accordingly remanded the case to the bankruptcy court to determine whether the Agency was otherwise entitled to relief under section 304.

That was not, however, the end of the district court's rulings in the case. The Superintendent moved for reconsideration based on arguments of federal preemption and sovereign immunity. The district court rejected both. The court underlined that the purpose of section 304 is to bring order to the chaos that otherwise ensues when foreign companies with property in the U.S. commence bankruptcy proceedings abroad. Furthermore, it explained, the power to enforce the
repatriation of assets over the objection of a state superintendent without any interest in the property is an elementary exercise of federal supremacy. According to the district court, where Congress intended to embrace foreign banks with U.S. branches within the scope of section 304, the fact that this might interfere with a "mandatory state statute" is well within the constitutional prerogatives given to Congress.

Analysis

JugoBanka reinforces the important role played by section 304 in promoting international cooperation in connection with transnational bankruptcy or insolvency proceedings. Section 304 establishes a comparatively cost-effective and expeditious procedure for a foreign representative to protect a foreign debtor's U.S. assets so that the claims of all of its creditors can be resolved in an appropriate forum abroad. The eligibility restrictions that exist for debtors in ordinary bankruptcy cases, most of which acknowledge a competing regulatory scheme governing the liquidation or restructuring of various entities (e.g., banks and insurance companies), simply do not apply in a case under section 304.

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