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I. Introduction

Insolvency continued to be one of the most dynamic areas of international law during 2003. News headlines often were dominated by bankruptcy proceedings involving massive multi-jurisdictional enterprises and insolvencies driven by economic turmoil. Beneath the headlines, bankruptcy law was one of the areas most often targeted by reformers in national legislatures. A great many of the changes were intended to bring local practice in line with the processes of Chapter 11 of the United States Bankruptcy Code. The process of bankruptcy reform in the United States again failed to result in adoption of the UNCITRAL Model Law on Cross Border Insolvencies, but American decisional law continued to provide interesting insights into the scope of relief available to the fiduciaries of foreign debtors' estates.

Part II of this article summarizes three interesting bankruptcy court decisions reported during 2003 that address: (1) the extent to which a U.S. bankruptcy court can consider the proper jurisdictional basis of a foreign proceeding in granting comity to the proceeding; (2) whether the attorneys for a multi-national debtor properly delayed the commencement in the European Union of a companion proceeding following the commencement of a Chapter 11 proceeding in the United States; and (3) whether alleged deficiencies in a plan of reorganization in a foreign proceeding are sufficient reasons for a bankruptcy court to refuse to enjoin enforcement of collection action by judgment creditors against assets located in the United States that are vital to the reorganization. Part III of this article then highlights some of the notable changes to domestic insolvency laws proposed during 2003.

II. U.S. Cases of Note Reported During 2003

In *In re Bullmore*, 300 B.R. 719 (Bankr. D. Neb. 2003), creditors challenged the standing of foreign representatives appointed in the Cayman Islands to oversee the liquidation of National Warranty Risk Retention Group (National Warranty). The principal place of

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business of National Warranty was Lincoln, Nebraska, but the debtor was incorporated under the laws of the Cayman Islands.[1] National Warranty was the operator of a risk retention group (i.e., a reinsurer) and was authorized by U.S. statute to sell product liability insurance in the United States while being incorporated in and regulated by a foreign jurisdiction.[2] In this instance, National Warranty reinsured vehicle service contracts sold by group members, such as automobile dealerships, to consumers.[3]

Disputes arose between National Warranty and its customers regarding the adequacy of reserve accounts backing the vehicle service contracts. These disputes ultimately caused National Warranty to determine that its reserves were insufficient to pay claims for which it was directly liable.[4] National Warranty then transferred most of its reserves, totaling approximately twenty-four million dollars, from the United States to banks in the Cayman Islands, whereupon National Warranty filed a petition in the Grand Court of the Cayman Islands for an order winding up the company.[5] The Grand Court granted the liquidators appointed in the case an injunction against all actions, suits, and proceedings of any nature against the company.[6] The liquidators next commenced an ancillary proceeding in the U.S. Bankruptcy Court for the District of Nebraska and requested a temporary injunction against the initiation or continuation of any action against the property of the debtor involved in the Caymanian proceedings. Several consumer purchasers of vehicle service contracts objected to the temporary injunction.[7]

The principal objection of the contract holders was that the liquidators improperly invoked section 304 of the U.S. Bankruptcy Code (Code) because National Warranty was actually an American, and not Caymanian, company.[8] The uncontested evidence showed that the only connection between National Warranty and the Cayman Islands was its corporate registry there and related governmental regulation, but National Warranty was prohibited by the nature of its corporate registration from conducting any business in the Cayman Islands.[9] Instead, National Warranty conducted all of its business and located all of its assets in the United States.[10] Therefore, the contract holders argued that the Caymanian liquidation did not fall within the definition of "foreign proceeding" under section 101(23) because National Warranty did not maintain a domicile, residence, principal place of business, or principal assets in the jurisdiction of the principal proceedings.[11] Furthermore, because National Warranty was a corporate entity, it could not have a domicile or residence as an individual can.[12] The contract holders urged that nothing in section 304 or the definition of "foreign proceeding" in section 101(23) mentions the place of incorporation as a qualifying jurisdiction.[13] The contract holders urged the court to consider the

1. In re Bullmore, 300 B.R. 719, 723 (Bankr. D. Neb. 2003).
2. *Id.; See generally* Liability Risk Retention Act, 15 U.S.C. § 3901 (2004).
3. *Bullmore*, 300 B.R. 719.
4. *Id.* at 724.
5. *Id.*
6. *Id.*
7. *Id.* at 725.
8. *Id.* at 727.
9. *Id.*
10. *Id.*
11. *Id.* at 727.
12. *Id.*
13. *Id.* at 729.

debtor's "center of main interests" in determining the proper jurisdiction for the debtor's primary bankruptcy proceeding.[14] The prominent expert witnesses testifying for the contract holders urged the court to follow the precedent of the European Union Insolvency Regulation 2000 (Council Regulation (EC) N 1346/2000) and the UNCITRAL Model Law on Cross-Border Insolvency (UNCITRAL Model Law) to overcome a presumption that the jurisdiction of the corporate registration was the appropriate forum for the debtor's principal insolvency proceeding.[15]

The bankruptcy court ultimately ruled that National Warranty's primary case was properly filed in the Cayman Islands and should be afforded recognition under Code section 304.[16] Existing American precedent provides that a corporation does, in fact, have a domicile and that such domicile is the corporation's state of incorporation. Therefore, the Cayman Islands was the domicile of National Warranty.[17] Moreover, the Liability Risk Retention Act specifically authorized businesses, such as National Warranty, to incorporate in foreign states like the Cayman Islands and transact most of their business in the United States as a risk retention group.[18] Because the Caymanian liquidation proceeding constituted a foreign proceeding under the Bankruptcy Code, the petitioning joint liquidators were proper foreign representatives to prosecute the ancillary case.[19]

The bankruptcy court refused to apply the "center of main interest" standard to determine if National Warranty's main case was filed in the proper jurisdiction.[20] Although the "center of main interest" standard is widely accepted and is included in the proposed U.S. enactment of the UNCITRAL Model Law as Chapter 15 of the Code, the bankruptcy court believed that existing American precedent precluded application of the standard.[21] The bankruptcy court refused to accept the "center of main interest" concept as the prevailing standard under current U.S. law or the applicable standard under Code section 304 in spite of acceptance of the concept by scholars and its use elsewhere in the world.[22] The bankruptcy court emphasized that U.S. statutes specifically allow the manner in which the debtor was organized and conducted its business, but the Court did not comment on whether the absence of a specific statute would have tipped the analysis in favor of accepting favored acceptance of the "center of main interest" standard.[23]

The contract holders also objected to the scope of the injunction sought by the liquidators, which was comparable to the automatic stay of Code section 362(a).[24] The effect of the injunction would require the contract holders to pursue claims against National Warranty only in the Caymanian proceedings, which the contract holders believed would be a hardship. The bankruptcy court rejected the hardship argument and refused to provide a remedy, allowing the contract holders to file and liquidate their claims in the Nebraska bankruptcy court because the Caymanian statute provided for relatively straightforward

14. *Id.*
15. *Id.* at 728–29.
16. *Id.* at 730.
17. *Id.*
18. *Id.* at 730 (citing 15 U.S.C. § 3901).
19. *Id.* at 731.
20. *Id.* at 728–731.
21. *Id.* at 730.
22. *Id.*
23. *Id.* at 730–31.
24. *Id.*

claim filing and allowance procedures.[25] The Caymanian proceeding was also entitled to comity under Code section 304(c).[26] General unsecured creditors would be treated equally regardless of the nature of their claims, and local creditors would not be favored over U.S. or other foreign creditors.[27] Consequently, the appropriate forum for the contract holders to file and, if necessary, liquidate their claims, would be the proceedings before the Cayman Islands Grand Court as provided by Caymanian law. Furthermore, the Caymanian proceeding would also be the appropriate forum to adjudicate the request of the contract holders to allow a class-action lawsuit to proceed against the debtor.[28]

In re Cenargo International, PLC provides an interesting analysis of several issues involved in selecting the jurisdiction in which to commence insolvency proceedings for a cross-border enterprise and the role of debtor's counsel once a competing case commences in another nation.[29] The discussion takes place in the context of an application to approve the fees of the debtors' counsel and the objections of some creditors questioning the prudence of the decisions made by counsel to commence a Chapter 11 proceeding in the United States instead of an administration proceeding in England.[30] The objectors also criticized the allowance of fees earned by debtors' counsel after the commencement of the competing English proceeding in seeking to enforce the automatic stay of the Code[31] against the proponents of the English proceeding.[32]

The debtors in *Cenargo* consisted of an international transportation company and its affiliates organized under English law. The debtors maintained their central offices and conducted most of their business in and around England, Ireland, and the rest of Europe.[33] The debtors held very few assets in the United States, but their contacts with the United States did include $175 million in high yield notes held by American investors under an indenture governed by U.S. law.[34] The debtors' attorneys, with offices in the United States and in England, had prior experience in restructuring international shipping enterprises through Chapter 11, and the debtors commenced their Chapter 11 proceedings soon after a group of note holders threatened to file an involuntary bankruptcy proceeding in the U.S.[35] Two weeks after the filing of the Chapter 11 cases, the primary secured creditor commenced involuntary provisional liquidation proceedings in England against several of the U.S. debtors and other affiliates.[36] The secured creditor commenced the English pro-

25. *Id.;* cf. In re Atrimm, 278 B.R. 832 (Bankr. C.D. Cal. 2002) (allowing creditor to file claim in U.S. court and providing Italian foreign representative with U.S. forum to challenge allowance of claim).

26. *Bullmore*, 300 B.R. at 731.

27. *Id.* at 734.

28. *Id.* at 736.

29. *See* In re Cenargo Int'l, PLC 294 B.R. 571 (Bankr. S.D.N.Y. 2003). The fees to be paid to counsel for a debtor are governed by section 330 of the United States Bankruptcy Code and are limited to "reasonable compensation for actual, necessary services. . . ." *Id.* at 595 (citing Code § 330(a)(1)(A)).

30. *Id.* at 575. The Court's inquiry occurred at the behest of an objection to counsel's fees filed by a group of note holders and the joint administrators of the English proceeding that was eventually filed to reorganize the debtors.

31. *See* Code § 362(a).

32. *See Cenargo*, 294 B.R. at 575.

33. *Id.* at 576.

34. *Id.*

35. *Id.* at 577–78.

36. *Id.* at 583.

ceedings without leave of or notice to the U.S. bankruptcy court or the parties involved in U.S. cases, and the U.S. bankruptcy court later suspended the U.S. proceedings.[37]

The objectors claimed that the debtors' attorneys should not have filed cases in the United States and took several unnecessary and unauthorized actions in continuing to prosecute the U.S. cases after the commencement of the English proceedings.[38] The bankruptcy court determined that, under the circumstances, the debtors had a valid statutory basis for filing the Chapter 11 cases in the U.S. and that such decision was supported by the reasonable professional judgment of the debtors' attorneys.[39] In addition to the prior success of the similarly situated cases and the involuntary case threatened by the note holders, the bankruptcy court accepted counsel's judgment that an American proceeding preserved control over management of the cases compared to what might have occurred under an English administration.[40]

In spite of the propriety of the Chapter 11 proceedings filed in the United States, the bankruptcy court questioned whether counsel should have commenced a companion proceeding in England or anticipated that the secured creditor would have sought a provisional liquidation.[41] The possibility of dual proceedings was raised in the first day orders approved by the bankruptcy court,[42] which included the requirement that the debtors seek the imposition of a stay through foreign proceedings if possible to avoid payments to creditors outside the reach of the bankruptcy court's jurisdiction and the reach of the automatic stay.[43] The few post-petition incidents involving creditor action had failed to result in actual damages to the estates,[44] but the bankruptcy court believed that a companion proceeding commenced in England, with the extension of a stay implemented by such a case throughout the European Union, would have better protected all of the debtors' assets.[45] Based on the limited fees incurred in the law firm's English offices concerned with a possible filing for a provisional administration, the bankruptcy court was not convinced that the debtors were prepared to file in England if necessary.[46]

The objectors also asserted that counsel should have ceased working once the English proceedings commenced, and the fees earned after the commencement of the administration and until the suspension of the U.S. cases should not be allowed.[47] Their argument

37. *Id.* at 574, 583. The debtors later initiated administration proceedings, and the joint provisional liquidators from the English involuntary case were appointed as joint administrators. *Id.* at 590.

38. *Id.* at 575.

39. *Id.* at 580.

40. *Id.* at 579. The debtors believed that a special purpose entity among the debtor group—the only creditor of which entity was the group's secured creditor—could swerve away from the reorganization pursued by the rest of the enterprise if the cases were filed in England.

41. *Id.* at 580.

42. The term "first day orders" refers generally to the orders entered very early in Chapter 11 proceedings upon requests for expedited consideration and which authorize a debtor in possession to continue its business operations while complying with the limitations of the Code.

43. *Cenargo*, 294 B.R. at 580. The bankruptcy court had approved the payment of certain pre-petition debts under the "doctrine of necessity." The approved debts included those owed to creditors outside the reach of the automatic stay imposed by the U.S. cases and who threatened to enforce their local collection remedies against the debtors. *See id.*

44. *Id.* at 583.

45. *Id.*

46. *Id.* at 582.

47. *Id.* at 596–87.

was based on an alleged lack of authority by the debtors' attorneys to act once existing management was suspended under English law governing the liquidation.[48] The secured creditor also obtained an anti-suit injunction against the debtors' management, preventing management from directing counsel's efforts in the United States,[49] but the bankruptcy court believed that management maintained its authority under U.S. law.[50] The English liquidators after their appointment quickly sought post-hoc relief from the U.S. automatic stay in order to resolve the obvious jurisdictional issues between the competing proceedings, and the bankruptcy court concluded counsel properly represented the debtors in the ensuing stay litigation.[51] The debtors' attorneys were still obligated to act consistently with the special duties required under Chapter 11 of attorneys representing a debtor in possession.[52] Moreover, no creditors or fiduciaries of the English cases sought to remove the debtors' attorneys until after resolution of the question of which set of cases would go forward as the main proceeding.[53]

The bankruptcy court ultimately reduced counsel's total fee request to almost one-fifth of the amount requested.[54] Although some of the litigation to determine whether the English proceedings should be stayed was an inevitable consequence of harmonizing the competing cases, the lack of a companion case in England filed by the debtors, and the lack of preparation to commence an English proceeding on short notice, subjected the debtors to potentially serious disruptions in the event of creditor action in the collection or insolvency arenas by creditors beyond the reach of U.S. jurisdiction.[55] Consequently, the bankruptcy court reduced counsel's fees by an amount the court attributed to the fees incurred, to address the disruption and confusion in the cases that the firm could have reasonably foreseen.[56]

In *In re Garcia Avila*, 296 B.R. 95 (Bankr. S.D.N.Y. 2003), the conciliator of a Mexican bankruptcy obtained a Code section 304 injunction prohibiting the debtors' judgment creditors from executing upon the proceeds of a note offering used to fund the debtors' reorganization plan and the Mexican toll road concessions which would be used to pay the notes.[57] The debtors were among a group of companies which constructed and operated toll roads in Mexico. Through this process, the debtors were holders of numerous toll road concessions granted by the Mexican government.[58] After gaining the concessions, the debtors used the anticipated stream of payments from the toll road concessions to immediately realize the value of the concessions through securitized financing and related debt offer-

48. *Id.* at 579–80.
49. *Id.* at 585.
50. *Id.* at 597.
51. *Id.* at 597–99.
52. *Id.* at 598–601.
53. *Id.* at 598.
54. *Id.* at 605.
55. *Id.* at 604.
56. *Id.* at 605.
57. In re Garcia Avila, 296 B.R. 95, 99 (Bankr. S.D.N.Y. 2003).
58. *Id.* at 100.
59. "Instead of waiting to collect future revenues, the concessionaire could realize the proceeds immediately through the process of securitization. Reduced to its basic terms, a securitization works in the following manner: The concessionaire assigns its toll collection rights to a trust. The trust issues debt, and pays the net proceeds from the sale of a debt in accordance with the trust or other related agreements. The proceeds may be payable

ings.[59] After the debtors defaulted, a group of note holders obtained a series of judgments against the debtors totaling approximately thirteen million dollars.[60]

The debtors' proposed plan of reorganization centered around a new note offering which would rely on the proceeds of the original toll road concessions to serve as principal and interest payments.[61] The trust administering the pre-bankruptcy notes would assign the toll road concessions to the trust administering the new notes, and the cash consideration paid for the assignment would fund the distributions to creditors—including the respondent judgment creditors presently before the court who held notes from the original pre-bankruptcy debt offering proposed under the debtors' plan.[62] The judgment creditors commenced additional enforcement actions in New York state court upon learning of the debtors' efforts with respect to the new series of notes and the disposition of the toll road proceeds in the Mexican bankruptcy, thus precipitating the commencement of the ancillary proceeding.[63]

The judgment creditors contended that the debtors were not entitled to injunctive relief because the proceeds of the new notes were not property of the debtors' bankruptcy estates and the priority of distribution under the Mexican bankruptcy act failed to elevate the interests of the judgment creditors as holders of non-avoidable judicial liens above those of general unsecured creditors.[64] The bankruptcy court ultimately rejected both arguments and granted a restraining order against the judgment creditors. Although the proceeds of the bond offering that would be used to fund the debtors' plan were property of the trusts administering the original notes instead of property of the estates, the bond proceeds were substantially involved in the debtors' estates because the funding of the plan was dependent upon the availability of the bond proceeds.[65] The bankruptcy court was further disinclined to ignore the interests of the Mexican bankruptcy proceeding because the judgment creditors had appeared and filed objections to the plan.[66]

The judgment creditors further objected to the treatment of their claims under the Mexican bankruptcy act and to the amount of their anticipated recoveries.[67] Although the Mexican act contains a distribution scheme favoring secured, administrative, priority, and unsecured creditors, in that order, the holders of nonavoidable judgment liens are relegated to the status of unsecured creditor.[68] The court avoided addressing the issue of whether such a difference in priority compared to the U.S. system would prevent recognition of the Mexican proceeding because the judgment liens at issue never attached to the proceeds of the original notes or to the toll road revenues.[69] The court also rejected challenges to the Mexican proceeding based upon the concepts of the absolute priority rule and the best interest of creditors test found in the Code.[70] The judgment creditors objected that existing

to third parties, the concessionaire, or a combination of the two. The trust then collects the tolls, and uses the collections to pay the principal and interest on the debt. After the debt has been paid in full, the remaining collection rights, if any, revert to the concessionaire." *Id.*

60. *Id.* at 101.

61. *Id.* at 103.

62. *Id.* at 104.

63. *Id.*

64. *Id.* at 104–05, 109.

65. *Id.* at 106.

66. *Id.*

67. *Id.* at 109.

68. *Id.*

69. *Id.* at 110.

equity would be able to retain their interest in the debtors, but the bankruptcy court concluded that the Mexican act is quite similar to the Code in that existing equity could retain their interests in the debtors only with the consent of a majority of creditors.[71] The bankruptcy court also rejected the judgment creditors' challenge that their claims would receive less of a distribution under the Mexican act compared to the Code.[72] As long recognized by other courts, Code section 304(c) does not require that an unsecured creditor receive the same distribution in the foreign proceeding as it would under American law in order for the form proceeding to be granted comity.[73]

III. Proposed Reforms to States' Insolvency Laws[74]

Legislation was proposed in France during 2003 to provide a bankruptcy system more favorable to reorganizations than the current one, which is thought to be more inclined to result in liquidations.[75] Promoters of the legislation assert that a system modeled after Chapter 11 of the U.S. Bankruptcy Code would allow more businesses to restructure.[76] The impetus for reforming French bankruptcy law appeared after government intervention was required to stabilize the Alstom Manufacturing concern and significant bankruptcies in the steel and airline industries.[77] The reforms included an emergency decree that would allow the government to appoint an administrator with immediate powers to act, overturning a previous process that could take up to sixty days.[78] Further reforms were proposed in order to accelerate the bankruptcy process for debtors with more than one thousand employees and more than one billion Euros in debt.[79]

Poland significantly reformed its bankruptcy laws in 2003 through passage of the Bankruptcy and Corporate Law of January 8, 2003 to replace the former Bankruptcy and Composition Law.[80] The new law broadened the ability to seek court protection for a reorganization proceeding by allowing companies that were current in their obligations to seek relief based upon a fear of imminent insolvency.[81] Under the former law, a business could commence a reorganization proceeding only upon an inability to maintain current obligations.[82] The new law provides for a process blending the concepts of reorganization and

70. *Id.* at 111–113.

71. *Id.* at 111. The bankruptcy court noted that Code § 1129(b), which imposes a fair and equitable requirement upon so-called "cram down plans," applies only to nonconsensual plans or in circumstances where at least one of the impaired classes rejects the plan.

72. *Id.* at 112.

73. *Id.*

74. Articles relating to proposed changes to states' bankruptcy laws were obtained exclusively through use of the internet; however, the URL addresses or links used to access the articles may differ from the URL addresses or links associated with the original publication of the article or are likely to have become inaccessible by the time of publication. Therefore, copies of the articles referenced herein may be obtained by contacting the author at *jcarruth@winstead.com*.

75. *See* Anthony Collins, *France To Launch U.S. Style Bankruptcy*, LEGAL WEEK, Nov. 20, 2003; *France Draws Up Plans To Reform Bankruptcy Rules*, GULF DAILY NEWS (Bahrain), Aug. 25, 2003 (articles on file with author).

76. *See* sources cited, *supra* note 75.

77. *See* sources cited, *supra* note 75.

78. *See* sources cited, *supra* note 75.

79. *See Government Alters Bankruptcy Law Over Parmalat*, Dow Jones Newswires, Dec. 23, 2003 (article on file with author).

80. *See* Leon Paczynski, *Poland's New Bankruptcy and Corporate Recovery Law*, EUROPA PLUS, May 20, 2003, *at* http://www.mondaq.com/default.asp?section_id = 1&product_id = 12 (last visited May 20, 2004).

81. *Id.*

liquidation as found in Chapters 11 and 7 of the U.S. Bankruptcy Code, whereby a court may order a liquidation with the possibility of a composition agreement.[83] The net effect of a liquidation with the possibility of a composition agreement is intended to allow for an easier transition between a liquidation and a reorganization depending upon the available outcomes for the debtor. The new law also allows businesses which are meeting their current obligations to commence a corporate recovery proceeding on the basis that the business is threatened with immediate insolvency.[84] The corporate recovery debtor's plan must demonstrate that the business can return to a competitive position in its market.[85] A corporate recovery debtor is protected by a stay of execution proceeding against the debtor and its assets, but there is no protection against pending litigation.[86] Confirmation consists of a meeting convened by a court appointed supervisor, at which creditors may propose amendments to the plan which ultimately are subject to a vote by the creditors.[87]

Indonesia also proposed reforms to implement a restructuring law similar to Chapter 11 during 2003.[88] Under the proposed law, only businesses that still had a chance of survival would be granted bankruptcy protection, and this determination would be influenced by the opinion of a court-appointed, independent auditor or business advisor.[89] Minimum debt thresholds would also be imposed upon creditors filing an involuntary petition.[90] The legislation for the reorganization reforms accompanies proposed legislation to enact a liquidation proceeding similar to Chapter 7 of the Code.[91] The crisis involving the Parmalat conglomerate spurred reforms in Italy's bankruptcy laws during 2003.[92] Hong Kong also proposed reforms in 2003 to bring its bankruptcy regime in line with Chapter 11. The proposed bill would allow debtors a six-month period to reorganize before creditors could take action.[93]

82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *See Government Drafts New Law On Corporate Restructuring*, THE JAKARTA POST, Jul. 30, 2003 (article on file with author).
89. *Id.*
90. *Id.*
91. *Id.*
92. *See Crisis Powers Invoked To Save Parmolot*, THE GUARDIAN, Dec. 24, 2003 (article on file with author).
93. *See Hong Kong Plans "Chapter 11" Law*, FINANCIAL TIMES, Dec. 12, 2003 (article on file with author).