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Representing Foreign Representatives in American Bankruptcies

Kaaran E. Thomas*

I. Introduction.

A representative of foreign creditors seeking to collect assets located in the United States may need to commence a wide variety of actions in the United States, including taking charge of assets, becoming a party in lawsuits that affect the assets or liabilities of the debtor, and commencing litigation. The assets and lawsuits in question may be scattered throughout the United States with suits pending against the debtor in several states. The foreign representative may find that the states in which a debtor has assets do not recognize the power of the foreign representative. U. S. creditors will likely seek priority over claims of foreign creditors represented by the foreign representative. Even worse, the foreign representative might well find themselves sued in the courts of the United States by U. S. creditors or even by the debtor himself. Having come to the United States, the foreign representative has probably submitted to the jurisdiction of these U. S. courts, especially if he is served with the lawsuit while in the United States.

The United States Bankruptcy Code (hereinafter the “Code”), provides remedies for foreign representatives who seek to recover assets or to obtain other relief in the United States.¹

This discussion focuses on the problems and options of the foreign representative in deciding whether to file or participate in a Bankruptcy proceeding in the United States, compares the types of cases available to the foreign representative under the Code, and discusses some of the practical problems faced by the foreign representative in commencing, administrating and winding up the ancillary bankruptcy proceedings and obtaining a discharge from his or her home court.

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II. Definitions.

A. THE FOREIGN REPRESENTATIVE.

A foreign representative is defined in Code § 101(24) as the “duly selected trustee, administrator or other representative of an estate in a foreign proceeding.”

B. THE FOREIGN PROCEEDING.


Code § 101(23) defines a foreign proceeding as “a proceeding, whether judicial or administrative and whether or not under the bankruptcy law, in a foreign country in which the debtor’s domicile, residence, principal place of business or principal assets were located at the commencement of such proceeding, for the purpose of liquidating an estate, adjusting debts by composition, extension or discharge, or effecting a reorganization.”

2. Judicial Determinations.

A voluntary winding up pursuant to Cayman law was held not to be a “foreign proceeding” because the liquidators were free from supervision or control of the Cayman court and it was not, in any sense, a judicial proceeding. Courts have emphasized the flexibility available under the Code to apply the statutory definitions of “foreign proceeding” and “foreign representative” to the specific circumstances in each case to arrive at a fair result. Although some prior cases have granted Code relief where the underlying foreign proceeding was not pending before a court, in those situations the liquidation was under the auspices of an administrative authority. The court will determine whether the relief sought by the petitioner will afford equality of distribution of the available assets. Thus, in TAM, the court was concerned that the voluntary winding up was conducted without any regulatory oversight and virtually no creditor participation and thus was clearly distinguishable from those cases involving non-judicial liquidations where there was supervision pursuant to a governmental administration.

7. In re Gee, 53 B.R. 891 (S.D.N.Y. 1985). (a winding up By court under the companies law is a “foreign proceeding”, and court appointed liquidator is a “foreign representative”).
8. TAM, 170 B.R. 838.
One noted bankruptcy commentator, Professor Lawrence King, suggests that the definition of a foreign representative is not broad enough to include a receiver or manager appointed under a floating charge.\(^9\) Other commentators have taken the opposite position.\(^{10}\)

A liquidation of a bank under the auspices of the Swiss Banking Commission was held to be a foreign proceeding for the purposes of § 101(22), although it was a non-judicial liquidation.\(^{11}\) An out-of-court liquidation of an insolvent bank conducted by the superintendent of banks was deemed to be a foreign proceeding because the liquidation was under the auspices of an administrative authority.\(^{12}\)

Voluntary winding up proceedings before the High Court in London and the Supreme Court of Bermuda were held to constitute foreign proceedings because of judicial supervision.\(^{13}\)

III. The Options Available to a Foreign Representative.

There are four options available to the foreign representative who meets the Code criteria for a foreign representative to assist in protecting and administering assets of the foreign debtor located in the United States: (1) file a petition under Code § 304 to commence a case ancillary to the foreign proceedings (the "Ancillary Proceeding")\(^{14}\); or (2) file an involuntary petition under Code § 303(b)(4) to commence either a full chapter 7 liquidation proceeding or a chapter 11 reorganization proceeding\(^{15}\); or, (3) commence a voluntary petition under chapter 7 or chapter 11 pursuant to Code § 301\(^{16}\); or, (4) seek dismissal of a pending bankruptcy case or suspension of all pending bankruptcy proceedings under Code § 305(a)(2).\(^{17}\)

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10. See Charles D. Booth, Recognition of Foreign Bankruptcies: An Analysis and Critique of the Inconsistent Approaches of United States Courts, 66 Am. Bankr. L.J. 135, 153 (1992) ("No American bankruptcy policy will be advanced by refusing [to permit a receiver privately appointed under a floating charge] to... [file a § 304 petition]. Once this type of receiver has been appointed, liquidation will take place and American courts, in one way or another, need to consider whether comity will be extended to the foreign activity" (quoting Douglas G. Bashkoff, United States Judicial Assistance in Cross-Border Insolvencies, 36 Int'l & Comp. L.Q. 729, 742-43 (1987)).


IV. § 304 Ancillary Proceedings.

Code § 304 permits a foreign representative to commence a "case ancillary to a foreign proceeding" by filing a petition to commence an ancillary proceeding with the bankruptcy court. An ancillary proceeding is usually based upon the need to protect property in the United States and is thought of as an in rem proceeding. An ancillary proceeding has also been used to conduct discovery.

A. COMMENCING THE ANCILLARY PROCEEDING.

1. Venue.

A foreign representative commences the ancillary proceeding by filing a petition with the United States Bankruptcy Court in the appropriate federal district. 28 U.S.C. § 1410 specifies where the ancillary proceeding may be filed. When the purpose of the ancillary proceeding is to enjoin the commencement or continuation of an action or proceeding in a State or Federal court, or the enforcement of a judgment, the proceeding may be commenced only in the district court where the state or federal court sits in which the action is pending. When the purpose of the action is to enjoin the enforcement of a lien against property or to require turnover of property, the case may be filed only in the district where the property is found. When the purpose of the proceeding is anything else the proceeding may be commenced only in the district where the debtor's principal place of business or principal assets are located in the United States.

2. Service of the Petition and Opposition.

§ 304 provides that the filing of an ancillary case is governed by Bankruptcy Rule 1010. Rule 1010 requires issuance of a summons and service of the summons upon the parties against whom relief is sought and such other parties as the court may direct. Service of the summons can be by mail or publication in the form and manner directed by the court. The summons is served with a copy of the petition. The parties against whom relief is sought have until thirty days after the summons is issued to answer and oppose the relief requested. If the ancillary petition is opposed, the court will conduct a trial on the petition.

B. POWERS OF THE FOREIGN REPRESENTATIVE UNDER CODE SECTION 304.

The foreign representative may request that the Court: (a) enjoin the continuation of any action against a debtor with respect to property involved in the foreign proceeding or

24. Id.
25. Id.
against the property itself; (b) enjoin the enforcement of any judgment against the debtor with respect to such property or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property; (c) order turnover of the property or the proceeds of the property to the foreign representative; or, (d) order "other appropriate relief". Under this last section, a foreign representative has been permitted to commence an ancillary proceeding for the purpose of conducting discovery within the federal district for the court in which the proceeding is commenced, although there were no assets known to be in the district.26

In determining whether to grant relief, the Code requires that the court be guided by:
(a) what will best assure an economical and expeditious administration of the estate;
(b) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceedings;
(c) prevention of fraudulent or preferential dispositions of property of the debtor's estate;
(d) distribution of proceeds of such estate substantially in accordance with the order prescribed by the Code;
(e) comity; and
(f) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.27

C. Pros and Cons.

1. Legal Issues.

The primary purpose of § 304 is to permit the foreign representative to prevent "piecemeal dismemberment of the United States assets" and to obtain turnover of those assets. The invocation of § 304 does not create a bankruptcy estate nor does it trigger the § 362 automatic stay, the rights of a trustee or debtor-in-possession or other controls of a typical bankruptcy proceeding. The foreign representative, however, can seek a temporary restraining order or injunctive relief from the U.S. court.28 While § 304 is quite flexible in its ability to respond to different circumstances, there is no assurance that any of the relief sought will be granted (unlike the automatic stay provisions of § 362, the rejection of executory contract powers under § 365, or the power to borrow funds as a debtor-in-possession pursuant to § 364). The foreign representative does have the additional benefit that commencing a § 304 proceeding is not a submission to jurisdiction of the U.S. court by the foreign representative and the foreign representative remains "in power," and is not displaced by a U.S. court-appointed trustee.29

27. 11 U.S.C. § 304(c).
28. Interpool Ltd. v. Certain Freights, 878 F.2d 111 (3rd Cir. 1989); In re Koreag, Controle et Revision SA, 961 F.2d 341 (2d Cir. 1992), cert. denied. 113 S.Ct. 188 (1992).
29. In re Koreag, Controle et Revision SA, 961 F.2d at 341.
2. Practical Considerations.

If the debtor’s assets and creditors are numerous and scattered over the United States, and if there are lawsuits pending in several jurisdictions that pose a threat to the debtor’s assets, the foreign representative may not have sufficient time or funds to risk filing a § 304. The foreign representative is always at risk that his home court, the persons who initiated the foreign proceeding, or the debtor will second guess her decisions and object to her discharge.


The Code permits trustees in standard bankruptcy proceedings to avoid or set aside certain types of transactions that occurred prior to the filing of the petition. These transactions include: (1) fraudulent transfers under Code § 548 (transfers that were made either with actual intent to defraud creditors or for less than fair consideration and made at a time when the debtor was insolvent); and (2) preferential transfers under Code § 547 (transfers of property of the debtor made in repayment of debts and made within ninety days prior to the filing of the petition or within one year prior to the filing of the petition if the creditor was an insider, which enables the creditor to receive more than the creditor would have received on its claim in a liquidating bankruptcy). Courts are divided whether a foreign representative who files an ancillary proceeding can take advantage of these avoidance powers.


The Petition of Kojima involved a Japanese administrator appointed in a bankruptcy case pending in Japan who sought permission to commence ancillary proceedings pursuant to § 304 and pursue fraudulent or preferential transfer claims invoking both Japanese and U. S. law. The debtor had owned real property in Colorado and, through a series of complex transactions and assignments, the property was eventually transferred during the pendency of a full-blown Chapter 11 case that was subsequently dismissed. Apparently, after the transactions in question, the foreign debtor filed a voluntary petition for liquidation in Japan and an administrator was appointed. The foreign representative brought the ancillary proceeding to provide a jurisdictional vehicle that would allow him to continue his investigation into assets in the United States, conduct discovery, commence an adversary proceeding in the Colorado ancillary court, and have the ancillary court determine the debtor’s rights to the real property.

The court described the intentions of the foreign representative as follows:

Although the exact course of action of the Japanese Administrator is not specified, it is suggested that the vehicles he might use to advance his claims to the golf course would be one or more adversary proceedings in the nature of

a. Seeking to avoid the alleged fraudulent transfer of the golf course;

31. Id.
32. Id.
33. Id.
34. Id.
b. Seeking to avoid the transfers made during the chapter 11 case without notice or court approval;
c. Requesting declaratory judgment; and/or
d. Instituting an action to quiet title.\textsuperscript{35}

\textit{Kojima} recognized that a § 304 case is limited and designed to function in aid of a pending proceeding in a foreign court and recognized that Congress gave the foreign representative the option of commencing a full case if required to do so for proper administration. \textit{Kojima} characterized § 304, however, as a demonstration that the United States "...in ancillary bankruptcy cases has embraced an approach to international insolvency which is a modified form of universalism accepting the central premise of universalism, that is, that assets would be collected and distributed on a worldwide basis, but reserving to local courts discretion to evaluate the fairness of home country procedures and to protect the interests of local creditors."\textsuperscript{36}

Having concluded that the case was appropriate for an ancillary proceeding because Japanese bankruptcy law was neither contradictory nor repugnant to the laws and policies in the United States, the court concluded that the ancillary proceeding should go forward in Colorado and the Colorado court could address the alleged fraudulent or preferential disposition of the property apparently under either, or both, Japanese and United States avoiding powers law.\textsuperscript{37} Although it is not entirely clear, \textit{Kojima} appears to grant the Japanese administrator the authority to bring fraudulent conveyance and preferential transfer actions under U.S. law. Subsequently, the Japanese administrator did file an adversary proceeding in the Colorado Bankruptcy Court contending that certain transfers were in violation of both Japanese and United States fraudulent transfer laws.\textsuperscript{38} Nowhere in the complaint filed by the foreign administrator does the administrator explain how a foreign representative has the powers of a debtor-in-possession or a trustee in bankruptcy.\textsuperscript{39}

\section*{2. Judicial Decisions Illustrating Limitations on Use of Avoiding Powers in Ancillary Proceedings.}

\textit{In re Metzeler}, which held that the foreign representative may assert only the avoiding powers vested in the foreign representative by the law of the foreign forum.\textsuperscript{40}

\begin{itemize}
\item[35.] \textit{Id.} at 699, n19.
\item[36.] \textit{Id.} at 700 (quoting from \textit{In re Maxwell Communications}, 170 B.R. 800, 816 (Bankr. S.D.N.Y. 1994)).
\item[37.] \textit{Id.}
\item[38.] \textit{Id.}
\item[39.] See \textit{In the Matter of Axona Int'l. Credit & Commerce Ltd.}, 188 B.R. 597 at 607 (Bankr. S.D.N.Y. 1988) and \textit{In re Tarricone, Inc.}, 80 B.R. 21, at 23 (Bankr. S.D.N.Y. 1987), which held that a foreign representative may not invoke §§ 547 and 548 for the simple reason that he is not a trustee in bankruptcy appointed under the Bankruptcy Code. See also \textit{In re Comstat Consulting Servs. Ltd.}, 10 B.R. 134 (Bankr. S.D. Fla. 1981) (holding that the petition referred to in Bankruptcy Code § 547 could be the petition filed under § 304), and \textit{In re Egeria}, 723 F.2d 900 (4th Cir. 1983) (relying on the reference to preferential or fraudulent dispositions of property in §304(c)(3) as authority to apply United States avoidance powers).
\item[40.] \textit{In re Metzeler}, 78 B.R. 674 (Bankr. S.D.N.Y. 1987). See also \textit{In re Culmer}, 25 B.R. 621 (Bankr. S.D.N.Y. 1982), which ordered the foreign debtor's property in the United States turned over to the Bahamian liquidators to be administered pursuant to Bahamian law and suggesting that United States law would not be applicable to the transactions.
\end{itemize}
In the Petition of Shavit, the court stated that “unlike a full-scale bankruptcy case,” the commencement of a § 304 case “does not trigger the automatic stay, or cloak the petitioner with avoiding powers.” Shavit was a rather unusual § 304 case inasmuch as the debtor was a U.S. corporation headquartered in New York.

V. Voluntary or Involuntary Chapter 7 or 11 Proceedings.

The foreign representative who wishes to avoid the problems with an ancillary proceeding has the option of commencing a full-blown bankruptcy case. However, there are limitations on the foreign representatives, powers to commence such a case.

A. Jurisdictional Requirements.

Code § 303(a) provides that an involuntary case may be commenced only under Chapter 7 or 11 and only against a person, except a farmer, family farmer, or a corporation, that is not a moneyed business, or commercial corporation, that may be a debtor under the chapter under which the case is commenced. Reference must be made to the definition of who may be a debtor in § 109 in order to determine whether the potential debtor is disqualified. Note that under § 109(b)(3), read in conjunction with § 109(d), a foreign bank or insurance company that is not engaged in business in the United States may be a debtor.

B. Practical Considerations.

1. Control.

A foreign representative who commences a full bankruptcy proceeding may be required to surrender control to the bankruptcy trustee or a debtor-in-possession the management of the debtor. This loss of control may prevent the representative from obtaining a discharge from his home court. It may also render him liable to the creditors of the debtor in his home country or in the United States.


In some cases, a foreign representative has filed an involuntary petition under § 303(b)(4), consented (or obtained the debtor’s consent) to the entry of the order for relief, and then conducted the case as though the foreign representative were either the debtor-in-possession or a pseudo trustee in bankruptcy. The Mizuno case was a liquidation and not a rehabilitation case, but the foreign representative and its U.S. counsel did not elect to file a Chapter 7 because the foreign representative would have been displaced by a trustee resident in the district and counsel for the foreign representative would have been displaced by counsel for the trustee in bankruptcy.

42. See, for example, In re Ken Mizuno (Bankr. C.D. Cal, Case No. SA 94-14429-LR).
43. Id.
When the foreign representative in *Mizuno* brought adversary proceedings complaining about violation of the automatic stay and seeking other relief, the foreign representative could not decide whether the action was being brought in the name of the debtor-in-possession or in the name of the bankruptcy estate. Although the bankruptcy court permitted the foreign representative and his U.S. counsel to proceed in this bizarre fashion, on appeal, the District Court held that the foreign representative had no standing to bring the actions because the foreign representative could not be the debtor-in-possession, inasmuch as it was not the debtor, or the trustee in bankruptcy. After more than three years of administering the bankruptcy case in this fashion, the court finally entered an order converting the case to Chapter 7 and appointing a trustee in bankruptcy. Clearly, the only reason for this peculiar procedure was the desire of both the Japanese administrator and the U.S. counsel to remain in control of the proceedings.

Another similar case in the Southern District of Texas was more successful. In *Standard Indemnity*, the foreign representative sought permission from the home court to file a Chapter 11 and sought permission from the bankruptcy court (with the approval of the debtor's president who was under criminal investigation) to serve as the debtor-in-possession representative. The foreign representative filed a plan that was confirmed with no opposition.

3. Problems for Professionals.

The foreign representative as debtor-in-possession under a Chapter 11 Reorganization bankruptcy may require three sets of professionals. The debtor-in-possession requires legal counsel. The foreign representative may require independent U.S. counsel and counsel in his home country. If all of the assets of the debtor are in the United States, where does the money come from to pay the foreign representative's professionals? If the foreign representative transfers the debtor's funds pre-petition as retainers to the professionals who are not working for the estate, has there been a fraudulent transfer?

The professionals who represented the foreign representative prior to filing the *Standard Indemnity* case received permission from the bankruptcy court to represent the receiver as debtor in-possession. However, the bankruptcy court specifically gave the home court the right to reconsider the bankruptcy court's award of fees to all of the professionals in the case.

44. *Id.*
45. *Id.*
46. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
4. Other Practical Problems for the Foreign Representative as Debtor-in Possession.

a. Treatment of Creditors.

Many times the petition under which the foreign representative was originally appointed was initiated by creditors. If the foreign representative takes over operations of the debtor, he may have little or no help in determining which of the creditors claims should be allowed and which should be objected to. Is he bound in the U.S. proceeding to list the claims of the foreign petitioning creditors as undisputed and liquidated? Often the petitioning creditor’s opinions are given great weight by the home court. The foreign representative considering filing an ancillary proceeding in the United States would be well advised to consult with and, if possible, obtain the consent of the petition creditors as well as the officers of the debtor.

b. The American Liability.

Debtors in bankruptcy proceedings may get discharges from the bankruptcy court. American bankruptcy law does not provide for a discharge for the foreign receiver. The discharge the foreign representative receives from his home court may not be binding on American creditors. How does the foreign representative bring his responsibility/liability to a satisfactory conclusion in the United States?

c. The Home Court Discharge.

Foreign representatives are generally required to give an accounting and final report to their home court whereupon they receive a discharge from their duties. The home court is not bound by the proceedings or findings of the U.S. bankruptcy court. The actions a debtor-in-possession might be required to take in an American bankruptcy proceeding may be repugnant to the home court. On the other hand, if the foreign representative relinquishes his responsibility for the assets and liabilities of the debtor, he may never be able to get a discharge from his home court. How does the foreign representative escape from this dilemma?

VI. Abstention.

A foreign representative may already be faced with a pending American bankruptcy case filed by the debtor or his creditors. The Code provides a means for the foreign representative to terminate or suspend this pending case.
A. JURISDICTION.

Code § 305 permits a bankruptcy court, after notice and hearing, to suspend a pending bankruptcy case "if the interests of creditors and the debtor would be better served by such dismissal or suspension; or if there is pending a foreign proceeding." An order either granting or refusing such dismissals and suspensions "is not reviewable by appeal or otherwise." Orders under § 305 which include provisions transferring the estate to the home country may not be reviewable because of § 305(c).

B. PRACTICAL CONSIDERATIONS.

To what extent has the foreign representative who seeks such abstention submitted himself to the jurisdiction of the American Courts?

VII. Conclusions.

The foreign representative in the United States has a position of unlimited liability and limited rights. Absent some sort of bankruptcy proceeding, the foreign representative must rely on the laws of the various states regarding his rights to take control of property in the United States. On the other hand, the provisions of §§ 303, 304 and 305 of the Code do not assure that the representative will have the flexibility and control necessary to fulfill the charge of his home court and obtain a discharge of his responsibilities. The foreign representative must have skilled professionals in his home country and the United States to minimize the risks and maximize the results achievable from these proceedings.

52. 11 U.S.C. § 305(c).