



Forum Non Conveniens and Chapter 15 Bankruptcy

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Introduction

When pursuing a case under Chapter 15 of Title 11 in the United States, Code (the “Bankruptcy Code”) a plaintiff can litigate all claims in a single forum or in certain cases they may be able to pursue additional claims stemming from the same case in a foreign forum. Many parties will want to litigate all of the claims in a single forum and will file a forum non conveniens motion when their adversary tries to pursue claims in multiple forums. Forum non conveniens is a discretionary power that allows courts to dismiss a case where another court, or forum, is much better suited to hear the case. This memorandum analyzes when a foreign representative can pursue claims in both the U.S. and a foreign forum at the same time. Part I discusses the standard that courts apply in deciding a forum non conveniens motion. Part II addresses whether or not a foreign representative can simultaneously pursue claims in and outside the U.S.

I. Forum Non Conveniens Standard

“[T]he central purpose of any forum non conveniens inquiry” is, after all, “to ensure that the trial is convenient.”¹ When ruling on a forum non conveniens motion bankruptcy courts consider a variety of factors. Initially, a court must determine if an adequate forum alternative

¹ Piper Aircraft Co. v. Reyno, 454 U.S. 235, 256 (1981).

exists.² If no adequate alternative forum exists then the forum non conveniens motion will be denied and the parties may continue to pursue the claim in the existing forum.³ Courts will consider the plaintiff's original choice of forum and will decide whether the decision was made as matter of convenience and also whether forum shopping motivated the decision.⁴

A bankruptcy court must balance the plaintiff's choice of forum with the public and private interest factors at stake.⁵ Private interest factors include access to sources of evidence and the cost for witnesses to attend the trial, while public interest factors include having local disputes settled locally and avoiding problems of applying foreign law.⁶ Additionally, when balancing these factors there is a strong presumption in favor of the plaintiff's choice of forum and a forum non conveniens motion will only succeed when the public and private interest factors at stake greatly outweigh that.⁷

A. What is an Adequate Alternative Forum?

“An alternative forum is adequate if the defendants are amenable to service of process there, and if it permits litigation of the subject matter of the dispute.”⁸ In many cases the parties will consent to jurisdiction of the foreign forum, making it an adequate alternative forum. The foreign forum can still be adequate even if it does not provide the same procedural functions as an American court. For example, in *India* despite that plaintiffs did not have the same class action remedies, were not offered a right to a jury and were faced with different discovery

² See *In re Commodore Int'l, Ltd.*, 242 B.R. 243, 263 (Bankr. S.D.N.Y. 1999).

³ See *id.*

⁴ See *id.*

⁵ See *id.*

⁶ See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

⁷ See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 261 (1981).

⁸ *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d at 75.

methods offered in the U.S., but the United States Court of Appeals for the Second Circuit held that India could be an adequate alternative forum.⁹

B. The Bankruptcy Courts Application of Forum Non Conveniens in In re Hellas

The [liquidators of] Hellas Telecommunications (Luxembourg) II SCA (“Hellas II”), filed a complaint against TPG Capital Management in the Bankruptcy Court for the Southern District of New York following recognition of the English liquidation of Hellas II under Chapter 15 of the Bankruptcy Code. The liquidators sought to avoid and recover an initial transfer from Hellas II to its parents’ entity of approximately \$1.57 billion and also to avoid and recover \$973.7 million that was later transferred to several named defendants and an unmanned class of transferees.¹⁰ Initially, the court denied the forum non-conveniencs motion because it had the jurisdiction to adjudicate the claims under Sections 213 and 423 of the U.K. Insolvency Act.¹¹ Thereafter, plaintiffs commenced a similar action under U.K. law, in the U.K., against nine dismissed defendants.¹² In response to this new avoidance action filed in the U.K., the defendants filed another forum non-conveniencs motion on January 19, 2016, and the Court concluded that in light of this new U.K. action it is now best to litigate all the claims in one forum. The defendants were able to take advantage of the fact that new claims were being pursued in an additional forum and were able to flip the court’s opinion. The court reasoned that it would not be efficient to allow claims to be pursued simultaneously in multiple forums and therefore granted the forum non-conveniencs motion.

⁹ See *In re Union Carbide Corp. Gas Plant Disaster at Bhopal*, India in Dec., 1984, 809 F.2d 195, 199 (2d Cir. 1987).

¹⁰ See *In re Hellas Telecommunications (Luxembourg) II SCA*, 555 B.R. 323, 331 (Bankr. S.D.N.Y. 2016).

¹¹ See *id.* at 332.

¹² See *id.* at 339.

Because foreign plaintiffs are afforded less deference, the court analyzed whether the U.S. was selected as a matter of convenience.¹³ The court determined that forum shopping might have motivated the decision because of a “tactical advantage resulting from local laws or they are hopeful of an advantage given the degree of unpredictability associated with an American court's interpretation of U.K. law.”¹⁴ Additionally, the court noted the U.K. was an adequate alternative forum because all U.S. defendants agreed to submit to jurisdiction there.¹⁵

In analyzing the public interest factors the bankruptcy court determined the U.K. court has a greater local interest in hearing this case because U.K. law is being applied, the initial transfer involved English bank accounts and Hellas II compulsory liquidation proceeding is also being held in a U.K. court.¹⁶ The court supported its decision by analyzing private interest factors and ruled that Hellas II did not unreasonably delay in bringing the forum non-conveniens motion and because many of the witnesses were foreign, the court could not subpoena such witnesses.¹⁷

II. Can a foreign representative pursue similar claims against the same parties in the foreign jurisdiction and the U.S.?

In *In re Hellas* the bankruptcy court did not allow similar claims to be pursued against the same defendants in both the U.K. and the U.S.. Initially, all of the claims were filed in the U.S. and the entire case could have been heard in a single forum. However, once an avoidance action was filed in the U.K., Hellas had filed a new forum non-conveniens motion and the court had to decide whether it should grant Hellas’ motion or if certain claims could be heard in U.S. while the avoidance action was being heard in the U.K.. Ultimately, the court denied the liquidators their right to pursue claims in the U.S. because the U.K. provided an adequate alternative forum.

¹³ See *Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146 (2d Cir. 2005).

¹⁴ *In re Hellas Telecommunications (Luxembourg) II SCA*, 555 B.R. at 346.

¹⁵ See *id.* at 347.

¹⁶ See *id.* at 349.

¹⁷ See *id.* at 351.

When applying the goals of Chapter 15 it is clear the U.S. court is meant to provide assistance and not supplant the U.K. court, which in this case is in a better position to interpret the law and adjudicate all of the claims. *See id.*

However, in *In re Octaviar Admin. Pty Ltd*, the United States Bankruptcy Court for the Southern District of New York ruled that Octaviar could pursue bankruptcy claims arising out of the same action in both Australia and the United States.¹⁸ Drawbridge, a defendant in the case argued that they could not bring claims based on the same legal grounds in both forums, which the court analogized to a forum non conveniens defense. However, Drawbridge “assiduously refused to consent to jurisdiction in Australia.”¹⁹ Because Drawbridge would not consent to jurisdiction in Australia the court determined that it was not an adequate alternative forum, therefore, eliminated this defense. This is a critical difference between Octaviar and *In re Hellas*. In *In re Hellas* jurisdiction in the U.K. was consented to, allowing the court to adjudicate all of the claims there. However, in *In re Octaviar* without consent to litigate claims in Australia some of the claims still had to be pursued in the U.S. where jurisdiction could be obtained.

Additionally, the court allowed Octaviar to pursue claims in both forums because it “. . . facilitates and promotes cooperation between the courts . . . and in furtherance of the goals of chapter 15, granting recognition will foster the fair, efficient, and timely administration of the Octaviar insolvency, and possibly . . . maximiz[e] the value of Octaviar's assets for the benefit of its creditors.”²⁰

Conclusion

¹⁸ *In re Octaviar Admin. Pty Ltd*, 511 B.R. 361 (Bankr. S.D.N.Y. 2014).

¹⁹ *Id.* at 374.

²⁰ *Id.* at 375.

Courts are reluctant to allow parties to bring claims predicated on the same factual and legal grounds in multiple forums when one single adequate alternative forum exists. In making forum non-conveniens a determination, courts consider the plaintiff's choice of forum, access to sources of evidence, and problems in applying foreign law. Most importantly, a court will abstain in favor of a foreign forum if the parties either consent to the foreign jurisdiction or if the court otherwise has appropriate jurisdiction. In a Chapter 15 case when making such a determination the court will also assess the efficiency of allowing such an action to proceed in multiple forums. In *In Re Hellas* the court held that it would not be in the best interest of the creditors and would not promote judicial efficiency to allow claims to be simultaneously pursued in multiple forums. In *Octaviar*, the court permitted litigation to be pursued in multiple jurisdictions because one of the defendants refused to consent to jurisdiction in the foreign forum. Absent multiple litigations, there was a risk that a defendant would avoid litigation to the detriment of the foreign debtor's estate.