Submission to Jurisdiction in Insolvency Claims and Availability of Cross-border Anti-suit Relief – the BVI and US Perspective on the Privy Council Decision in Stichting Shell Pensioenfonds v Krys and another

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A recent decision of the Privy Council *in Stichting Shell Pensioenfonds v Krys and another (British Virgin Islands) [2014] UKPC 41* clarifies a liquidator's authority in relation to anti-suit injunctions and provides guidance as to what amounts to a submission to the jurisdiction within the liquidation process.

The case arose out of the liquidation of Fairfield Sentry ("Fairfield"), a BVI feeder fund of the collapsed Madoff fund. Fairfield Sentry had assets in its own name at a Dutch bank account in an account in Ireland ("the bank account").

The appellant (Shell), a Dutch pension fund which had bought shares in Fairfield, was granted conservatory attachments (security for a claim before judgment) over Fairfield assets, being the cash balance of US$71 million held in the bank account. The effect of the attachments was that, if Shell succeeded in its substantive claim in the Dutch courts (for breach of representations and warranties), Fairfield would be able to satisfy its judgment debt in full ahead of other creditors in the BVI liquidation process.

Shell, however, had also submitted a proof of debt in the liquidation of Fairfield in the BVI. Accordingly, in contrast to the other creditors who had claims in the liquidation who could only recover a dividend, Shell was seeking to gain a priority over the funds in the account via direct enforcement overseas, but hedging bets with respect to a claim within the liquidation process alongside other creditors.

The liquidators of Fairfield applied to the BVI Court for an anti-suit injunction to restrain Shell from enforcing the attachments. The liquidators were unsuccessful at first instance but succeeded on appeal. Shell subsequently appealed and the matter was heard by the Privy Council on 26 November 2014.

The Privy Council considered two factors: (a) whether Shell had submitted to the BVI Court's jurisdiction and (b) whether it was appropriate to prevent a foreign litigant from utilising remedies available to it from the court of its own country.

In relation to the first issue the board determined that Shell had submitted to the BVI Court's jurisdiction by defending the anti-suit proceedings and submitting a proof of debt in the liquidation proceedings.

In relation to the second issue they found no basis for a distinction between domestic and foreign claimants. Accordingly, there was no principle which prevented the anti-suit injunction from being enforced against a foreign litigant, Shell. It found there was an underlying public interest in enabling a single court, in the place of incorporation of a company, to conduct an orderly winding up of its affairs on a worldwide basis. Consequently, when a party has submitted to the jurisdiction of the Court and it brings foreign proceedings which will interfere with the assets of the insolvent company, an injunction may be available to restrain those proceedings irrespective of nationality or residence.

Accordingly, the Privy Council dismissed the appeal and upheld the anti-suit injunction.

This case provides liquidators with greater certainty that, in relation to creditors over which the Court has in personam jurisdiction, the option of an anti-suit injunction is available where the creditor is using its home court to interfere with the liquidation process. Further, creditors should consider, before submitting a proof of debt in an insolvency, that this will be treated as a general submission to the jurisdiction. This is indeed the fairest way to create the level playing field of creditors within the central liquidation process. If creditors could reserve their space in the queue of distribution while at the same time attempting to bypass the queue altogether, it would drive a coach and horses through any sense of cross-border cooperation in respect of orderly distributions.

The situs of the Madoff fund in the United States and extensive activity of the Fairfield Liquidator in that country invite a comparative analysis: How would the U.S. courts have dealt with a similar situation involving Shell's efforts to attach the assets of a U.S. debtor in an account located outside the U.S.?

In theory, there would have been no need to apply to the U.S. bankruptcy court for any form of anti-suit injunction to restrain Shell's actions against the account in Ireland. Among other things, the automatic stay that arises upon commencement of a bankruptcy case in the U.S. bars the commencement or continuation of any judicial, administrative or other action or proceeding against the debtor, or any act to obtain or exercise control over property of the debtor or the bankruptcy estate (Bankruptcy Code, section 362(a)(1), (3)). Similarly, under section 541 of the Bankruptcy Code the commencement of a case creates an estate comprised of all property of

the debtor, "*wherever located* and by whomever held." The "exclusive jurisdiction" granted to the court in which the case is pending is similarly unbounded, extending to all of the property of the debtor and the estate *"wherever located."* 28 U.S.C. s.1334(e).

While the automatic stay is, as the term suggests, automatic and in need of no independent action for enforcement, the practical application of these statutory broad principles can, in many circumstances, be something of a different story. Enter section 105 of the Bankruptcy Code, which authorizes the bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]" – in this instance, an injunction against the party taking action against the Debtor's overseas account, so as to preserve and enforce the protection of the automatic stay.

As in the Privy Council decision, the creditor's filing of a proof of claim in the U.S. bankruptcy case would be deemed a submission to the jurisdiction of the U.S. court for the purposes of the adversary proceeding that assuredly would be brought by the Debtor or Trustee (as applicable) under section 105. Even absent the filing of a proof of claim, U.S. courts would look to the question of whether the opportunistic creditor pursuing its offshore remedies has "sufficient minimum contacts" with the United States to establish a basis for in personam jurisdiction. Absent such contacts, the representative of the U.S. bankruptcy estate likely would be required to seek recognition of the U.S. case and enforcement of the stay under local laws of the country in which the creditor was taking the action.

What is most interesting perhaps about the U.S. analysis of the issue is the Constitutional question raised by the series of well-known recent cases from the U.S. Supreme Court commencing with *Stern v. Marshall* (2011), and extending to *Executive Benefits Insurance Agency v. Arkinson* (2014) and the recently argued *Wellness International Network v. Sharif.* While there is little doubt as to the ability of the Debtor or Trustee to seek relief against the creditor in the form of an adversary proceeding under sections 362 and 105 as described above, it remains most uncertain whether the bankruptcy court would have the authority under the U.S. Constitution to "hear and determine" such an action which involves the adjudication of issues "above and beyond" those presented by the mere filing of the proof of claim.

In its forthcoming and widely anticipated decision in *Wellness* the Supreme Court may decide, or at least offer guidance, on whether these Constitutional limitations on the authority of a bankruptcy court can be waived by consent of the parties, with such consent determined by the voluntary submission to the bankruptcy court as in the filing of a proof of claim. Short of a determinative ruling, a Debtor or Trustee seeking injunctive relief against the foreign collection proceeding may be required to pursue its action in the district court which has no other involvement with the bankruptcy case, rather than the bankruptcy court which would more likely view the 105 action as a necessary proceeding to protect the estate and its property and readily grant relief in the manner of the Privy Council in *Stichting Shell.*

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