

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
-----X

In re

Agency for Deposit Insurance,
Rehabilitation, Bankruptcy
and Liquidation of Banks, As
Bankruptcy Administrator
of Jugobanka, A.D., Beograd,

Case No. 02 B 12930 (CB)

and

Agency for Deposit Insurance,
Rehabilitation, Bankruptcy,
and Liquidation of Banks, As
Bankruptcy Administrator of
Beogradska Banka A.D., Beograd,

Case No. 02 B 12932 (CB)

Debtors in Foreign
Proceedings.

-----X

OPINION AFTER TRIAL

APPEARANCES:

Attorney General of the State of New York
120 Broadway, 24th Floor
New York, New York 10271

Katherine E. Timon, Esq.
Of Counsel

Co-Counsel for the Superintendent of Banks of the
State of New York

Sullivan & Cromwell LLP
125 Broad Street
New York, New York 10004

William J. Snipes, Esq.
Amal R. Alamuddin, Esq.
Phyllis Staub Wallitt, Esq.
Of Counsel

Co-Counsel for the Superintendent of Banks of the
State of New York

Robinson & Cole LLP
780 Third Avenue, 4th Floor
New York, New York 10017

Stephen H. Gross, Esq.
Thomas J. Donlon, Esq.
Christopher J. Major, Esq.
Of Counsel

Co-Counsel for the Agency for Deposit Insurance,
Rehabilitation, Bankruptcy And Liquidation of
Banks

Brown & Welsh, P.C.
P.O. Box 183
Meriden, Connecticut 06450-0183

Houston Putnam Lowry, Esq.
Of Counsel

Co-Counsel for the Agency for Deposit Insurance,
Rehabilitation, Bankruptcy And Liquidation of
Banks

Federal Reserve Bank
33 Liberty Street
New York, New York 10045-0001

Thomas C. Baxter, Jr., Esq.
Shari D. Leventhal, Esq.
Of Counsel

Richard C. Stein, Esq.
210 East 49th Street, 4th Floor
New York, New York 10017

Co-Counsel for Sage Realty Corp.

Neal Fellenbaum, Esq.
144 East 44th Street, 6th Floor
New York, New York 10017

Of Counsel to Richard C. Stein, Esq.

CORNELIUS BLACKSHEAR

United States Bankruptcy Judge

This matter comes before this Court by way of section 304 of the Bankruptcy Code (the "Code") pursuant to which a petition for an ancillary proceeding was filed by the Agency For Deposit Insurance, Rehabilitation, Bankruptcy and Liquidation of Banks (the "Petitioner" or "BRA") as duly appointed Bankruptcy Administrator of Jugobanka A.D., Beograd ("Jugobanka") and Beogradska Banka A.D., Beograd ("Beogradska"), in a bankruptcy liquidation and wind-up proceeding pending in the Commercial Court, located in Belgrade Yugoslavia. The New York State Superintendent of Banking ("State Superintendent"), has filed opposition pursuant to Bankruptcy Rule 1011, to dismiss BRA's petition.

BACKGROUND

Jugobanka opened an office in New York City in 1962 and received its license to operate as an agency of a foreign bank in the state of New York from the State Superintendent in June 1980. Jugobanka Petition at ¶ 4. Beograska was similarly licensed in 1982. Beogradska Petition at ¶ 4. The agencies were never authorized to, nor did they accept, U.S. customer deposits, and thus have no U.S. depositors. Rather, the U.S. agencies were used to

facilitate trade between the United States and Yugoslavia through credits extended to subsidiaries of Yugoslav companies. Jugobanka Petition at ¶ 4; Beogradska Petition at ¶ 4.

On May 30, 1992, in response to the political and military unrest in Yugoslavia, President George Bush issued an Executive Order freezing the property of the Federal Republic of Yugoslavia in the United States. Executive Order 12,208,57 Fed. Reg. 23,299 (May 30, 1992). Additional subsequent Executive orders imposed further restrictions. The U.S. assets of Jugobanka and Beogradska were eventually frozen by Executive Orders as of June 1992, whereupon the United States Treasury Department's Office of Foreign Assets Control ("OAFIC") closed the agencies' offices and seized their assets and business records. As a result, the New York agencies of Jugobanka and Beogradska ceased operations in June 1993 and their New York State licenses expired. Jugobanka Petition at ¶ 5; Beogradska Petition at ¶ 5.

From the time of Agencies' licensing, until they ceased operations in 1993, Jugobanka and Beogradska were both subject to all of the strictures of New York Banking

Law, including an asset maintenance requirement.¹ Hrg. Tr. 25. In 1992, following growing concerns over the instability of the foreign parent bank, Jugobanka and Beogradska were required by the State Superintendent to maintain assets equal to 140% of their liabilities on deposit with a third-party custodian. See Hrg. Tr. 21.

On January 3, 2002, Jugobanka and Beogradska were been placed into bankruptcy by the Belgrade Commercial Court in Belgrade, Yugoslavia. On the same day, the State Superintendent issued a Notice of Possession pursuant to section 606 of the New York Banking Law, whereby the Superintendent took possession of the agencies and their in-state property. Hrg. Tr. 32-33. This Notice also empowered the Superintendent to advise all creditors to start the liquidation process. Hrg. Tr. 33. On June 14, 2002, petitioner filed the instant section 304 petition in this Court to open an ancillary proceeding to the parent bank's bankruptcy in Belgrade. Through the filing of that petition, BRA sought to enjoin the State Superintendent from commencing a liquidation of the agencies and for the turnover of over \$100 million in assets that were in the

¹ Under asset maintenance, a licensed agency or branch of a foreign bank is required to maintain assets to liabilities in a proportion determined by the State Superintendent based on the assessed risk of the bank's failure, in order to protect New York creditors dealing the agency. See N.Y. Baking Law § 202-b (2003).

Superintendent's custody. The State Superintendent moved to dismiss the petition. After the dismissal motion was fully briefed by all parties and set for oral argument on October 23, 2003, the United States Government ("Government") made a motion in the United States District Court for withdrawal of the automatic reference of the Petitions to this Court under 28 U.S.C. § 157. The Government argued, inter alia, that because of the matter's complex nature and policy implications of a ruling regarding an Executive Order, an Article III judge, with lifetime tenure, was required to rule on the issue. Hrg. Tr. 10. On December 30, 2003, the District Court denied the Government's motion.

Pursuant to further Government regulation, on February 25, 2003, the assets originally frozen by the Executive Order were freed, and this Court issued a temporary restraining order prohibiting the State Superintendent from distributing the assets as provided for by New York Banking Law. This Court then extended the temporary restraining order until March 11, 2003, at which time this court signed a preliminary injunction to preserve the status quo pending a final ruling on the section 304 petition.

DISCUSSION

Section 304(a) of the Code authorizes a representative of a foreign bankruptcy proceeding to file a petition to commence a proceeding ancillary to that foreign bankruptcy in the United States Bankruptcy Court. The purpose of section 304 is to protect the administration of the foreign proceeding and to prevent the "piecemeal distribution of assets in the United States by means of legal proceedings initiated in domestic courts by local creditors." In re Koreag, 961 F.2d 341, 348 (2d Cir. 1992) (citing Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B., 825 F.2d 709, 713-14 (2d Cir. 1987); Cunard S.S. Co. v. Salen Reefers Servs. A.B., 773 F.2d 452, 454-55 (2d Cir. 1985)(remedy intended to be broad and flexible).

Thus, section 304 embraces the universality approach, where a primary insolvency proceeding is commenced in the debtor's home country, and ancillary proceedings in foreign jurisdictions are opened in collaboration to facilitate the worldwide collection and distribution of assets according to the rules of the debtor's domiciliary country. See In re Treco, 240 F.3d 148 (2d Cir. 2001); In re Hourani, 180 B.R. 58, 63-64 (Bankr. S.D.N.Y. 1995); In re Maxwell Communication Corp., 170 B.R. 800, 816 (Bankr. S.D.N.Y. 1994).

More specifically, all that is required to invoke the United States Bankruptcy Court's jurisdiction under section 304 is that: (1) a foreign proceeding was commenced against another debtor; (2) the petitioner is a foreign representative entitled to file the action under section 304; and (3) the debtor has assets within the judicial district where the section 304 petition was filed. In re Trakman, 33 B.R. 780, 783 (Bankr. S.D.N.Y. 1983). See also Matter of Stuppel, 17 B.R. 413, 415 (S.D. Fla. 1981); Matter of Toga Mfg. Ltd., 28 B.R. 165, 167 (Bankr. E.D. Mich. 1983).

Section 101(23) of the Code defines a "foreign proceeding" as a proceeding "judicial or administrative [], 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." 11 U.S.C. 101(23) (2003). Here, it is clear that the insolvency proceedings in the Commercial Court in Belgrade, Yugoslavia constitute a "foreign proceedings" under section 304, as the debtors' domiciliary country is Yugoslavia, where the insolvency proceeding is pending.

Section 101(24) of the Code defines a "foreign representative" as a "duly selected trustee, administrator, or other representative of an estate in a foreign

proceeding.” 11 U.S.C. § 101(24) (2003). Here, it is clear that BRA falls within the scope of this definition, as it was appointed as the bankruptcy administrator by the Belgrade Commercial Court upon the commencement of the parent banks’ liquidation. See Jugobanka Petition at ¶ 6; Beogradska Petition at ¶ 6. It is also undisputed that pursuant to Yugoslavian law, BRA’s administrative authority extends to the banks’ property and assets located in foreign jurisdictions. Id.

However, the protections of 11 U.S.C. § 304(b) are not available to all foreign debtors who meet the Bankruptcy Court’s low jurisdictional threshold. Rather, section 304(c) dictates that several factors be taken into consideration before the court will grant relief to lend support to the foreign proceeding:

- (c) In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with—
- (1) just treatment of all holders of claims against or interests in such estate;
 - (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
 - (3) prevention of preferential or fraudulent dispositions of property of such estate;
 - (4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;
 - (5) comity; and

(6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

11 U.S.C. § 304 (2003).

In addition, because the Debtors are foreign banks, this Court will consider the eligibility constraints of 11 U.S.C. § 109.² 11 U.S.C. § 109(b) reads in pertinent part:

(b) A person may be a debtor under chapter 7 of this title only if such person is not...

(3) a foreign insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, or credit union, engaged in such business in the United States.

11 U.S.C. § 109(b)(2003).

A review of the legislative history reveals the reasoning behind §109(b)(3)'s exclusion:

Banking institutions and insurance companies are excluded from liquidation under the bankruptcy laws because they are bodies for which alternative provisions is made for their liquidation under various regulatory laws. Conversely, when a foreign bank or insurance company is not engaged in the banking or insurance business in the United States, then those regulatory laws do not apply and the bankruptcy laws

²This Court is cognizant of cases in this Circuit that find that eligibility under § 109 is not a consideration under § 304. However, this Court finds these cases distinguishable. For example, in In re Gee, the New York State Superintendent of Insurance consented to the Bankruptcy Court's jurisdiction. See 53 B.R. 891, 900 n. 10 (Bankr. S.D.N.Y. 1985). In In re Israel-British Bank (London), Ltd., the Second Circuit found that a foreign bank was not a "banking corporation" under the Bankruptcy Act, and was therefore not precluded from federal bankruptcy law. See 536 F.2d 509, 514-15 (2d Cir. 1976). In this case, though, § 109 of the Bankruptcy Code does specifically exempt foreign banks from chapter 7 and chapter 11 protection.

are the *only ones available* for liquidation of any assets found in the United States.

H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 318 (1977)(emphasis added).

Banking institutions and insurance companies engaged in business in this country are excluded from liquidation under the bankruptcy laws because they are bodies for which alternate provision is made for their liquidation under various State or Federal regulatory laws.

S. Rep. No. 95-989, 95th Cong., 2d Sess. 31 (1977).

This Court understands the purpose of 11 U.S.C. § 109, as articulated in the statute as well as the legislative history, to limit this Court's jurisdiction over foreign banks where some alternate regulatory scheme exists for the liquidation of a foreign bank's assets. See In re Medicare HMO, 998 F.2d 436, 442 (7th Cir. 1993). Accordingly, this Court will not exercise its jurisdiction over a foreign bank where an appropriate regulatory scheme exists. Id.

In this case, the two debtors are foreign banks whose assets are subject to the regulatory exercise of the Superintendent of Banks of the State of New York. See N.Y. Banking Law § 606 (2003)(superintendent's authority includes taking possession and liquidating banking organization). 11 U.S.C. § 109(b)(3) would therefore

clearly prevent the banks from becoming chapter 7 debtors.³ The New York State Superintendent is the very type of regulatory agency, and its liquidation scheme the very type of scheme, to which 11 U.S.C. § 109(b)(3) defers. See In re Medicare HMO, 998 F.2d at 442. This Court will not exercise its jurisdiction over the banks simply because the debtors filed petitions pursuant to 11 U.S.C. § 304, and not pursuant to chapter 7 or chapter 11. See, e.g., California Fed. Savings & Loan Ass'n v. Guerra, 479 U.S. 272, 281 (federal law may preempt state regulation when state law stands as obstacle to accomplishment and execution of full purposes and objectives of Congress). To do so would allow the debtors to get through the back door where the front door is most decidedly barred.

In the interest of completeness, this Court would have reviewed the evidence presented by the Debtors at trial to determine whether such evidence was sufficient to satisfy § 304(c); however, the Debtors called no witnesses, nor did they present any other evidence to rebut the Superintendent's prima facie showing in favor of dismissal. See Hrg. Tr. 114. Therefore, this Court will confine its analysis and opinion to the issues already addressed.

³ 11 U.S.C. § 109(d) would further prevent the banks from becoming debtors under chapter 11.

CONCLUSION

The Superintendent's motion to dismiss is granted.
The Superintendent is to settle an order on five days'
notice consistent with this opinion.

Dated: New York, New York
August 18, 2003

/s/ Cornelius Blackshear
UNITED STATES BANKRUPTCY JUDGE