Cross-Border Bankruptcy Proceedings Present Crucial Choice of Law Considerations

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Where chapter 7 Trustees are now increasingly faced with the prospect of avoiding and recovering fraudulent transfers of a debtor's pre-petition assets that implicate the concepts of extraterritoriality and foreign law, choosing the "right" foreign "applicable law" under Code section 544 causes of action, becomes increasingly important. Cross-border disputes can present unique and complex choice of law issues that may not present themselves in purely domestic bankruptcy cases.

In a jury trial conducted just last year, the United States District Court for the District of Connecticut decided a choice-of-law issue in *Coan v. Dunne*, a cross-border bankruptcy avoidance and recovery action, ruling that Irish law applied to the several counts of fraudulent conveyance facing the debtor's insiders, even though certain of the acts transpired in Ireland, Switzerland, England, South Africa as well as the United States. The court found that the numerous connections to Ireland, including the location of the creditor body, the location of the assets fraudulently transferred and the citizenship of the debtor, created a substantial relationship between the content of the case and the Republic of Ireland. In its jury instructions, the court utilized choice-of-law principles to determine the governing law, permitting the trustee's fraudulent transfer claims to be litigated under the Code, under state law and, significantly, under Irish law. After several days of deliberation, the jury returned a verdict in favor of the trustee avoiding multiple transfers as actually fraudulent and awarding in excess of twenty-one million dollars.[1]

Critically, the *Coan* decision differs from how the choice-of-law issue in similar cases has been traditionally decided — defaulting to the law of the place of transfer. The court instead applied Irish law even though some alleged transfers may have occurred elsewhere.

The *Coan v. Dunne* Decision

[1] Curran Antonelli, LLP served as special litigation counsel to the chapter 7 Trustee, Richard M. Coan.

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The *Coan v. Dunne* action began as a chapter 7 voluntary bankruptcy case commenced in the District of Connecticut by one of Ireland's most prominent former real estate developers during the Irish Celtic Tiger period that collapsed in 2008. The debtor, Sean Dunne, an Irish national, had fled Ireland and re-invented himself as a property developer in Connecticut and in New York, conspiring with his wife to do so. He filed for bankruptcy in 2013, with liabilities of approximately one billion dollars, owed mainly to Irish banks and other Irish creditors. In 2015, the trustee commenced an avoidance action against the debtor's wife and other insiders, asserting claims under §§ 544, 548, 550, bootstrapping Connecticut state law and the law of Ireland and/or other "applicable law" under § 544 to the transactions at issue. The trustee sought avoidance and recovery of real estate and monetary transfers dating back to 2005 that totaled tens of millions of dollars. Most prominent among the transfers was the alleged fraudulent transfer of a residential property located in Dublin that the debtor allegedly transferred to his wife on the petition date. Throughout the years, the bankruptcy matter was heavily and continuously litigated in both the U.S. and Ireland, as well as South Africa.[2]

Contemporaneously with the commencement of the U.S. bankruptcy, the debtor's main Irish bank creditor commenced an involuntary bankruptcy case in Ireland, thereby creating a second parallel bankruptcy case. The appointed Official Assignee in Ireland later commenced a related avoidance and recovery action in Ireland in coordination with the trustee.

Which Law to Apply?

The parties engaged in extensive cross-border discovery, with the trustee and his counsel coordinating closely with the Official Assignee. Prior to trial of the trustee's avoidance action, the transferee defendants filed a motion *in limine* seeking to apply Swiss law to some of the fraudulent transfer claims, based on what they claimed to be a connection with that country. They also designated and disclosed a Swiss law expert who opined that the claims at issue were barred because certain conditions precedent to bringing Swiss fraudulent transfer claims had not been met. Arguing a traditional choice-of-law principle, that the governing law should default to the place of the transfer, the transferee defendants primarily relied on the fact that the assets (a luxury condominium and monies in a Swiss bank account) were located in Switzerland. Attempting to further establish substantive contacts to Switzerland, the debtor argued that his temporary residence and his wife's commencement of a divorce proceeding in the country created sufficient ties to have Swiss law apply to the trustee's fraudulent transfer claims.

The trustee rebutted these contentions arguing for the more appropriate interpretation of the choice-of-law analysis based upon the "significant relationship" test of the Restatement (Second) of Choice of Laws. The trustee argued that federal common law, specifically the significant relationship test, should govern the choice-of-law analysis, because courts have generally found that § 544 claims are federal claims grounded in bankruptcy public policy.[3] Relevant contacts at issue in the significant relationship test include: the place where the injury and conduct causing it occurred, the domicile, nationality, place of incorporation, and the place where the relationship between the parties is centered.[4]

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2 *See generally In re Dunne*, 684 F. App'x 85 (2d Cir. 2017); *Coan v. Dunne*, 602 B.R. 429 (D. Conn. 2019); *In re Dunne*, No. 13-50484, 2013 WL 3779979, at *1 (Bankr. D. Conn. July 18, 2013).

3 *In re Gulf Fleet Holdings, Inc.*, 491 B.R. 747, 763-64 (Bankr. W.D. La. 2013) ("[C]ourts have generally held that federal common law governs the choice-of-law for section 544(b) claims because these claims are ultimately federal causes of action grounded in important federal bankruptcy policy…'to prevent debtors from illegitimately disposing of property that should be available to their creditors.'"); *In re Hydrogen, L.L.C.*, 431 B.R. 337, 353-54 (Bankr. S.D.N.Y. 2010); *In re Best Products Co., Inc.*, 168 B.R. 35, 51 (Bankr. S.D.N.Y. 1994), *aff'd* 68 F.3d 26 (2d Cir. 1995).

4 *In re Worldcom, Inc.*, No. 02-13533(AJG), 2003 WL 23861928, at *40 (Bankr. S.D.N.Y. Oct. 31, 2003).

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Because of the existence of a significant relationship among the debtor, his business activities and his creditors, and their connection to Ireland, the trustee asserted that Irish law should apply to his fraudulent transfer claims. His arguments highlighted that the injury experienced in the case occurred to Irish creditors who held 97% of the unsecured claims against the debtor. Moreover, the debtor himself was an Irish citizen, and lived in Ireland at the time of the asset's purchase. Monies from the debtor's Irish companies were used to purchase the assets. Indeed, subsequent transfers at issue in the case involved money transfers from the debtor's Irish company and a substantial amount originating from an Irish bank account.

Rooting its decision in the significant relationship test, the federal district court agreed with the trustee that Irish law was the appropriate law to apply to the fraudulent transfers. Although acknowledging that the certain acts alleged to constitute the fraudulent transfers may have occurred in Switzerland, the court placed greater weight on the overwhelming connections to Ireland as identified by the trustee. The substantial Irish relationships in the case proved significant enough to permit the court to find that the governing law may not necessarily be where the alleged underlying conduct occurred.

Importantly for the trustee, Irish law on fraudulent transfers, stemming from the English Statute of Elizabeth enacted in 1571, contains no limitations period on bringing fraudulent transfer claims, meaning that the lookback period could reach pre-petition transfers that occurred in 2008. Moreover, to succeed on a fraudulent transfer claim under Irish law, a trustee or creditor need not prove intent to defraud, but only that the transaction had the "necessary and probable effect" of hindering, delaying or defrauding creditors. This is vastly different from, and more lenient than, the traditional formulation of fraudulent conveyance in the United States which usually requires a showing of actual or constructive intent.

Finally, the trustee argued that these claims under Irish law must be adjudicated under the functional equivalent of the preponderance of the evidence standard. The defendants in *Coan v. Dunne* urged the Court to apply the "clear and convincing evidence" standard found in U.S. law. The Court rejected the defendant arguments and after briefing from the trustee during the charge conference, the Court agreed with the trustee and applied the Irish law standard for his jury instructions.

Takeaways and Conclusion

The implications of a choice-of-law analysis between several foreign and domestic jurisdictions in cross-border disputes can be staggering and many times outcome determinative to the action, especially given the substantive and procedural variability of the law in different cross-border jurisdictions. A prelitigation analysis of the available avenues presented by the various legal regimes of the varying jurisdictions will serve the litigant well in these multi-jurisdictional cross-border cases.

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