2004 WL 42268 (S.D.N.Y.)

United States District Court,
S.D. New York.
JP MORGAN CHASE BANK Plaintiff
v.
ALTOS HORNOS DE MEXICO, S.A. DE C.V., Defendant.
No. 03 Civ.1900(HB).
Jan. 8, 2004.

Background: Lending bank sued foreign borrower, seeking a declaration of ownership in certain monies held in an account in its name at one of its branches.

Holding: On the borrower's motion to dismiss, and the bank's motion for summary judgment, the District Court, Baer, J., held that the suit would be dismissed on the grounds of comity in light of the borrower's Mexican bankruptcy proceeding. Motion to dismiss granted.

West Headnotes

KeyCite Notes

221 International Law
221k10.1 k. Public Policy and Comity in General. Most Cited Cases

Lending bank's suit against a foreign borrower, seeking a declaration of ownership in certain monies held in an account in the bank's name at one of its branches, would be dismissed on the grounds of comity in light of the borrower's Mexican bankruptcy proceeding, notwithstanding a waiver provision in the parties' loan agreement providing that the borrower waived "to the fullest extent permitted by law" any objection to venue; the issue of the ownership of the account was implicitly raised by the borrower in the Mexican proceeding, and Mexican law appeared to be quite agnostic on the issue of where the dispute had to be decided. 11 U.S.C.A. § 304(b)(1).

OPINION & ORDER

BAER, J.
*1 On March 18, 2003, plaintiff JP Morgan Chase Bank ("JPMCB") initiated this lawsuit. It sought a declaration of ownership in certain monies held in an account in its name at one of its branches in New York. Defendant Altos Hornos de Mexico, S.A. de C.V. ("Altos Hornos") moves to dismiss the complaint in this matter on the grounds of comity, pursuant to Federal Rule of Civil Procedure 12(c). JPMCB moves for summary judgment. For the following reasons, Altos Hornos's motion is granted, and thus I need not reach JPMCB's motion for summary judgment.

I. BACKGROUND
A. Facts
In April 11, 1997, Altos Hornos, Mexico's largest liquid steel producer, entered into a $330-million loan agreement with JPMCB and twenty-seven other lending banks. See Compl. 7, 17-22. In connection with this loan, the parties executed two documents, a Loan Agreement and a Security Agreement (collectively "the Loan Documents"). In addition to being one of the lending banks, JPMCB was designated as the "Facility Agent" to act on behalf of the banks. [FN1] The purpose of this loan was to permit Altos Hornos to satisfy existing loans of some $228 million and certain other debts. See Loan Agreement §§ 1.01, 2.02. The Loan Agreement, among other things, established a "special cash collection account" ("Collection Account") held at JPMCB's office in New York into which certain payments under the Loan Agreement were to be made and from which JPMCB, as Facility Agent, would distribute funds to the other lending banks. See Compl. ¶¶ 7-10; Loan Agreement §§ 3 .01(a), 3.02(b). [FN2] The Loan Agreement provided that the Collection Account was "in the name and under the control of" the Facility Agent and that Altos Hornos had "no right or power of withdrawal over the Collection Account." See Loan Agreement §§ 3.01(a), 3.02(a). Under the Security Agreement, Altos Hornos agreed to instruct three of its customers who had pre-existing contracts with Altos Hornos to make payments to the Collection Account. [FN3] Section 2 of the Security Agreement pertained to collateral and provided: "As collateral security for the prompt payment in full when due ..., the Company [Altos Hornos] hereby pledges and grants to the Facility Agent, for the benefit of the Secured Parties as hereinafter provided, a security interest in all of the Company's right, title and interest in ... the balance from time to time in the Accounts [the Collection Account and the Reserve Account]." (The Loan Agreement adopted the definition of "Collateral" from the Loan Agreement. See Loan Agreement § 1.01.) The Loan Agreement provided that twice a year, JPMCB as the Facility Agent was to distribute the assets in the Collection Account to the lending banks, after deduction of its expenses, to pay for all interest and principal due and payable. If there was any surplus after payment of these prior items, JPMCB was to pay this surplus to Altos Hornos. See Loan Agreement §

3.02(b). In addition, each of the Loan Documents contained a forum-selection and choice-of-law clause in favor of New York. [FN4]

FN1. JPMCB is the successor in interest to Morgan Guaranty Trust Company, which was the Facility Agent under the Loan Agreement.

FN2. The Loan Agreement also created a "special cash reserve account"--or "Reserve Account"--at JPMCB's office in New York

FN3. These three steel purchasers are Thyssen Handelsunion AG, Ferrorstaal AG, and Kloeckner Stahl-Und Metallhandel GmbH.

FN4. Altos Hornos also executed a series of promissory notes in connection with the loan on behalf of each of the lending banks, including JPMCB. Each of these promissory notes provided:

This Promissory Note shall be governed by, and construed in accordance with, the laws of the State of New York; provided, however that if any action or proceeding in connection with this Promissory Note were brought in any courts in the United Mexican States, this Promissory Note shall be deemed as governed under the laws of the United Mexican States. Any legal action or proceeding arising out of or relating to this Promissory Note may be brought in any New York State or Federal Court sitting in the Southern District of New York or any court sitting in the City of Monclova, Coahuila, United Mexican States; the undersigned waives the jurisdiction of any other courts.

*2 Due to adverse developments in the global steel market in the late 1990s caused largely by the financial crisis in Asia, Altos Hornos, already in financial difficulty, suffered additional significant operating losses. See Gonzalez Saravia Decl. ¶¶ 9-10. [FN5] As a result, Altos Hornos missed a payment required by the Loan Agreement and JPMCB declared Altos Hornos in default. On May 24, 1999, Altos Hornos filed a petition with the First Court of First Instance in Monclova (Coahuila), Mexico to be declared in suspension de pagos--suspension of payments ("SOP")--pursuant to Title VI of the Ley de Quiebrasy Suspension de Pagos, the then-existing Mexican law of bankruptcy. [FN6] (Suspension de Pagos is somewhat analogous to a reorganization under Chapter 11 of the U.S. Bankruptcy Code.) The following day, the SOP court declared Altos Hornos to be in suspension of payments and notice was provided to its creditors, which included JPMCB. In June and August 1999 [FN7]-- i.e., after the Mexican court granted the petition--the three steel customers paid into the Collection Account approximately $4.7 million for purchases they had made prior to the SOP in the ordinary course of Altos Hornos's business. Morgan did not distribute these proceeds to the lending banks, as was provided in the Loan Agreement. [FN8] In June 1999, as a result of Altos Hornos's SOP, JPMCB determined to accelerate the entire loan amount. JPMCB formally appeared in the SOP proceedings on March 20, 2000 and filed an acknowledgment-of-credit claim, in which it sought acknowledgement as a secured creditor for $225,355,617.25 in principal and $1,912,330.78 in interest--Altos Hornos having repaid approximately $105,000,000 of the amount it owed before its SOP petition. On June 13, 2002, the SOP court recognized JPMCB's claim against Altos Hornos but declared it an unsecured general creditor for the total principal ($225,355,617.25) and reserved judgment as to the amount of interest. [FN9] Declaration of Miguel Angel Hartasanchez Noguera ("Hartasanchez Noguera Decl.") ¶ 12. Both JPMCB and Altos Hornos appealed these rulings, and that matter remains sub judice. See Hartasanchez Noguera Decl. ¶ 13.

FN5. Specifically, its operating losses in 1998, 2001, and 2002 were respectively $191 million, $150 million, and $100 million See Gonzalez Saravia Decl. ¶¶ 9-10.

FN6. Mexico's bankruptcy law, Ley de Quiebras y Suspension de Pagos, was superceded in 2000 by a new law, Ley de Concursos Mercantiles. However, because Altos Hornos filed its petition prior to the revision, its SOP is governed by the previous law, which provides two types of proceedings: quiebras or liquidation and suspension de pagos, which is a device through which a debtor may avoid liquidation. See Declaration of Miguel Angel Hernandez Romo ("Hernandez Romo Decl.") ¶ 28.

FN7. In its statement of undisputed facts pursuant to Local Rule 56.1, JPMCB states that these payments were made between June and August, while Altos Hornos contends in its Rule 56.1 statement that these deposits occurred "in or about July and/or August."

FN8. The Loan Agreement contemplates that upon an "Event of Default"--which includes the commencement by Altos Hornos of a reorganization or suspension-of-payments proceeding, see Loan Agreement § 8.01(i)--the Facility Agent is to distribute the funds in the Collection Account to the banks.

FN9. In its decision of June 13, 2000, the SOP court stated that "this case is not about a collateral in favor of the alleged creditor but, as seen in the above transcribed section, rather of an assignment of collection rights in relation to the steel buyers under the above described [Loan Documents]...." The court then ruled that JPMCB was a common business

creditor, the fourth-lowest of five classifications of creditors set forth in Article 261 of the Mexican bankruptcy law. (The priority of creditors is as follows: 1) "creditors who are exclusively privileged," 2) "creditors with security," 3) "creditors with special privilege," 4) "common creditors due to business activities," and 5) "common creditors based on civil law.")

By letters dated August 5 and October 5, 2002 JPMCB notified Altos Hornos of the existence of the $4.7 million in the Collection Account, and in December 2002, Altos Hornos made the equivalent in Mexico of a motion to order JPMCB to reimburse the $4.7 million to Altos Hornos for distribution in the SOP proceeding on the ground that this money is part of Altos Hornos's equity and properly belongs to it as an asset to be equitably distributed in this SOP proceeding. JPMCB filed opposition papers to this motion, and on July 17, 2003, the SOP court issued an order in which it postponed a decision on Altos Hornos's request for letters rogatory until the court of appeals decided the claims filed with respect to JPMCB's acknowledgment-of-credit claims. [FN10] On January 15, 2003, JPMCB withdrew $880,708 from the Collection Account to pay legal bills, which left a balance, as of July 31, 2003, of $3,913,317.51. [FN11] On February 6, 2003, Altos Hornos sent JPMCB a letter demanding repayment. On March 18, JPMCB commenced this action seeking a declaration that the funds in the Collection Account are not property of Altos Hornos's estate.

FN10. In his ruling on Altos Hornos's December motion, the judge in the SOP proceeding summarized his decision on JPMCB's claim as follows: JPMCB "was acknowledged as the unsecured creditor for the debtor's commercial operations, upon considering that the guarantee and preference rights to the benefit of the creditor referred to in the [Loan Agreement] did not constitute a pledge to the benefit of the presumed creditor, but rather an assignment of rights of collection which respect to those who purchased steel as a result of the exhibited supply contracts and to those to whom the debtor refers in his referred motion." (emphasis added) The SOP court then noted that this decision was appealed by both parties and a decision on those appeals is pending.

FN11. On November 12, 2002, Miguel Angel Hartasanchez, the lawyer in Mexico responsible for the litigation there for JPMCB (and others) sent Umm Boucher of JPMCB a bill for $880,708, which represented the sum of Hartasanchez's monthly bills from November 1999 to April 2002. On December
20, 2002, Boucher sent an e-mail to the "Ahmsa lenders" which indicated that JPMCB intended to pay Hartasanchez's bill from the cash in the Collection Account, rather than asking each bank to pay its prorate share. This email referred to a letter sent on July 17, 2002 proposing the use of the Collection Account to pay this bill rather "than remit funds to replenish our retainer fund" and requesting that any objections to this proposal be made by July 31. The letter further stated:

Initially, we did not believe we could use these funds to pay advisor or legal fees under the rules of Suspension de Pagos, [without jeopardizing our status as secured creditors, which we believed ourselves to be]. However, Hartasanchez believes we can use these funds to pay his bills and Tom Heather of Ritch Heather y Mueller agrees with him.

Throughout the proposed restructuring (which we referred to as modified Plan B) we argued that the collection account was an asset of the SEN holders and would not be used to pay financial advisors, Shearman & Sterling, or Ritch, Heathery Mueller. Rather, those bills were to be reimbursed by Ahmsa. However, it was never contemplated that Ahmsa would reimburse any of its creditor's litigation fees. This issue is probably moot, since we believe that Modified Plan B will never close. However, if these funds are used to pay Hartasanchez, there is some risk that our ability to get these funds reimbursed under an alternative restructuring proposal might be reduced. Nevertheless, we feel the best alternative is to pay Hartasanchez out of the retainer account.

II. DISCUSSION

*3 Altos Hornos contends that this matter should be dismissed on the grounds of comity; it argues that the two primary considerations under the principles of comity weigh in favor of dismissal here--namely that 1) the SOP proceedings in Mexico abide by fundamental standards of procedural fairness and 2) no public policy is violated by granting comity to the SOP proceedings. Altos Hornos also argues that although it has proceeded by this motion to dismiss for the sake of efficiency, dismissal would also be appropriate under Section 304 of the U.S. Bankruptcy Code. Finally, Altos Hornos contends that JPMCB's actions impair Altos Hornos's estate to the prejudice of other creditors. JPMCB, on the other hand, contends that 1) this matter is properly before this court to determine the ownership of the Collection Account--i.e., there is subject-matter and personal jurisdiction--and that the issue presented is not before the Mexican court and lies beyond its jurisdiction. JPMCB also contends that Altos Hornos waived any argument for dismissal based on a parallel proceeding.

1. Principles of comity

Under the principle of comity, American courts defer to proceedings in foreign countries so long as "the foreign court had proper jurisdiction and enforcement does not prejudice the rights of the United States citizens or violate domestic public policy." Finanz AG Zurich v. Banco Economico S.A., 192 F.3d 240, 246 (2d Cir.1999). "We have repeatedly noted the importance of extending comity to foreign bankruptcy proceedings. Since 'the equitable and orderly distribution of a debtor's property requires assembling all claims against the limited assets in a single proceeding,' American courts

regularly defer to such actions." Id.; see also Ecoban Fin. Ltd. v. Grupo Acerero del Norte, S.A. de C.V., 108 F.Supp.2d 349, 351-52 (S.D.N.Y.2000) ("Comity is particularly appropriate and important with respect to foreign bankruptcy proceedings, where equitable principles demand that all claims against a debtor's limited assets be addressed in a single proceeding."). The decision whether or not to extend comity is generally a matter of discretion. As the Supreme Court stated more than 100 years ago--and courts and commentators continue to repeat:

"Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113, 1164, 16 S.Ct. 139, 40 L.Ed. 95 (1895); see also In re Treco, 240 F.3d 148, 157-58 (2d Cir.2001) (quoting Hilton v. Guyot); 2 Lawrence P. King et al., Collier on Bankruptcy ¶ 304.08[5][a], at 304-34 (15th ed. Revised.1996)(same). [FN12]

FN12. Moreover, a district court's decision whether to extend or deny comity to a foreign proceeding is reviewed for an abuse of discretion. See Finanz AG, 192 F.3d at 246 ("We review a district court's decision to extend or deny comity to a foreign proceeding for abuse of discretion."); cf. In re Treco, 240 F.3d at 154-55 (noting that § 304(c) requires an exercise of judicial discretion and reviewing the bankruptcy court's analysis of the § 304(c) factors for abuse of discretion).

*4 Another district judge recently reviewed Mexico's SOP proceedings and afforded comity to these very proceedings initiated by Altos Hornos. See Ecoban, 108 F.Supp.2d at 355. Ecoban involved a lawsuit against Altos Hornos and its parent company to collect on a series of past-due promissory notes worth approximately $18 million. Id. at 350. Judge Hellerstein granted defendants' motion to dismiss on the basis of comity, given Altos Hornos's petition for suspension de pagos. See id. Judge Hellerstein noted that a suspension de pagos generally resembles a reorganization under Chapter 11 of the U.S. bankruptcy law and found that Mexican law abides by fundamental standards of procedural fairness and violates no public policy in New York or the United States. See id. at 351, 353. Despite superficial similarities-- i.e., Altos Hornos is a defendant in both cases and both revolve around the petition for SOP that Altos Hornos filed in 1999--it is fair to say there are differences between the facts at issue here and Ecoban. Most significantly, the plaintiff sought to collect on past-due promissory notes and as Judge Hellerstein noted, "In the end, we are left with a simple case of an American creditor of a Mexican corporation asking this Court to give it a preference over other creditors by releasing it from the obligations imposed by Mexican bankruptcy law." Id. at 354. Unlike the plaintiff in Ecoban, JPMCB is not attempting to gain a preference over other creditors--at least not directly--by asserting a claim for repayment outside the Mexican SOP; rather, JPMCB is attempting to ascertain whether the Collection Asset is within Altos Hornos's estate. Interestingly on the comity front, JPMCB does not seriously challenge Judge Hellerstein's conclusion that Mexico's SOP proceedings are fundamentally fair.

The case upon which JPMCB primarily relies is In re Koreag, Controle et Revision S.A., 961 F.2d 341 (2d Cir.1992), in which the Second Circuit ruled that it was improper to order the turnover of assets to a foreign bankruptcy proceeding without making a threshold determination as the ownership of the assets. In re Koreag, 961 F.2d at 348. JPMCB contends that the principles of Koreag govern and that a U.S. court is permitted, under the principles of comity, to decide this issue of ownership. There, a New York company (Refco) engaged in commodity and currency transactions deposited approximately $6.9 million dollars into a bank account of a Swiss company (Mebco) pursuant to several contracts for the exchange of currency, unaware that the Swiss company had gone into liquidation in Switzerland. See id. at 344-45. After Refco's demand to the liquidator (Koreag)for the return of its money was refused, it brought suit against Mebco in federal court in New York. See id. at 346. Koreag, the liquidator, moved for dismissal based on comity and for the turnover of the assets for administration in Switzerland. See id. In addition, at the district court's suggestion, Koreag brought suit in bankruptcy court pursuant to 11 U.S.C. § 304(b)(2), which authorizes the commencement of a case in a United States bankruptcy court ancillary to a foreign bankruptcy proceeding in order 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." [FN13] Id. at 348. The bankruptcy court ordered that the assets in the New York account be turned over to Koreag, and the district court affirmed. See id. at 347. The Circuit reversed the lower courts' decision to order the turnover of the funds without first determining whether they constituted part of Refco's estate. It noted that "the term 'property of such estate' presupposes an antecedent determination of property interests as a condition to the turnover of property to a foreign representative," id. at 348, and that "[a] determination that the funds are not property of the estate therefore does not improperly affect other creditors of the estate, because they have valid claims only against the estate's bona fide assets," id. at 349.

FN13. Section 304 provides:

Subject to the provisions of subsection (c) of this section, ... the court may -

(1) enjoin the commencement or continuation of -

(A) any action against -

(i) a debtor with respect to property involved in such foreign proceeding; or

(ii) such property; or

(2) order turnover of the property of such estate, or the proceeds of such property, to such foreign representative; or

(3) order other appropriate relief.

11 U.S.C. § 304(b).

*5 I agree with Altos Hornos that Koreag is not controlling where, as here, a foreign debtor seeks injunctive relief pursuant to 304(b)(1) rather than the turnover of property pursuant to § 304(b)(2). [FN14] This argument finds support in a leading treatise on bankruptcy law:

FN14. As noted above, § 304(b) empowers a court to "enjoin the commencement or continuation of (A) any action against (i) a debtor with respect to property involved in such foreign proceeding," see 11 U.S.C. § 304(b)(1), or to "order turnover of the property of such estate, or the proceeds of such property, to such foreign representative," see id. § 304(b)(2). Altos Hornos did not bring an action under § 304(b). Had Altos Hornos done so, the Court, in determining whether to enjoin JPMCB from commencing or continuing this action or ordering other appropriate relief, would have been guided by the following considerations to "best assure an economical and expeditious administration of such estate:"

(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(c).

Because section 304(b)(2) applies to property of the estate, the reach of that section is narrower than section 304(b)(1), which applies to "property involved in such foreign proceeding." As explained in [Koreag], "the use of the term 'property of such estate' [in section 304(b)(2)] presupposes an antecedent determination of property interests as a condition to the turnover of property to a foreign representative." Section 304(b)(1), in contrast, does not require a determination of the issue of ownership as a precondition to enjoining "litigation 'with respect to property involved in' a foreign insolvency ... to prevent dismemberment by local creditors of assets located [in the United States]." '

2 King et al., Collier on Bankruptcy ¶ 304.06, at 304-24 to -25 (footnotes omitted). Furthermore, as the Second Circuit noted in Koreag, the determination of ownership of such property involves the consideration both of foreign bankruptcy law and local law: "For purposes of section 304, the estate of a foreign debtor is defined by the law of the jurisdiction in which the foreign proceeding is pending, with other applicable law serving to define the estate's interest in particular property." Koreag, 961 F.2d at 348 (emphasis in original removed).

In sum, the present dispute is not on all fours with either Ecoban or Koreag.
a. Whether the issue is before the SOP court
JPMCB contends that the issue raised in this lawsuit--i.e., who owns the Collection Account--is not before the Mexican SOP court because, inter alia, Altos Hornos has not claimed the Collection Account as an asset in its SOP filing. JPMCB also argues that it did not dispute the question of ownership in its opposition to Altos Hornos's December 2002 motion,

and that even if the SOP court were to issue the letters rogatory, it would not dispose of the issue of ownership of the Collection Account.

In its December 2002 motion, Altos Hornos petitioned the SOP court for an order that JPMCB repay and place at Altos Hornos's disposal an amount equal to the amount in the Collection Account. Altos Hornos clearly asserted that the assets in the Collection Account belong to it and petitioned the SOP court "to order [JPMCB] ... to repay and place at the disposal of [Altos Hornos] the sum of US$4,767,574.16." (As noted above, the court deferred decision on the motion until the court of appeals resolved the appeals by both Altos Hornos and JPMCB with respect to JPMCB's acknowledgment-of-credit claim.) Although it appears that the issue is not before the SOP court as formulated so specifically by JPMCB in this declaratory-judgment action--i.e., neither party has expressly asked the SOP court to decide who owns the Collection Account and the funds contained therein--the issue of the ownership was implicitly raised by Altos Hornos. The fact that JPMCB managed to sidestep the dispute in its response cannot be used now to disadvantage the defendant. [FN15] Moreover, in its June 13, 2002 order, the judge in the SOP proceeding attempted to characterize the Collection Account and determine its significance; the parties appear to agree that their dispute about whether the funds in the account are collateral or ordinary income from pre-petition contracts or payments on the loan is significant to the issue of ownership.

FN15. For example, one of Altos Hornos's experts stated "the very dispute at issue here--the treatment of the funds in the Collection Account--remains before the Mexico Court...." See Gonzalez Saravia Decl. ¶ 30 (emphasis added). In its counterargument, JPMCB emphasizes the aspect of Altos Hornos's motion that seeks letters rogatory and minimizes that part in which Altos Hornos asked the court to order JPMCB to turn over the amount in the Collection Account. See Hartasanchez Noguera Decl. ¶¶ 14-16 (stating that Altos Hornos's December filing sought an order notifying JPMCB of Altos Hornos's request to turn over the Collection Account and requesting the SOP court to issue letters rogatory, which was "merely ... a mechanism by which to convey its demand").

b. Whether under Mexican law U.S. courts can, should, or must resolve the issue *6 As to whether under Mexican law U.S. courts can, should, or must resolve the issue, JPMCB posits the thought that under Mexican law the ownership of this property is more appropriately resolved by a U .S. court, given that Mexico follows the doctrine of lex rei sitae and also the SOP court lacks jurisdiction over claims secured by pledges. Altos Hornos contends on the other hand that its SOP proceeding has the effect of staying actions such as JPMCB's. I disagree with both positions.

With respect to JPMCB's argument that the concept of lex rei sitae requires that the issue of ownership of property situated in New York be decided by a New York court, my reading suggests otherwise--i.e., New York law applies, even if decided by a non-New York court. With respect to JPMCB's argument that the SOP court lacks jurisdiction, this argument is what psychiatrists might characterize as rationalization. Article 126 of the Mexican bankruptcy law establishes the scope of claims that must be heard by the bankruptcy court. [FN16] It provides as follows:

FN16. JPMCB's expert concedes that pursuant to Article 429, Article 126 establishes the scope of claims that must be heard by the bankruptcy court for liquidation proceedings and for SOP proceedings. See Romo Decl. ¶ 31.

All pending suits against the bankrupt shall be tried jointly with the bankruptcy proceedings, except the following and without interference with that set forth in Article 122 and the powers given to the trustee to sell all assets:
I. Those in which the judgment has already been declared in the trial court;
II. Those dealing with secured claims or collateral.

Assuming that JPMCB is correct that the assets in the Collection Account are assets that deal with secured claims or collateral and thus fall within the exception enumerated in subsection II--a point which Altos Hornos disputes but which finds considerable support in the language of the Loan Documents -the SOP court has jurisdiction. Indeed, JPMCB's own expert, Miguel Angel Hernandez Romo, a leading authority on Mexican bankruptcy law and the Reporter for the American Law Institute's Restatement of Mexican Bankruptcy Law of the Transnational Insolvency Project, appears to reach this conclusion: "I do not believe that there is anything in Mexican law that would require the issue [of ownership of the Collection Account] to be resolved in a Mexican court." Hernandez Romo Decl. ¶ 11.

With respect to the scope of the stay, Article 409 of the Mexican bankruptcy law provides: "With the exception of claims for debts for work or food, or claims with guarantees, all suits against the debtor that have as their purpose claiming compliance with a monetary obligation shall be in suspension; but actions may be maintained to prevent damage to things subject to litigation or to preserve the rights of the parties." I agree with JPMCB's expert, Miguel Angel Hernandez Romo, who opines that JPMCB's claim for a declaration of the ownership rights of the Collection Account is not within the scope of this automatic stay that pertains to suspension of pagos for two reasons. First, JPMCB's claim is not for the purpose of "claiming compliance with a monetary obligation." Second, it appears to fall within the exception for actions "to preserve the rights of" JPMCB. Relatedly, Altos Hornos contends that the effect of the SOP was to terminate the Loan Agreement. Although I am not fully persuaded that Altos Hornos has demonstrated this to be the law of Mexico, a Mexican court is clearly better able to evaluate this argument.

*7 The banks' expert summarized it best: "I do not believe that there is anything in Mexican law that would require the issue [of ownership of the Collection Account] to be resolved in a Mexican court; nor is there any principle in Mexican law that would be offended by this Court's resolution of the issue." Hernandez Romo Decl. ¶ 11. In short, Mexican law appears to be quite agnostic on this issue--it does not dictate one way or the other where the dispute must be decided.

2. Waiver

Both the Loan Agreement and the Security Agreement contain a similar forum-selection and choice-of-law clause. For example, the Loan Agreement provides:

This Agreement shall be governed by, and construed in accordance with, the laws of the State of New York. Each of the parties hereto hereby submits to the jurisdiction of the United States District Court for the Southern District of New York, of any New York State court sitting in New York City, and of the courts of its own corporate domicile with respect to actions brought against it as a defendant, for purposes of the legal proceedings arising out of or relating to this Agreement or the transactions contemplated hereby.

Loan Agreement 11.06(a). The Security Agreement contains nearly identical language, and both further provide that Altos Hornos waives "to the fullest extent permitted by law" any objection to venue. [FN17] Loan Agreement 11.06(a); Security Agreement 5.07. The Loan Agreement further states:

FN17. The relevant provision in the Security Agreement in its entirety is as follows:

This Agreement shall be governed by, and construed in accordance with, the laws of the State of New York. Each of the parties hereto hereby submits to the jurisdiction of the United States District Court for the Southern District of New York, of any New York State court sitting in New York City, and of the courts of its own corporate domicile with respect to actions brought against it as a defendant, for purposes of all legal proceedings arising out of or relating to this Agreement or the transactions contemplated hereby, provided, that nothing herein shall be deemed to limit the ability of any party to this Agreement to bring suit against any other party to this Agreement in any other jurisdiction. The Company irrevocably waives, to the fullest extent permitted by law, any objection which it may now or hereafter have to the laying of the venue of any such proceeding brought in such a court, any claim that any such proceeding brought in such a court has been brought in an inconvenient forum and any objection based on place of residence or domicile.

[Altos Hornos] irrevocably waives, to the fullest extent permitted by law, any claim that any action or proceeding commenced by the Facility Agent or any Bank relating in any way to this Agreement should be dismissed or stayed by reason, or pending the resolution, of any action or proceeding commenced by [Altos Hornos] relating in any way to this Agreement whether or not commenced earlier.

Loan Agreement 11.06(d). JPMCB contends that the forum-selection and choice- of-law clause and the waiver provision operate to prevent Altos Hornos from objecting to jurisdiction here. I disagree.

It is settled law that the presence of such a forum-selection and choice-of-law clause does not preclude comity where it is otherwise warranted. See Allstate Life Ins. Co. v. Linter Group, Ltd., 994 F.2d 996, 1000 (2d Cir.1993) (noting that the presence of forum-selection and choice-of-law clauses "does not preclude a court from granting comity where it is otherwise warranted"); see also Ecoban, 108 F.Supp.2d at 354. JPMCB argues that the cases associated with this rule are distinguishable on the basis that they involved forum-selection and choice-of-law clauses but did not, as here, contain this additional waiver provision that appears to encompass the comity argument. In short, the presence of this waiver provision fails to change the rule and the result. As with a contract that contains only a forum-selection and choice-of-law provision, courts still determine that the considerations associated with comity trump the parties' express wishes. That the parties here appear to have stated their intentions with even more emphasis does not change the fact that there are important considerations that may not have concerned the parties then but which must concern this Court now--for example, Altos Hornos's other creditors and the importance of a unified administration rather than a piecemeal administration of its estate in the SOP proceeding. Dismissal on the ground of comity should prevail.

*8 In sum, Koreag does not control and require this Court to make a threshold determination of the ownership of the Collection Account, notwithstanding Altos Hornos's pending SOP proceeding in Mexico. Nor does the waiver provision in the Loan Agreement prevent this Court from dismissing the action and permitting the SOP court in Mexico to resolve this dispute, which has been raised at least implicitly in the proceeding there. While this is not a matter where, as in Ecoban, a creditor is making a direct claim on a foreign company's estate, given the Second Circuit's instruction that comity is especially appropriate for foreign bankruptcy proceedings, see Finanz AG Zurich, 192 F.3d at 246, the prudent exercise of discretion dictates dismissal of JPMCB's action so as to permit the SOP court to resolve this dispute. Thus, I need not reach JPMCB's motion for summary judgment. [FN18]

FN18. With respect to its motion for summary judgment, JPMCB contends that the Loan Agreement and the Security Agreement establish that the parties intended the Collection Account to belong exclusively to JPMCB as the Facility Agent, and that the dispute is amenable to disposition by summary judgment because it presents a straightforward question of contract interpretation. JPMCB makes a forceful argument that the Loan Documents show the parties' intent that the Collection Account belongs to JPMCB. Altos Hornos contends that the Loan Documents must be read in light of the SOP and offers the opinions of several experts to support this position. Although it is not entirely clear what impact, if any, Altos Hornos's SOP petition had on the Loan Documents, a Mexican court has the advantage of better understanding the particulars of Mexican bankruptcy law and the effect of the SOP petition--and the Mexican court should have little trouble resolving the contract-interpretation aspect of this matter.

III. CONCLUSION

For the foregoing reasons, Altos Hornos's motion to dismiss the complaint on the basis of comity is granted, and it is not necessary to reach JPMCB's motion for summary judgment. The Clerk of the Court is instructed to close this case and any open motions and remove the matter from my docket.

IT IS SO ORDERED.

S.D.N.Y.,2004.

JP Morgan Chase Bank v. Altos Hornos De Mexico, S.A. DE C.V.

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