NY BANKING LAW

Thompson, Don

§ 606. When superintendent may take possession of banking organization; when possession may be surrendered. 1. The superintendent may, in his discretion, forthwith take possession of the business and property of any banking organization whenever it shall appear that such banking organization:

(a) Has violated any law;

(b) Is conducting its business in an unauthorized or unsafe manner;

(c) Is in an unsound or unsafe condition to transact its business;

(d) Cannot with safety and expediency continue business;

(e) Has an impairment of its capital; or, in the case of a mutual savings and loan association or credit union, has assets insufficient to pay its debts and the amount due members upon their shares;

(f) Has suspended payment of its obligations; or, in the case of a mutual savings and loan association, has failed for sixty days after a withdrawal application has been filed with it by any shareholder to pay such withdrawal application in full;

(g) Has neglected or refused to comply with the terms of a duly issued order of the superintendent;

(h) Has refused, upon proper demand, to submit its records and affairs for inspection to an examiner of the department;

(i) Has refused to be examined upon oath regarding its affairs.

(j) Has neglected, refused or failed to take or continue proceedings for voluntary liquidation in accordance with any of the provisions of this chapter.

2. The superintendent may, in his discretion, and upon such conditions as may be approved by him, surrender possession and permit such banking organization to resume business.

3. When the superintendent shall have duly taken possession of the property and business of any such banking organization, he may hold such possession until its affairs are finally liquidated by him, unless he shall surrender possession as provided in subdivision two of this section or be enjoined from continuing possession as provided in section six hundred seven of this article, or unless such banking organization shall, with the written approval of the superintendent, voluntarily wind up its affairs as provided in section six hundred five of this article.

4. (a) The superintendent may also, in his or her discretion, forthwith take possession of the business and property in this state of any foreign banking corporation that has been licensed by the superintendent under the provisions of this chapter, including, for the purposes of this article, any such corporation whose license has been surrendered or revoked, upon his or her finding that any of the reasons enumerated in subdivision one of this section exist with respect to such corporation or that it is in liquidation at its domicile or elsewhere or that there is reason to doubt its ability or willingness to pay in full the claims of the creditors hereinbelow described. Title to such business and property shall vest by operation of law in the superintendent and his or her successors forthwith upon taking possession. Thereafter the superintendent shall liquidate or otherwise deal with such business and property in accordance with the provisions of this chapter applicable to the liquidation of banking organizations, except that the superintendent may deal with such business and property and prosecute and defend any and all actions relating thereto in his or her own name as superintendent. Only the claims of creditors of such corporation arising out of transactions had by them with its New York agency or agencies, or with its New York branch or branches, shall be accepted by the superintendent for payment out of such business and property in this state as provided in this article. Acceptance or rejection of such claims by the superintendent shall not prejudice such

creditors' rights to otherwise share in the assets of such corporation. The following claims shall not be accepted by the superintendent for payment out of such business and property in this state: (1) claims which would not represent an enforceable legal obligation against such branch or agency if such branch or agency were a separate and independent legal entity; and (2) amounts due and other liabilities to other offices, agencies or branches of, and affiliates of, such foreign banking corporation.

(b) Whenever the accepted claims, together with interest thereon, if interest was paid, and the expenses of the liquidation have been paid in full or properly provided for, the superintendent upon the order of the supreme court shall turn over the remaining assets to, in the first instance, other offices of the foreign banking corporation that are being liquidated in the United States, upon the request of the liquidators of those offices, in amounts which the liquidators of those offices demonstrate to the superintendent are needed to pay the claims accepted by those liquidators and any expenses incurred by the liquidators in liquidating those other offices of the foreign banking corporation. After such payments, if any, have been made, any assets of the foreign banking corporation remaining in the hands of the superintendent shall be turned over to the principal office of such foreign banking corporation, or to the duly appointed domiciliary liquidator or receiver of said foreign banking corporation. Dividends and other amounts remaining unclaimed or unpaid in the hands of the superintendent for six months after such turn-over shall be deposited by him or her as provided in article two of this chapter.

(c) As used in this subdivision the phrase "business and property in this state" includes, but is not limited to, all property of the foreign corporation, real, personal or mixed, whether tangible or intangible, (1) wherever situated, constituting part of the business of the New York agency or branch and appearing on its books as such, and (2) situated within this state whether or not constituting part of the business of the New York agency or branch or so appearing on its books.

(d) For the purposes of this subdivision, the words "debts", "obligations", "deposits" and other similar terms as used in subsequent sections of this article, shall be deemed to refer to the claims that the superintendent shall accept pursuant to paragraph (a) of this subdivision, the words "creditors" and "depositors" shall be deemed to refer to the owners of such accepted claims and, except when the context shall otherwise require, the terms "banking organization" and "corporation" shall be deemed to refer to the New York agency or agencies or branch or branches and the word "officer" shall include the agent or other person in charge of such agency or agencies and any person in charge of or who is an officer of such branch or branches. As used in this subdivision, (i) "affiliate" shall mean any person, or group of persons acting in concert, that controls, is controlled by or is under common control with such foreign banking corporation and (ii) "control" means any person, or group of persons acting in concert, directly or indirectly, owning, controlling or holding with power to vote, more than fifty percent of the voting stock of a company, or having the ability in any manner to elect a majority of the directors of a company, or otherwise exercising a controlling influence over the management and policies of a company as defined by the superintendent by regulation. For purposes of this subdivision, the term "person" shall mean a corporation, unincorporated association, partnership, or any other entity or individual.

5. The term "banking organization" as used in this and subsequent sections of this article shall be deemed to include a corporation which has engaged in any business or other activity prohibited by section one hundred thirty-one of this chapter, and an unincorporated association,

partnership, fiduciary or individual who has engaged in any business or other activity prohibited by section one hundred eighty of this chapter.

6. (a) In the case of the liquidation of an investment company by the superintendent, accepted claims, amounts due and other liabilities owed to affiliates of such investment company shall be paid only after all accepted claims, amounts due and other liabilities owed have been fully paid to such creditors and other claimants of the investment company that are not affiliates of such investment company.

(b) For the purposes of this subdivision, (i) "affiliate" shall mean any person, or group of persons acting in concert, that controls, is controlled by or is under common control with such investment company, and (ii) "control" means any person, or group of persons acting in concert, directly or indirectly, owning, controlling, or holding with power to vote, more than fifty percent of the voting stock of a company, or having the ability in any manner to elect a majority of the directors of a company, or otherwise exercising a controlling influence over the management and policies of a company as defined by the superintendent by regulation. For purposes of this subdivision, the term "person" shall mean a corporation, unincorporated association, partnership, or any other entity or individual.

Thompson, Don

From: Lenczowski, Mark
Sent: Monday, October 03, 2011 11:19 AM
To: Thompson, Don
Subject: Foreign Branch exemption
Attachments: OCC Retail FX Rule.pdf

The OCC exempts transactions entered into by foreign branches of a US national bank from the Retail Foreign Exchange Transaction Rule. Following is the pertinent section from 12 CFR Section 48.1 (full rule attached):

(d) *International applicability.* Sections 48.3 and 48.5 to 48.16 do not apply to retail foreign exchange transactions between a foreign branch of a national bank and a non-U.S. customer. With respect to those transactions, the foreign branch remains subject to any disclosure, recordkeeping, capital, margin, reporting, business conduct, documentation, and other requirements of foreign law applicable to the branch.

The Federal Reserve Board exempts transactions executed by a US bank outside the US from its Regulation U, which governs extensions of credit for the purpose of purchasing or carrying margin stock. Following is the pertinent section from 12 CFR 225.6 (link to full Regulation below that):

§ 221.6 Exempted transactions.

A bank may extend and maintain purpose credit without regard to the provisions of this part if such credit is extended:

(a) To any bank;

(b) To any foreign banking institution; [or]

(c) Outside the United States;

http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=2835c36420ae726d49b80cfc701a7692&rgn=div8&view=text&node=12:3.0.1.1.2.0.2.6&idno=12

Issues in Cross-Border Bank Insolvency: The European Community Directive on the Reorganization and Winding-Up of Credit Institutions

Andrew Campbell[1]

Introduction

It is becoming increasingly likely that a bank that is experiencing financial difficulties will have operations, or interests, in more than one jurisdiction. This was certainly the case in the collapse of Bank of Credit and Commerce International (BCCI) in 1991 and Barings in 1995. At the time of its collapse BCCI was operating in more than seventy jurisdictions and although Barings was a merchant bank with headquarters in the City of London its problems resulted from overseas operations in Singapore.

The insolvency of a bank that is operating on an international basis raises many legal problems and difficulties. For example, different jurisdictions approach insolvency from different philosophical perspectives. Some jurisdictions are more pro-debtor than others while some may favour judicial rather than administrative procedures for dealing with the insolvency procedures. Some of the problems also include conflicts of laws, differences of procedure, different treatment of assets and different approaches to set-off and netting[2].

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[2] The different treatment of set-off led to problems in the BCCI liquidation where the laws in Luxembourg were different to those in the United Kingdom. This led to creditors not all being treated equally.

One particular problem is in relation to the recognition and implementation of insolvency proceedings, court orders or administrative actions in the context of an international bank insolvency. This paper focuses on the European approach to resolving this issue by examining the new European Community Directive on the Reorganization and Winding-Up of Credit Institutions (hereafter referred to as "the Directive").[3] The introduction of the Directive is generally viewed as a significant development within the European Union which will hopefully provide a greater deal of efficiency and certainty in bank insolvency proceedings. That the scope of the Directive also extends to reorganization measures is an interesting and welcome development. This paper is not intended to be a complete guide to the Directive but instead seeks to consider some of the more important aspects.

Bank Insolvency issues

Before going on to consider the background to the introduction of the Directive and to then examine some of its significant provisions, it may be helpful to highlight some of the issues that arise in the context of a bank insolvency that contains a cross-border dimension and which are of relevance before turning attention to the Directive. A brief account of these topics should assist in promoting a better understanding of the provisions of the Directive and the reasons why they have been included.

The following issues are all relevant:

- Single entity versus separate entity

[3] Directive 2001/24/EC of the European Parliament and of the Council of 4th April 2001 on the Reorganization and Winding-Up of Credit Institutions.

- Comity
- Ring-fencing
- Regulatory issues in international bank insolvencies
- Universality versus territoriality
- Harmonization of bank insolvency laws?

Single Entity versus Separate Entity

One issue of fundamental importance in bank bankruptcy laws is whether the insolvent bank should be treated as a "separate entity" or a "single entity". Where the separate entity approach is used the various parts of the financial institution located in different legal jurisdictions will be dealt with in separate legal proceedings. For example a branch of a foreign bank in jurisdiction *X* will be liquidated as a separate entity in jurisdiction *Y*.[4] Where, however, the single entity approach is adopted there will only be one set of insolvency proceedings in which the financial institution is treated as one entity. In this situation all the assets of the institution, no matter where they are located, will be included in a single liquidation, or reorganization, process. Where the single entity approach is adopted all creditors, no matter where situated, will be entitled to lodge their claims in that one set of proceedings and will be entitled to receive the same treatment as all creditors of the same class. It is arguably fairer to use the single entity approach and it has been suggested, quite correctly, that to resolve a bank failure using the separate entity

[4] See, for example, France and the United States.

approach "further hampers the rational determination of the method of resolution."[5] It is certainly much harder to attempt a reorganization under the separate entity method and it is likely also to prove more expensive to administer thereby increasing costs and reducing efficiency.

Comity

This has been defined as the "the courteous and friendly understanding, by which each nation respects the laws and usages of every other, so far as may be without prejudice to its own rights and interests"[6] and "that body of rules which the states observe towards one another from courtesy or convenience, but which are not binding as rules of international law".[7]

The approach taken by countries to the recognition of foreign proceedings tends to be quite variable but is, of course, of great significance in the context of an international bank insolvency. See, for example, section 426 of the Insolvency Act 1986 in the United Kingdom which provides for cooperation between courts which exercise jurisdiction in insolvency cases. In the United Kingdom the courts have a discretion to refuse recognition if this would be contrary to public policy (although this unlikely in practice) and under section 426 the courts are required to give assistance, on the request of the

[5] E. Hupkes, The Legal Aspects of Bank Insolvency, (Kluwer, 2000) 143.
[6] The Oxford Dictionary (Clarendon Press, 2nd Edition, 1989).
[7] Osborn's Concise Law Dictionary, (Sweet & Maxwell, 9th Ed, 2001).

relevant foreign court, provided it is a 'relevant' territory i.e. designated as such[8]. Section 304 of the United States Bankruptcy Code provides the approach taken in that jurisdiction. In the United States the courts have to take various factors into account including the protection of United States creditors plus the existence in the other jurisdiction of a broadly similar legal framework to the United States. This will obviously limit the number of situations where a court in the United States will be either willing or able to assist a request from a foreign court.

Ring-fencing

This practice is contrary to the *pari passu* principle that all claims of a similar type should be treated equally. Where ring-fencing is allowed branches of foreign banks will be treated as separate legal entities and, if necessary, will be wound-up as such. Indeed the purpose of using ring-fencing is to ensure that assets in a particular jurisdiction actually receive special protection at the expense of others. Essentially the aim is to ensure that local creditors receive preferential treatment over foreign creditors. Ring-fencing is permitted in some jurisdictions; the United States is an example of this where in the BCCI liquidation the New York court refused to make assets available to the UK liquidator. The practice of ring-fencing is frequently criticised and the UNCITRAL Model Law on Cross-Border Insolvency does not permit this. Article 13(1) of the Model Law provides "...foreign creditors have the same rights regarding the opening of, and participation in, a proceeding under (name of State)....as creditors...in this State."

[8] This covers all parts of the United Kingdom, including the Channel Isles. All of the other jurisdictions, with the exception of Ireland, are Commonwealth countries – there are only about 19 in total.

While it may be difficult to support the use of ring-fencing in principle it is worth asking whether the use of ring-fencing ever be justified? It is possible that foreign regulators may be perceived to be inefficient or lacking in powers and it may also sometimes be the case that serious concerns exist that domestic creditors will not receive equal treatment in the foreign proceedings.

Regulatory Issues in International Bank Insolvencies

The role of regulators in the period prior to insolvency differs between jurisdictions and it is important to distinguish between regulatory intervention and measures which are considered to go beyond this and form part of the insolvency process. The reasons for drawing this distinction are important in relation to multi-national bank insolvency and this is a feature of the Directive which is examined below.

Clearly there is a need for co-operation between banking regulators from separate jurisdictions in both the pre-insolvency and post-insolvency phases. It is beyond the scope of this paper to discuss regulatory intervention in detail[9] but it is a matter of some importance as the role of the supervisory authority in the pre-insolvency phase may have a significant bearing on whether or not some form of insolvency procedure becomes necessary. This is especially relevant when banks are operating internationally as the

[9] For further information on this topic see, for example, T. Asser, The Regulatory Treatment of Banks in Distress, (IMF, 2001), E. Hupkes, supra n 5., M. Giovanoli & G. Heinrich, International Bank Insolvencies: A Central Bank Perspective, (Kluwer, 1999).