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Chief Judge Stark (D. Del.) Issues a Pair of Opinions Addressing New Value, Ordinary Course of Business, and Earmarking Defenses (Part II)

By: Evan Miller

Attorney Miller analyzes a Delaware decision that discussed the Ordinary Course of Business, New Value, and Earmarking defenses to Preference actions.

Is the Spanish Government facing International Investment Arbitration due to regulatory changes in the Spanish Public Highways Concessions Sector?

By: Kauldi Gandarias
A discussion of how a Spanish bankruptcy filing could have been mitigated and what international law says about the issues presented

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Share Your Thoughts about the ABA’s Mid-Year Conference in San Diego and Spring Conference in St. Louis

What CLE programs did you attend that inspired you? What CLE would you like to see this committee propose or co-sponsor for future events? Do you have ideas for committee-only programming that we could develop? Please share your thoughts with the co-chairs and foster discussions with the listserv

Hello from the other side….

Cheesy Adele lyrics aside, we are always looking for contributions to the newsletter. Case recaps, advice on practice, discussions of hot topics, and anything you think a bankruptcy or insolvency practitioner would want to read and discuss.
ARTICLES

Chief Judge Stark (D. Del.) Issues a Pair of Opinions Addressing New Value, Ordinary Course of Business, and Earmarking Defenses (Part II)

By: Evan Miller

The second of Chief Judge Stark’s two September 2015 opinions is *Prudential Real Estate v. Burtch (In re AE Liquidation, Inc.*), 2015 WL 5301553 (D. Del. Sept. 10, 2015). The pertinent facts of that case are as follows: in May 2006, the Debtor engaged the defendant/appellant, Prudential Real Estate and Relocation Services, Inc. and Prudential Relocation, Inc. (“Prudential”), to perform various relocation services for the Debtor’s employees. The agreement contemplated that the Debtor would pay Prudential for services within 30 days of receiving an invoice. While the Debtor was timely with its payment of invoices during the first year and a half of the parties’ agreement, the Debtor began to fall behind. As a result, Prudential placed the Debtor on “billing review,” which implemented the following conditions: (1) Prudential would not accept new employee transfers, (2) the Debtor would begin paying Prudential on a weekly, instead of monthly, basis, (3) the Debtor would pay a $900,000 lump sum to reduce the outstanding accounts receivable balance, and (4) Prudential would eventually terminate the agreement if the conditions were not satisfied. By January 18, 2008, the Debtor had complied with these terms and Prudential removed the Debtor from the payment plan.

In August 2008, Prudential learned that the Debtor had terminated 650 of its employees in light of financial difficulties. That same month, Prudential again placed the Debtor on billing review due to late payments. This second payment plan implemented the same conditions as the first plan, except for varying payment amounts. On November 25, 2008, the Debtor filed for chapter 7 bankruptcy relief in the United States Bankruptcy Court for the District of Delaware.

In the 90 days prior to the petition date, the Debtor had made 12 payments to Prudential totaling $781,702.61, which the Trustee sought to recover as preferential transfers under 11 U.S.C. §§ 547 and 550. Following trial, the Bankruptcy Court awarded judgment in favor of the Trustee for $653,323.20, which represented $781,702.61 of preferential transfers, reduced by $128,379.40 of “new value” that Prudential had provided under 11 U.S.C. § 547(c)(4). Both parties filed timely appeals to the District Court.

Prudential argued on appeal that the transfers were not preferential because they occurred in the “ordinary course of business” as defined by 11 U.S.C. § 547(c)(2). The Trustee cross-appealed, alleging that Prudential’s “new value” defense impermissibly included amounts provided after the petition date, plus the Bankruptcy Court failed to provide prejudgment interest to his judgment.

The District Court first addressed the ordinary course of business defense under 11 U.S.C. § 547(c)(2). This defense provides that: “The trustee may not avoid under this section a transfer—(2) to the extent that such transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, and such transfer was—(A) made in the ordinary course of business or financial affairs of the debtor and
the transferee; or (B) made according to ordinary business terms”. Chief Judge Stark noted that courts have considered the following factors to assess if a transfer occurs in the ordinary course of business: (1) the length of time the parties engaged in the type of dealing at issue; (2) whether the subject transfers were in an amount more than usually paid; (3) whether the payments at issue were tendered in a manner different from previous payments; (4) whether there appears to be an unusual action by the debtor or creditor to collect on or pay the debt; and (5) whether the creditor did anything to gain an advantage (such as gain additional security) in light of the debtor's deteriorating financial condition.

Prudential argued that the Bankruptcy Court erred by finding that the Debtor’s faster payments during the preference period (during which the average payment time dipped from 45.3 days historically to 28 days) meant that they were not in the ordinary course of business. Citing *In re Archway Cookies*, 435 B.R. 234 (Bankr. D. Del. 2010), Chief Judge Stark found that the proper inquiry is whether the change in payment timing was significant, regardless of whether it was faster or slower, as “small deviations in the timing of payments may not be so significant as to defeat the ordinariness of such payments[,] whereas courts have held greater deviations . . . sufficiently significant to defeat the ordinariness of such payments.” In this case, the District Court found that the Bankruptcy Court’s ruling that a 40% increase in payment timing was significant—especially when paired with the fact that Prudential insisted on the quicker payment schedule—was not clearly erroneous.

The District Court went on to reject Prudential’s arguments, based on *In re Global Tissue L.L.C.*, 106 F. App’x 99 (3d Cir. 2004) and *In re AE Liquidation, Inc.*, 2013 WL 5488476 (Bankr. D. Del. Oct. 2, 2013) respectively, that (i) six “extremely late” invoices out of 3,500 may have improperly skewed the average payment time and (ii) that the Bankruptcy Court was inconsistent in finding a 40% increase in payment time was significant whereas a 10-15% increase in payment time (as found in the earlier, unrelated *AE Liquidation* case) was not. To the former, the District Court found that the late payment pattern in *Global Tissue* was established consistently over two months, while in this case, it was comparatively minimal. As to the earlier *AE Liquidation* case, Chief Judge Stark saw nothing inconsistent with finding a 40% deviation significant and 10-15% insignificant, given the subjective nature of these types of cases.

The District Court next found that Prudential had knowledge of the Debtor’s financially deteriorating condition and subsequently used this knowledge to extract better repayment terms. Chief Judge Stark rejected the relevance of the parties’ past payment plans, a holding which he found to be congruent with *In re Hechinger Inv. Co. of Delaware, Inc.*, 489 F.3d 568 (3d Cir. 2007). He found that the payment plans were a deviation from the “baseline” relationship the parties had established; i.e., once the conditions that precipitated the payment plan went away, the parties returned to their baseline relationship. Thus, they were not representative of the parties’ normal, ordinary arrangement.

Chief Judge Stark then turned to the Trustee’s appeal, specifically whether an improper amount of new value was allocated to Prudential. For this position, the Trustee argued that approximately $71,000 of Prudential’s $128,000 new value was provided *after* the petition date, which violates the precedent issued by the Third Circuit in *In re Friedman’s Inc.*, 738 F.3d 547 (3d. Cir. 2013); see also Evan T. Miller, “The Third Circuit Draws a Line in the Sand on New Value in Friedman’s,” ABI Unsecured Trade Creditors Committee Newsletter, Vol. 12, No. 1,
April 2014. Since the Bankruptcy Court did not distinguish between prepetition and postpetition payments for new value purposes, the District remanded the matter for a determination of the same.

The District Court likewise remanded the Trustee’s prejudgment interest claim to the Bankruptcy Court, so that the lower court could—as consistent with the Hechinger opinion—explain its reasoning for denying an award of prejudgment interest.

_Evan Miller is an attorney at Bayard, P.A. in Wilmington, Delaware and is a 2015-2016 Vice-Chair of the ABA YLD Bankruptcy Committee. This article was first posted on Attorney Miller’s blog, “Avoidance Action Update”, retrieved at avoidanceactionupdate.bayardlaw.com

Is the Spanish Government facing International Investment Arbitration due to regulatory changes in the Spanish Public Highways Concessions Sector?

By: Kauldi Gandarias

Between 2012 and 2014, eight Spanish concession companies (the “Concessionaires”), backed by foreign investors (international banking community that participated in the syndicated loans) (the “Foreign Investors”), that operate toll roads in the Madrid area filed for bankruptcy protection under the Spanish Insolvency Act. There were two main reasons that caused the bankruptcy. First, an unforeseen decrease of the traffic stream, principally due to the economic crisis. Second, an unforeseen increase in expropriation costs - to compensate land owners whose property was made subject to a forced right of way to be used for the roads. These costs deviated by more than 600% compared to those estimated at the time of the public tender, caused by a new doctrine by the Spanish Supreme Court, which meant that the expropriated land was now considered “urban land” instead of “rural land” (as it was when the bids were submitted).

The Public Administration (the “Administration”) approved—but failed to implement—several measures to compensate the unforeseen events described above (the “Rebalancing Measures”). These Rebalancing Measures implied a recognition by the Administration that a compensation to the Concessionaires should be given in the above mentioned circumstances, based on the doctrine of frustration of the purpose, which by virtue of the Spanish Public Sector Legal Regime Act (“SPSLR Act”) is also applicable to the public concessions.

Furthermore, under the SPSLR Act, the Concessionaires can claim the reimbursement of their costs, arising from the liability of the Administration due to the termination of the public concessions (Responsabilidad Patrimonial de la Administracion) (“RPA”). The liquidation of the Concessionaires under the bankruptcy proceedings would necessarily cause the termination of the public concessions, and consequently, the obligation of the Administration to pay the RPA. To avoid the liquidation of the public concessions, the Administration has recently presented a creditor’s arrangement proposal (the “Agreement”). The Agreement’s approval would discharge the Administration’s obligation to pay the RPA to the Concessionaires—which would exceed 4 billion euros—and enable the Administration to acquire the toll roads for 1.2 billion euros, a fifth of their real value.
In this scenario, the parties most affected would be the Foreign Investors whose capital is at risk due to (x) a regulatory change—in the form of the Supreme Court’s new doctrine; (z) the failure by the Administration to implement the Rebalancing Measures approved specifically for the Concessionaires; and (y) the potential entrance into force of the Agreement. What can these parties do to protect themselves? A solution for them could be initiating international investment arbitrations seeking protection through the rules of foreign investment contained in multilateral and bilateral treaties—mainly the prohibition of expropriation without indemnification and the fair and equitable standard principle.

First, the criteria to determine whether the measures adopted by the Administration constitute an expropriation have to be based on the loss caused to the Foreign Investors due to national measures adopted by the Administration that reduce the value of their investments. The arbitral doctrine known as the sole effect doctrine is important in this regard. In the arbitral proceeding of CME vs. Czech Republic, the tribunal stated that “de facto expropriations or indirect expropriations, - i.e. measures that do not involve an overtaking but that effectively neutralize the benefit of the property of the foreign owner -, are subject to expropriation claims. This is undisputed under international law”. Thus, it can be argued that the Administration’s failure to implement the Rebalancing Measures constitutes an expropriation in this sense. The economic impact thereof caused the Concessionaires to seek protection under the Spanish Bankruptcy Law. Furthermore, the Arrangement—if it were to be approved—would result in the Administration discharge from its duty to pay the RPA. This, as well, appears to constitute an appropriation under CME vs. Czech Republic.

Second, the fair and equitable standard principle, protected under international investment law, offers a further argument to Foreign Investors. A pioneering investor-friendly arbitral award was Tecmed vs. México. There, it is recognized that the bona fide principles required by international law demand the parties to provide a certain treatment which does not jeopardize the legitimate expectations under which investors based their decisions. Therefore, Administrations shall act in an expected manner in their relations with Foreign Investors, so these can be aware of, in advance, the regulations, acts or administrative directions that would apply to their sector in order for them to plan their activities. Foreign Investors could therefore base their compensatory claims on this case, arguing that maintenance of regulatory stability is necessary to protect their legitimate expectations.

Spanish Courts have already denied any sort of compensation to the Concessionaires. Thus, Foreign Investors could initiate new claims before international courts or organisms if the Administration does not offer a solution to reimburse the Foreign Investor’s capital investments. It is in the interest of the Administration to resolve this issue; to avoid millionaire claims commenced by Foreign Investors.

Kauldi Gandarias is a member of the in-house legal counsel team at Cintra US.

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NEWS AND ANNOUNCEMENTS

Some of our best ideas are inspired (ok, stolen as well) from programming at ABA conferences. If you attend and see a good idea to develop, please contact us and volunteer to contribute!

Upcoming Deadlines

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<th>Event</th>
<th>Due Date</th>
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<tr>
<td>Send 3Q listserv communication</td>
<td>3/1/16</td>
</tr>
<tr>
<td>resolution proposal 2</td>
<td>3/31/16</td>
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<td>3Q Reports Due</td>
<td>4/1/16</td>
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<td>teleconference 2</td>
<td>7/15/16</td>
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<td>8/1/16</td>
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<tr>
<td>3Q Newsletter and 3Q Web Site Update</td>
<td>4/30/16</td>
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<tr>
<td>Send 4Q listserv communication</td>
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Social Media Team Update

The Social Media Team is pleased to announce the new Social Media Policy! The purpose of this policy is to provide direction on appropriate and effective ways to utilize social media on behalf of the ABA YLD when delivering content, facilitating engagement, and communicating with both members and non-members. The policy includes such information as sample posts, proper use of our social media channels, and of course directions for using the online spreadsheet we set up to capture posts from across the division. The new policy can be found at:

http://www.americanbar.org/content/dam/aba/administrative/young_lawyers/leadership_portal/social_media_policy.authcheckdam.pdf

Disaster Legal Services Team

The DLS team is currently implementing DLS in Mississippi, Texas, South Carolina, and California. Earlier this year, we implemented DLS in Texas, Wyoming, Saipan, and Kentucky. We expect this to be a busy year on the DLS font, as NASA predicts that this year’s El Nino is going to be the worst ever.

The DLS team encourages all young lawyers to be prepared in the event of an emergency or disaster, and to coordinate with your local or state bar association to help disaster survivors. More information about the DLS program can be found on our website.

National Conferences Team Update

In addition to the regular activities of the ABA YLD National Conferences Team during the ABA Midyear meeting, this Team is putting together a social media photo scavenger hunt. New attendees will have the opportunity to be a part of a scavenger hunt that allows them to meet
seven YLD leaders, receive their business cards, and also take a selfie and post it to their social media accounts with the hashtag #YLDmidyear16. The first person to have a selfie with each YLD leader and receive their signature on a business card will receive a generous gift from the ABA YLD National Conferences Team.

**Member Services Project Update**

The Member Services Project is proud to launch the Young Lawyer Toolkit at the ABA Midyear Meeting. The Toolkit is a curated collection of ebooks, tutorials, and online resources, intended to be a one-stop-shop for lawyers in their first years of practice. The Toolkit contains resources covering trial practice, the business of law, going solo/opening a firm, financial wellness, diversity and inclusion, and first-year lawyers. At launch, the Toolkit will include materials for lawyers with one to three years of experience, with materials for more experienced lawyers to come.

To access the Toolkit, please visit [http://www.ambar.org/younglawyertoolkit](http://www.ambar.org/younglawyertoolkit). The Young Lawyer Toolkit is free for ABA Members.

**YLD Spring Conference**

May 5 – 7, 2016

St. Louis, MO

Thank you for reading and for your contributions