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ARTICLES

Serving as an Expert Witness in a Foreign Tribunal

A Singapore trial courtroom is quite different from what we have come to expect in the United States.

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In 2019 I was employed as an expert witness to provide opinions on American bankruptcy law for a trial in the International Commercial Court in Singapore. The dispute was whether the plaintiff probate estate or an individual defendant (our client) was the rightful owner of a Singapore business.

Background of Case

Twenty years earlier, an American retailer owned by the estate's decedent went through a Chapter 11 bankruptcy in Los Angeles. The decedent set up a New Zealand shell corporation to purchase the assets of the Chapter 11 debtor but concealed her ownership interest from the bankruptcy court. The New Zealand company then transferred the acquired assets to the Singapore company at issue. Our client owned the Singapore entity, but the decedent controlled its operations and paid our client 5 percent of the company's profits. Upon the decedent's death, the estate claimed that the decedent was the actual owner of the Singapore business. At issue during trial was whether our client was the constructive trustee of the Singapore company for the estate (for which the defense engaged a trust expert), and whether the decedent had committed a fraud on the bankruptcy court two decades earlier.

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Retention of Expert Counsel

When defense counsel retained me, the case had been pending for about two years. At that point, the court had assigned a trial date, and the parties were beginning to prepare experts.

My first task was to review all of the filings and other case materials. These included, among other things, complaints, cross-complaints, motions to amend, deposition transcripts, declarations, and motions for partial summary adjudication.

I found the form of pleading and briefing in Singapore markedly different from that in U.S. courts. Each paragraph contained just one or two sentences with very concise statements. Court rules required that every single statement be supported by documentary or testamentary evidence, which prevented briefs from becoming long, unsubstantiated arguments and put the parties to the burden of proof long before the trial began.

In addition to reviewing the case file, I consulted with Singaporean counsel to explain the bankruptcy system in the United States, which differs significantly from that in Singapore. For example, Singapore has no debtor-in-possession—a most basic concept of an American Chapter 11 proceeding—and it does not require insiders of the debtor to identify themselves as such in connection with the purchase of a debtor's assets.

Another interesting aspect of Singapore litigation procedure is that experts, by agreement, can be made part of a party's legal "team." This allows experts to avoid being deposed by the opposing side and permits them to present arguments directly to the court. The parties agreed to that procedure in this case.

Trial

I flew to Singapore for the trial and attended several hearing sessions in advance of providing expert testimony.

The trial courtroom was quite different from what we have come to expect in the United States. Three judges presided from a high bench. The lawyers were seated in four rows, ranging from the most senior counsel in the first row to apprentice lawyers in the back. Instead of a central podium, each row had its own movable podium, which the lawyers used for argument while standing at their place at the table. There was a theater-style gallery with ascending rows behind the last row of lawyers, separated from the lawyers by a glass wall.

All participants to the proceedings respected Singaporean culture and traditions, bowing to the judges when entering and leaving the courtroom and when being introduced. The Singapore lawyers were very impressive and knew every detail of the record. Witness examination was quite civil. The lawyers spoke impeccably with English accents, and while their questions were very pointed, there were no objections from opposing counsel. The judges also would jump in to question the witnesses and "suggest" to the lawyers that a topic had reached its conclusion.

At the request of defense counsel, I provided in-court consultation on the effectiveness and accuracy of the arguments presented and reviewed transcripts to assist the lawyers with any issues that may have arisen regarding U.S. bankruptcy law. The technology for this was amazing, as near-perfect transcripts were available within an hour of each day of the trial. Yet, in spite of the technical capabilities of the tribunal, all of the pleadings were bound in colored binders in bookcases behind the judges.

The day before my scheduled testimony, the defense made a surprising procedural move—the equivalent of a motion for judgment. It announced that it would not put on a case because, in its view, the plaintiff failed to meet its burden of proof and thus failed to put on a prima facie case. Defense counsel advised the court that it was ready to present closing arguments, which included a presentation from me. However, because the judges expected the defense to put on its case, they advised they were not prepared to entertain closing arguments, and the court adjourned the trial to a date to be determined. I returned to California.

As the judges in this specialized court are from countries all over the world (only the chief judge resides in Singapore), the court only sits for short blocks of time, and not at the convenience of the parties. As it turned out, it was impossible for me to appear in person on the date the court ordered proceedings to resume, and I had to present my arguments by video. I explained how the decedent's control and operation of the Singapore business resulted from her 20-year-old fraud on the U.S. Bankruptcy Court and creditors, i.e., failing to disclose her ownership interest in the off-shore entity that purchased the debtor's assets, among other nefarious actions. The judges appeared interested in American bankruptcy law but also questioned why the defendant, who was not defrauded by the decedent and who benefited from the apparent arrangement with her, should not be considered a trustee for the estate.

Following my presentation, the defense's trust law expert gave her argument that no constructive trust should be imposed in favor of the estate. This seemed to go well. However, the trust expert did not disconnect her audio after concluding her presentation, and the entire courtroom and all participants could hear her subsequent comments and conversation. The defense team frantically tried to get her attention but could not. Ultimately, the judges ordered the video disconnected, which also terminated my connection and prevented me from hearing final arguments by the lead lawyers.

Court Ruling

Four months later, we learned that the court ruled in favor of the plaintiff. While the court discussed the alleged fraud on the bankruptcy court and the propriety of imposing a trust, the judges were mostly of the opinion that the plaintiff had put on a prima facie case, which was not refuted by the defense as the defense chose not to put on a case in chief. And although the judges agreed that a higher degree of scrutiny is required to evaluate the fairness of a sale involving an insider purchasing a debtor's assets, it believed the heightened standard was met because the creditors' committee, which had the power to investigate and scrutinize the sale, approved the sale in the bankruptcy proceeding.

Appeal

The defense appealed the decision, and a panel of three different judges acting as the appellate tribunal heard arguments for three hours in late January 2021. Following a 10-minute recess at the end of counsel's presentations, the judges resumed proceedings for what we thought would be further questions for the parties. Instead, and to our surprise, the appellate court announced that the defendant's appeal was denied and that it was awarding the plaintiff 60,000 Singapore dollars for the cost of the appeal.

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