

In re Joseph Nakash (debtor) v Schmuël Zur, the Official Receiver of the State of Israel

[190 BR 763 \(Bankr SDNY 1996\) 28 Bankr Ct Dec 478](#)

12th January 1996

United States and Israel

Southern District of New York – Bankruptcy Court

Key Words

Chapter 11; protocol; civil law; coordination of proceedings; preservation of assets; reduction of costs; court integrity; sharing information.

Summary of Facts of the Case

Nakash, the Debtor, had diversified global business interests and conducted his business through corporations and partnerships or other ventures and enterprises in which the Debtor had an investment or equity interest. Nakash was on the board of directors when an Israeli banking institution, the North American Bank Ltd (NAB), was declared insolvent, shortly after which the Debtor filed for a reorganisation under Chapter 11 in the United States. His financial situation was created by a judgement against him by the Israeli Receiver relating the failure of the NAB in which an attachment order was made against him in the US District Court for the Eastern District of New York.

The issue in the *Nakash v Zur* case revolved around the global nature of the American Chapter 11 stay or moratorium. The Debtor filed a motion in the Southern District of New York requesting that the court find that the Official Receiver of the State of Israel was in violation of the automatic stay as they had filed a second involuntary bankruptcy petition against the Debtor in Israel. While the debtor was seeking civil contempt sanctions and actual and punitive damages for breaching the moratorium, the judge narrowed the arguments to the single question as to whether the Receiver's filing violated the automatic stay, leaving the other determinations for a future hearing. The judge found in favour of the Debtor in this instance that the Receiver was indeed in violation of the stay due to his filing of a second involuntary bankruptcy. Despite what on the face of it seemed a fairly confrontational set of circumstances, both parties unanimously agreed to be guided by three principle goals going forward: (1) to preserve the assets of the debtor; (2) honour the integrity of the courts of both countries; and (3) reduce costs.

Judge Burton R Lifland of the US Court concluded that it would be in the best interests of the Debtor and his creditors wherever situated to seek avenues for the promotion of international cooperation



and coordination with respect to the various judicial actions of the United States and Israel involving the Debtor and his assets (Flaschen and Silverman 1998). The court then appointed an Examiner to assist in achieving those best interests in the procedure. Both the Receiver and the Examiner were willing to ‘immediately consider the construct of a protocol to harmonize and coordinate the proceedings here [the United States] and in Israel.’

For more detail on the Nakash protocol, see Evan D Flaschen and Ronald J Silverman, ‘Cross-Border Insolvency Cooperation Protocols’ (1998) 33(3) Texas International Law Journal 587, 593-599.

Cooperation and/ or Coordination Issue

The coordination protocol devised in the Nakash litigation provided solutions to the following important aims:

- (1) Harmonisation and coordination of proceedings
- (2) Honouring the integrity of the courts in both the USA and Israel;
- (3) Promote orderly and efficient administration;
- (4) Preservation of the assets; and
- (5) Coordination of activities and sharing information to reduce costs.

These aims were accomplished through the creation and execution of a bespoke protocol devised between the parties and courts of the United States, a common law country, and Israel, a civil law country with an insolvency law broadly based on English system.

Resolution

It was indeed found that the Israeli Receiver was in violation of the stay when he filed for a secondary involuntary bankruptcy procedure against the debtor, but what is most interesting and the key point in this case for the purpose of this exercise in showcasing instances of coordination and cooperation in cross-border insolvency, was the fact that the United States, a common law country, was able to agree and execute a protocol with Israel, a civil law country. This a circumstance that was highlighted in Chapter 4 of Report 2 of the JCOERE Project as a potential obstacle to cooperation under the EIR Recast due to fundamental differences between common and civil law approaches to coordination, and the limitations that may exist, particularly in civil law jurisdictions, to the flexibility of judges to agree such protocols without a foundation in legislation.

Applicability to Preventive Restructuring

Given the likely future proliferation of preventive restructuring frameworks throughout the EU, and the fact that there is a variety of legal origin backdrops among the Member States, the innovative way in which the American and Israeli parties were able to achieve a successful procedural coordination may be of some interest to those involved in cross-border restructuring in the future.

Applicability of Existing Rules and Guidelines

EIR Recast

Were a case like *Nakash* to occur between Ireland (common law) and Italy (civil law), for example, in the first instance the EIR Recast would require cooperation as long as the procedures in question were contained in Annex A (and were not contrary to some matter of public policy). This would mean that similarly to the finding in this case, a new procedure filed that competes with the procedure filed first would be a violation of a moratorium, were such a provision included in the processes in question.

In terms of the main goals of the restructuring, which are common goals across cross-border cases generally, some of the European guidelines could also be of use to judges encountering similar circumstances in cross-border restructuring cases. Of key importance and as recognised in the *Nakash* Protocol is the harmonisation and coordination of proceedings generally, which can be accomplished by achieving the other aims of the same protocol.

Honouring the integrity of the courts in both the USA and Israel

This goal of the *Nakash* protocol encapsulates the fundamental principle of mutual trust and respect that is required for courts and judges (and practitioners) to effectively cooperate in cross-border cases. In the EIR Recast, this aim is emphasised in Recital 65 of the Recast, which notes that 'recognition of judgements delivered by the courts of the Member States should be based on the principle of mutual trust.'

Promote orderly and efficient administration and the preservation of assets

Asset coordination is a key aspect of coordination in restructuring procedures and is achieved in part by ensuring that the administration of the proceedings is efficient and orderly. In addition, the presence of a moratorium in most procedures will also act as a buffer to the dissipation of assets by creditors who are pursuing their self-interest.

The EU Judge Co Principles provides in Principle 8 that insolvency cooperation may require a stay or moratorium at the earliest possible time wherever the debtor has assets, though such constraints must also be reasonable. The Moratorium provisions under the Preventive Restructuring Directive provide a balanced approach to this method of asset preservation, so the issue going forward in relation to preventive restructuring frameworks may be resolved in part by the frameworks themselves.

The JudgeCo principles also stipulate in Principle 19 that insolvency practitioners should also obtain court approval for any action affecting assets if required by local law and to seek prior agreement with any other practitioner where assets in that practitioners jurisdiction may be affected. The CoCo Guidelines add in 12 para 2 that practitioners should also minimise conflicts between procedures and also to maximise the prospects of the rehabilitation and reorganisation along with the value of the debtor's assets that may be subject to realisation. This will require the cooperation between professionals of different procedures. Guideline 13 further suggests that selling assets should be done in cooperation with other professionals in order to realise the maximum value of the assets of the debtor as a whole and for courts to act in the approving of such value maximising sales.

Coordination of activities and sharing information to reduce costs

Information sharing is a key factor of many of the cooperation guidelines available. The JudgeCo Principles and Guidelines provides in Guideline no 3 that a court may communicate with another court or (Guideline 4) with another practitioner about matters related to the proceedings to coordinate and harmonise proceedings with those of another jurisdiction, while obtaining consent from all parties before disclosing any information.

The CoCo Guidelines provide in Guideline no 7 the information that insolvency practitioners are required to disclose including information about the existence and status of the insolvency proceedings. This obligation also extends to informing the courts. The information this covers includes confidential information so long as its provision is subject to appropriate confidentiality arrangements.