Pratt's Journal of Bankruptcy Law

LEXISNEXIS® A.S. PRATT® JUNE 2023

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Pratt's Journal of Bankruptcy Law

VOLUME 19 **NUMBER 4** **June 2023**

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Library of Congress Card Number: 80-68780

ISBN: 978-0-7698-7846-1 (print)

ISBN: 978-0-7698-7988-8 (eBook)

ISSN: 1931-6992

Cite this publication as:

[author name], [*article title*], [vol. no.] PRATT'S JOURNAL OF BANKRUPTCY LAW [page number] ([year])

Example: Patrick E. Mears, *The Winds of Change Intensify over Europe: Recent European Union Actions Firmly Embrace the "Rescue and Recovery" Culture for Business Recovery*, 10 PRATT'S JOURNAL OF BANKRUPTCY LAW 349 (2023)

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MATTHEW BENDER

(2023–Pub.4789)

Editor-in-Chief, Editor & Board of Editors

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POSTMASTER: Send address changes to *Pratt's Journal of Bankruptcy Law*, LexisNexis Matthew Bender, 230 Park Ave. 7th Floor, New York NY 10169.

Bankruptcy Court Authorizes Service of Subpoena on U.S. Nationals Through Social Media While Prohibiting the Issuance of Subpoena on Foreign Nationals Abroad

By Michael B. Schaedle and Evan Jason Zucker*

In this article, the authors explore a decision by a New York bankruptcy court that allowed the liquidators in a Chapter 15 bankruptcy case to serve a subpoena on a U.S. citizen overseas via social media.

Corrupt managerial behavior has been a driver in the collapse of the cryptocurrency market. Enforcing and defending claims against directors and officers, where the directors and officers are not living in the United States and may not be U.S. citizens, is a current judicial focus in the U.S. litigation system. In the Three Arrows Capital (Three Arrows) Chapter 15 case, the U.S. Bankruptcy Court for the Southern District of New York (the U.S. Bankruptcy Court) addresses founder misconduct[1] and defines the limits of the United States' broad discovery tools to aide a letterbox jurisdiction, like the British Virgin Islands (BVI), in corralling bad actors and subjecting them to forensic examination.

THE COLLAPSE OF THREE ARROWS AND THE OBFUSCATIONS OF ITS FOUNDERS' LOCATION

Three Arrows managed and invested digital assets. It was founded by Kyle Davies and Su Zhu. Davies was born in the United States, but he holds Italian and Singaporean passports. It is not known whether Davies renounced his U.S. citizenship but, as a matter of law, a person born in the United States is presumed to be a U.S. citizen.[2] Zhu was born in China and lived in San Francisco for some period of time in the last decade. Zhu, however, currently does not reside in the United States and his current residence is unknown. Zhu listed his nationality as Singaporean in company records.

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[1] In re Three Arrows Cap., Ltd., No. 22-10920 (MG) (Bankr. S.D.N.Y. Dec. 29, 2022).

[2] See In re Petrobras Sec. Litig. (S.D.N.Y. Mar. 4, 2016).

On June 27, 2022, Three Arrows commenced an insolvency proceeding in the BVI. The BVI court appointed joint liquidators to investigate and recover assets for Three Arrows' creditors. Prior to its liquidation, Three Arrows allegedly had over three billion dollars in assets under its management. At the direction of Davies and Zhu, these assets funded deals with cryptocurrency companies globally, including in the United States and Singapore. According to a Singaporean government agency, Three Arrows' investment arm breached asset management protocols for a prolonged period, calling into question Three Arrows' solvency and provided the agency with false and misleading information about its assets, liabilities, and value.

Thereafter, Davies and Zhu refused to provide the liquidators with "seed phrases" (a series of passwords that grant access to a cryptocurrency wallet) and other information necessary to access and control Three Arrows' digital assets. Thus, in early July, the liquidators commenced proceedings in the United States and Singapore to aid their efforts in investigating, recovering, and, ultimately, distributing assets to creditors. In the U.S. proceeding, the liquidators filed an emergency application seeking, on a provisional basis, to require the founders to disclose information to access company cryptocurrency. The U.S. Bankruptcy Court granted the application and authorized the liquidators to issue subpoenas to any person with relevant information.

Davies and Zhu, however, were not cooperative. Specifically, they failed to provide the liquidators with Three Arrows' books and records, remained unavailable for meaningful discussions with the liquidators, and refused to provide the liquidators with their current locations. Without their current locations, the liquidators were unable to formally serve Davies and Zhu with subpoenas to compel the production of the missing information. The founders' Singaporean counsel, their intermediary with the liquidators, declined service on their behalf. Additionally, Three Arrows' investment managers, also controlled by Davies and Zhu, refused to produce electronic copies of Three Arrows' books and records.

Left with no other choice, the liquidators sought authority to issue subpoenas on Davies and Zhu compelling the production of such documents. Additionally, given that the liquidators had no information regarding the present locations of Davies and Zhu, the liquidators sought permission to serve them by e-mail and Twitter.

THE TERRITORIAL LIMITS OF A U.S. COURT TO AUTHORIZE FOREIGN DISCOVERY

Rule 45 of the Federal Rules of Civil Procedure allows a party to serve a subpoena on any person requiring them to produce documents in their

possession or control. A subpoena is served by delivering a copy to the recipient. A subpoena may be served anywhere within the United States.[3] "[I]ssuing and serving a subpoena directed to a United States national or resident who is in a foreign country" is governed by 28 U.S.C. § 1783.[4] Section 1783 provides that a subpoena can be directed to a U.S. national or resident abroad if it is "necessary in the interest of justice, and . . . that it is not possible to obtain his testimony in admissible form without his personal appearance or to obtain the production of the document or other thing in any other manner."

A Party Cannot Serve a Subpoena on a Foreign National Abroad

Notably, Rule 45 is "silent" as to the service of a subpoena on foreign nationals located outside the United States. The Three Arrows' liquidators argued that because Rule 45 does not expressly prevent service on foreign nationals outside the United States, a court can authorize service on such parties. The U.S. Bankruptcy Court disagreed, finding "it strains credulity to believe that this apparent silence in the Rules would result in the unlimited ability of litigants to serve trial subpoenas on any foreign national anywhere in the world."[5]

The U.S. Bankruptcy Court, relatedly, rejected the liquidators' reliance on Rule 4(f), which expressly authorizes service of a complaint on persons, including foreign nationals outside the United States, pursuant to international protocols or other means reasonably calculated to provide notice and not prohibited by a foreign country's law.

Instead, it found that inclusion of foreign nationals in Rule 4(f) and not Rule 45 demonstrates a clear congressional intent to (1) limit a U.S. federal court's subpoena power on non-citizens abroad, and (2) subject U.S. citizens, regardless of their location, to compliance with a federal subpoena. The distinction between the method for service of a complaint under Rule 4(f), and a subpoena under Rule 45 is significant because service of a complaint is the means to extend U.S. jurisdiction to a party in a litigation whereas service of a subpoena under Rule 45 relates to nonparties that are not already subject to the jurisdiction of a U.S. court.

Having found that Zhu, a foreign national living abroad, was incapable of being served with a subpoena, the U.S. Bankruptcy Court found that the

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[3] Fed. R. Civ. P. 45(b)(2).

[4] Fed. R. Civ. P. 45(b)(3).

[5] In re Three Arrows Cap., Ltd. (quoting Aristocrat Leisure Ltd. v. Deutsche Bank Tr. Co. Americas, 262 F.R.D. 293, 305 (S.D.N.Y. 2009)).

liquidators' request for an alternative means of service of a subpoena on Zhu was an attempt to avoid the territorial/jurisdictional limitations of Rule 45. At its core, what the liquidators were seeking via its request for alternative service, was an alternative to Rule 45 itself. The fact that a means of service may provide a subpoena recipient with actual notice is not authority in and of itself to issue the subpoena in the first instance. Particularly, given the ubiquity of electronic media, if the liquidators' relief had been granted, Rule 45's explicit territorial limits would be rendered meaningless. While discovery from Zhu is unavailable in the U.S. case, such discovery may, however, be available in another one of the liquidators' ancillary proceedings.

Service of a Subpoena on U.S. Nationals Abroad

Serving Davies was a different matter, given the presumption that he is a U.S. citizen. As a U.S. citizen abroad, under 28 U.S.C. § 1783, the relevant inquiry is whether the discovery sought is (1) necessary in the interest of justice, and whether it is (2) not possible to obtain the discovery in any other manner.

With respect to the first inquiry, the U.S. Bankruptcy Court ruled that the founders of Three Arrows had unique knowledge of the debtor's liabilities and assets, including those with a connection to the United States. Similarly, the U.S. Bankruptcy Court noted that because the discovery sought was allowable under Bankruptcy Rule 2004, which allows for broad fact-finding in bankruptcy cases, the discovery was proper.

In assessing the second inquiry – the ability to obtain discovery from other sources – the U.S. Bankruptcy Court stated that the relevant inquiry does not require a finding of "sheer impossibility." Instead, a movant must show that the discovery is "likely" not obtainable by other means. Among the factors the court will consider is the subpoena recipient's cooperation, or lack thereof, in informal discovery prior to the issuance of a subpoena. Here, even though Three Arrows had multiple ancillary proceedings globally, the information sought in the U.S. proceeding was tailored to matters that have a connection with the United States. And, although discovery may be obtainable in the Singaporean proceeding, it does not mean that the information sought here, related to the United States, would be obtainable in Singapore.

NONCONVENTIONAL METHODS OF SERVICE OF PROCESS OF SUBPOENAS

Under Rule 45(b)(1), the service of a subpoena may only be completed by personal delivery. Notwithstanding the express language, courts routinely authorize an alternative means of service. These courts have found that the

meaning behind "delivering" a subpoena is to ensure receipt by a recipient. Thus, where a method of service is "reasonably calculated" to provide actual and timely notice to a subpoena recipient, such method meets the requirements of Rule 45.

In *Three Arrows*, the U.S. Bankruptcy Court considered three issues: "(1) when alternative service is permissible; (2) what types of alternative service have been recognized as permissible under Rule 45; and (3) to the extent that the [movant relies] on precedent involving alternative service pursuant to rules other than Rule 45, whether there is an adequate basis for applying those precedents in the context of Rule 45."

First, a movant is generally required to demonstrate that it attempted to serve the subpoena recipient personally before requesting an alternative means. A court, however, can waive this requirement. For example, the *Three Arrows* court found that attempting to serve Davies personally would be futile because he was concealing his location.

Second, the U.S. Bankruptcy Court found that the most recognized alternative means of service is certified mail because it requires actual receipt. Again, with respect to Davies, this method was impossible given Davies' unknown whereabouts.

Third, the U.S. Bankruptcy Court considered whether service by e-mail and social media was permissible. Previously, courts only authorized service of a subpoena by e-mail as a backup to personal service. With respect to the service of complaints, however, the U.S. Bankruptcy Court, found that U.S. federal courts had previously authorized service by email and social media. These courts, in so authorizing under Rule 4, applied the same standard in Rule 45 – a showing that the method is "reasonably calculated" to provide actual notice.

Thus, the U.S. Bankruptcy Court found that e-mail or social media is permissible where there is a demonstration that a subpoena recipient is presently using such medium. Indeed, given that "Twitter use appears to be somewhat public, . . . the continued use of public Twitter accounts could ostensibly provide probative evidence of actual receipt of the subpoenas." Accordingly, the U.S. Bankruptcy Court authorized, based on Davies' proven use of e-mail and Twitter, service of a subpoena through such mediums.

After the liquidators served a subpoena on Davies via social media, Davies was reportedly located in Indonesia. According to the liquidators, Indonesia is a jurisdiction that will not compel compliance with a foreign court's subpoena. Although enforcement of a U.S. court order abroad is dependent upon the local laws of the enforcing court, a U.S. court is not powerless to enforce its own

orders. Here, the liquidators filed a motion compelling Davies to produce documents. Additionally, his continued refusal to comply with a U.S. court order can lead to sanctions.

PRACTICAL IMPLICATIONS

The U.S. Bankruptcy Court's decision demonstrates the importance of U.S. courts and U.S. discovery rules in asset tracing. And, relatedly, how a Chapter 15 proceeding is used in implementing a global liquidation strategy with multiple ancillary proceedings. Specifically, U.S. courts will not allow an obstructionist party, hiding from creditors, to hinder an investigation. The *Three Arrows* liquidators, therefore, were allowed (creatively) to serve a subpoena on a U.S. citizen overseas via social media.