

Luxembourg investment vehicle's foreign representative "violated" US Bankruptcy Code

Benjamin Clarke
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Serious Fraud Office in central London
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In the latest development in a US case at the centre of a “major international fraud”, the foreign representative of a Luxembourg-based investment vehicle and his counsel have been accused of manipulating the Chapter 15 process to enrich themselves.

On 10 August, **Judge Shelly Chapman** at the US Bankruptcy Court for the Southern District of New York ordered **Yann Baden** of Baden & Baden, the foreign representative of SLS Capital, to return almost US\$3 million of funds he has collected in the United States.

Judge Shelly Chapman made the ruling after Connecticut-based broker dealer CRT Capital Group, SLS’s sole US creditor, accused Baden of having collected US\$18.6 million in the United States, and then distributed the funds without the court’s consent.

The court held that Baden had violated the US Bankruptcy Code's section 1521(b), which says that the court must authorise the distribution of the debtor's assets located in the US, and will only do so when it is satisfied the interests of US creditors are "sufficiently protected".

CRT applied to the court accusing Baden and his counsel – US firms Cohen & Buckley and Tarter Krinsky & Drogin, and UK firm Enyo Law – of pursuing claims in the United States and then distributing "80% of those amounts to themselves".

The broker dealer holds a FINRA arbitration award against the Luxembourgish company, granted by a tribunal last year after a failed claim by Baden over accusations that the CRT had engaged in a "complex conspiracy" with SLS's onetime largest shareholder David Elias.

International fraud

SLS's troubles over the last decade have seen the company placed into liquidation in Luxembourg, an investigation by the UK's Serious Fraud Office, and suspicions that Elias had faked his own death.

The District Court of Luxembourg put the company into liquidation in 2009, three years before SLS filed for Chapter 15 protection in New York.

In a declaration filed with that petition, Baden said Luxembourg's State Prosecutor had moved to wind up and liquidate the company after it failed to "make required filings" and abandoned its registered office in violation of commercial company laws.

2009 also saw the UK administration of Keydata, a UK-registered investment marketing firm, after an application by then-UK regulator the Financial Services Authority. It emerged that £103 million of life insurance policies managed by SLS and sold to Keydata investors had been "misappropriated".

The UK's *Daily Mail* reported in 2011 that Elias, SLS's largest shareholder at the time of the Keydata administration, had been investigated by the UK's Serious Fraud Office (SFO) over the company's collapse until May 2009, when he allegedly died of pneumonia in Singapore.

The newspaper says that SFO investigators had "serious doubts" that Elias, whose ashes were said to have been scattered in the jungles of Borneo, was in fact dead. Instead the *Mail* reports they suspected that he had in fact faked his own death.

The SFO closed its investigation in May 2011 having failed to find enough evidence to back a criminal prosecution.

SLS v CRT

Baden began Financial Industry Regulatory Authority (FINRA) arbitration proceedings against CRT in 2014 after being given authority to sue in the US on SLS's behalf, also filing an action against the broker dealer and two of its investment bankers in the SDNY District Court. SLS has since then pursued a case in New York's state courts. Both the state and federal claims were stayed pending the arbitration.

In its claims SLS has been seeking over US\$500 million in damages, accusing CRT and the two bankers of playing "a pivotal role in a major international fraud".

In documents filed at the SDNY District Court, SLS said CRT had participated in a scheme that raised about US\$250 million for SLS on the basis of false representations through a "complex conspiracy" with Elias and BWT, a Malaysian company which Elias also owned.

SLS argued that CRT had advised it over a bond offering backed by life insurance policies, purchased on the secondary market. It claimed the bonds' flawed structure had allowed Elias to liquidate the insurance policies and abscond with the proceeds.

The district court case was stayed pending the arbitration, and after the arbitrators threw out the bondholder claims – as they were not party to the arbitration agreement between the parties – SLS commenced a case in the New York State court, which has also been stayed.

But the arbitration tribunal issued an award in CRT's favour in March 2017 after 32 days of hearings spread over 13 months, denying all of Baden's claims against the broker deal. The tribunal awarded CRT legal fees and indemnification damages in the sum of over US\$4.25 million, and attorney's fees of almost US\$150,000.

A few weeks before the arbitration was concluded, Judge Chapman denied a request by Baden for discovery in the Chapter 15 case as premature and in violation of FINRA rules. CRT had argued he was attempting to investigate the collectability of an anticipated award and circumvent the discovery rules.

CRT applied to the SDNY bankruptcy court on 29 June for the return of assets SLS had obtained in the US and distributed, accusing Baden of spending the past six years "investigating and prosecuting burdensome, vexatious and meritless claims" against it.

Violating the code

Most recently, the matter returned to the New York bankruptcy court to deal with Baden's alleged violation of the Bankruptcy Code.

CRT filed a motion with the bankruptcy court on the back of its arbitration award in July seeking details of all proceeds Baden had obtained in the United States.

It said that Baden had collected US\$18.6 million in the United States and had distributed "every penny" without its consent. According to CRT's 29 June motion, Baden paid over 80% of the collected funds to professionals, including almost US\$9 million to Cohen & Buckley and about US\$6 million to Enyo Law.

The filing also said that Baden's counsel Cohen & Buckley had announced it was winding down its operations only a day after disclosing to the court that it had received over US\$8.7 million in unauthorised transfers from SLS.

The "audacity" of the request to be removed from the Chapter 15 process was even more apparent when it was later revealed that Baden's counsel had failed to inform him of the Bankruptcy Code's restrictions on distributing assets, the motion said.

CRT argued that Baden and his representative's assurances, that its interests would be "sufficiently protected", were belied by their ongoing efforts to use the US judicial system to "pursue more meritless litigation".

"While Baden made sure he knew all the rules when he sought recognition under Chapter 15 so as to use US laws and courts to pursue claims against US entities, he and his counsel disregarded those rules when it came time to distribute the assets recovered", it argued.

In response to the allegations, Cohen & Buckley partner **Michael Cohen** told the court that he "firmly believes... the Section 1521(b) requirement was not intentionally ignored by anyone and that the Foreign Representative was unaware of it."

But in the court's 10 August order Judge Chapman instructed Baden to wire US\$2.93 million into a US account, and barred any distributions from being made without the court's order. Judge Chapman also issued an injunction against Cohen & Buckley spending any further funds from its account.

Following CRT's allegations of "discrepancies" in the foreign representative's status reports – including distributions of US\$642,000 made to "unidentified parties" – the court ordered Baden, Tarter Krinsky, Enyo Law and Cohen & Buckley to file an accounting of all

distributions of assets collected by Baden, and supporting documentation for all payments made.

Baden's counsel did not respond to *GRR*'s request for comment.

In the US Bankruptcy Court for the Southern District of New York

In re: SLS Capital

- **Judge Shelly Chapman**

Foreign representative of SLS Capital

- Baden & Baden

Partner **Maître Yann Baden** in Luxembourg

Counsel to the foreign representative of SLS Capital

- Cohen & Buckley

Partners **Michael Cohen** and **Richard Regan** in Baltimore and Washington DC

- Enyo Law

Senior partner **Simon Twigden** in London

- Tarter Krinsky & Drogin

Co-chair of the bankruptcy practice **Alez Spizz** and counsel **Jill Makower** in New York

Counsel to CRT Capital Group

- Curtis Mallet-Prevost Colt & Mosle

Partners **Lynn Harrison** and **Nancy Delaney** with associate **Peter Buenger** in New York