

Cross Border Restructuring and Insolvency Update

May 2012

F-Tex SIA v Lietuvos-Anglijos UAB (CJEU C-213/10)

CJEU considers the relationship between the Judgment and Insolvency Regulation

Prior to the opening of Insolvency Proceedings NPLC, a German company, made a series of preferential payments (challengeable by a Liquidator under the German Insolvency Code) to J, a Lithuanian company. NPLC's liquidator assigned the cause of action to F-Tex (one of NPLC's major creditors) in return for 33% of any recoveries. F-Tex issued proceedings against J in the Lithuanian court. As readers will be aware, under English law preference claims are personal to the Office Holder and are not capable of assignment, unlike many other Jurisdictions.

The Lithuanian court dismissed the claim on the basis that the German Courts (where the Main Proceedings had been opened) had jurisdiction. The Court of Appeal in Lithuania reversed the lower Court's decision. J appealed to the Supreme Court of Lithuania who stayed proceedings while referring two key questions to the CJEU.

1. Does the Court of the Member State where Main Proceedings have been opened have exclusive jurisdiction to deal with actions that derive from those insolvency proceedings?; and
2. Does the assignment of a cause of action have the effect of removing the claim from the insolvency exception of the Judgments Regulation?

The Judgments Regulation seeks to provide uniformity and certainty on jurisdiction and enforcement across the EU member states. In order to fall within the scope of the

Judgments Regulation, the claim would have to (i) be a 'civil and commercial matter'; and (ii) not fall within the exception contained in Art 1(2)(b) relating to 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings'.

The CJEU confirmed that assignment of the cause of action removed the claim from the insolvency exception with the result that the claim was governed by the Judgment Regulation and not the Insolvency Regulation and therefore the claim should be pursued in Lithuania. The claim did not derive from or was closely linked with the insolvency proceedings because the assignment changed the nature of the claim. The Court said the effect of the assignment, subject to the 33% payment clause, conferred legal ownership of the claim on F-Tex who acted in their own interests, rather than the creditors' interests.

Regrettably because the CJEU answered the second question in the affirmative the first question remained unanswered, but it is hoped the UK Court of Appeal will consider it in the pending appeal in *Polymer Vision*.

Trillium (Nelson) Properties v Office Metro Limited (2012) EWHC 1191 (Ch)

Winding Up Petition dismissed by UK High Court due to lack of establishment

R was part of the Regus Group with a registered office in England. It had entered into a guarantee in relation to

various properties in England. The petitioner presented a petition for money due under the guarantee.

R claimed to have transferred its main headquarters and place of administration to Luxembourg, retaining a registered office in England purely out of necessity. A Trustee in Bankruptcy had been appointed in Luxembourg and those proceedings were Main Proceedings.

The petitioner pursued the petition in England on the basis that the winding up proceedings would be secondary proceedings but needed to demonstrate that R had an establishment in England.

The Court confirmed that the relevant date for determining establishment, following *Staubitz-Schreiber*, was the date of commencement of the insolvency proceedings (presentation of petition).

It held on the facts that there was no establishment because the only activity carried out in England related to its continuing guarantor liabilities and its ongoing requirements to comply with English company law filings. These activities were held to be transitory for the purposes of the establishment test, and thus the Court dismissed the petition.

The Court also refused to make a winding up order as a matter of discretion because secondary proceedings in England would have served no useful purpose.

Updates from around the World

Austria

The Austrian government has injected almost €1 billion into the state-owned lender KA Finanz AG after it lost an equivalent amount following the restructuring of Greek debt.

The news of the cash injection surfaced after it was revealed that the supposedly 'safer' sections of the banking sector (Kommunalkredit) had recorded a €148 million loss this year. The Austrian government was forced to step in and save three of its biggest banks in 2008. With the continuing euro crisis it looks probable that the 2008 sovereign debts will have to be written-off.

Spain

Bankia SA has been part-nationalised after the Spanish government was forced to take a controlling stake in the bank after converting a €4.5 billion loan into shares. It has been reported that a further €10 billion will be injected by

the government in an attempt to restore the financial markets' faith in Spain during the euro crisis.

Bankia is the largest of eight Spanish banks to be bailed out by the government, leading to concerns being voiced over the future solvency of other large Spanish banks.

United Arab Emirates

Justice Minister Hadeef bin Juan al-Dhaheeri has announced that the UAE will approve a bankruptcy law to come into force by the end of June 2012. The new laws are aimed at both listed and family-owned companies in the UAE and will allow them to be rescued rather than having to go through lengthy bankruptcy or liquidation proceedings. Existing federal bankruptcy laws remain untested in UAE courts as distressed companies prefer to settle creditor claims privately because the existing legislation is opaque and complex.

United Kingdom

The UK Supreme Court has recently heard arguments on whether or not bankruptcy rulings made by foreign courts should be directly enforceable in England and Wales.

Rubin v Eurofinance concerns recognition and enforcement of US bankruptcy judgments in England. New Cap Reinsurance concerns the enforcement by an Australian Liquidator of an Australian judgment in England.

The outcome of these cases could mark a significant change and signal a shift to universalism in cross-border insolvency cases. Judgment has been reserved until later this year.

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