Recognition of Judgments and Public Policy

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Article 16 EU Insolvency Regulation

Under the application of the EU Insolvency Regulation ("InsReg") a judgment opening an insolvency proceeding in a Member State must – automatically – be recognised in the other Member States (except Denmark). Article 16(1) determines that any judgment opening insolvency proceedings handed down "by a court of a Member State which has jurisdiction pursuant to Article 3 InsReg" shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings. It has been submitted in German legal literature[1] that a court in another Member State would be able to test the jurisdiction of the court that opened main proceedings by applying Article 16(1), first sentence, because the system of recognition of Article 16 presupposes that pursuant to Article 3 InsReg a duly authorized court, with "international jurisdiction", has opened the main proceedings. The "second" court should test this, thus this opinion.
Already in 2005 the Austrian Supreme Court has rejected this idea. It considered: "The Regulation is based on mutual trust. Decisive is not whether the court in the other Member State has jurisdiction pursuant to Article 3, as the text of Article 16(1) provides. This is a misconception. Decisive is whether the court has given due consideration to the international jurisdiction according to Article 3(1). Even when the court opening main proceedings …… has not given any reason for its international jurisdiction, this is not manifestly contrary to public policy."[2] The Austrian judgment has been promoted to the European division. The European Court of Justice ("ECJ") in the Eurofood case[3] has ruled that the main insolvency proceedings opened by a court of a Member State must be recognised by the courts of the other Member States, "without the latter being able to review the jurisdiction of the court of the opening State." A decision to open insolvency proceedings for the purposes of Article 16's rules of automatic recognition is, according to the European Court, "a decision handed down by a court of a Member State to which application for such a decision has been made, based on the debtor's insolvency and seeking the opening of proceedings referred to in Annex A to the Regulation, where that decision involves the divestment of the debtor and the appointment of a liquidator referred to in Annex C to the Regulation. Such divestment implies that the debtor loses the powers of management that he has over his assets."

Court of Appeal Innbruck 8 July 2008

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[1] Mankowski in his comments regarding Court of Düsseldorf 6 June 2003 (Supply Team GmbH / Daisytek ISA), EWiR 2003, 767.

[2] Austria Supreme Court 17 March 2005 (8Ob131/04d) (*Stojevic*). All translations in this article are mine.

[3] ECJ 2 May 2006 (C-341/04). See: Wessels, The place of the registered office of a company: a cornerstone in the application of the EC Insolvency Regulation, in: 3 European Company Law, August 2006, pp. 183-190.

In a decision of July 2008 by the Court of Appeal of Innsbruck in Austria, the opinion published in Germany is on the table again.[4] The insolvent debtor is a German incorporeted company (D) and in turn a full subsidiary of a parent company (Holding H), incorporated in Austria. D operates (production and packaging of body care products and perfumes) from two locations in Germany (Düsseldorf and Lenzkirch, in the jurisdiction of Freiburg), both registered in the German Trade register. On 20 May 2008 employees of D submitted a request for insolvency of D to the Court in Freiburg. One day later the appointment follows of a "*vorlaüfige Insolvenzverwalter*", a provisional liquidator (listed in Annex C). It is a person called Dr. K. The Court decides to "impose a general prohibition of transfers on the debtor" (in the meaning of § 22(2) nr. 2 InsO/German Insolvency Act). On 23 May 2008 District Court Innsbruck (although aware of the judgment of the Court in Freiburg) opens, at the request of the Austrian liquidator X *(*"*Masseverwalter*"), main insolvency proceedings ("*Konkursverfahren*") against D, as it regarded COMI to be in Austria (presemption rebutted). The court appoints X as liquidator.
A few days later X files for the opening of secondary proceedings concerning D at the court in Düsseldorf and this court refers the case to AG Freiburg.[5] On 1 July 2008 the Court in Freiburg opens *"ein (weiteres Hauptinsolvenzverfahren)"* (a further main proceeding). K and two creditors appeal against opening of main proceedings in Austria.
Court of Appeal Innsbruck d.d. 8 July 2008 decides that main proceedings opened in Germany must be recognised according to Article 16 InsReg in a case in which a provisional liquidator has been appointed, if a general injunction/prohibition has been imposed on the debtor. This must be seen as a "divestment" as meant by the ECJ in Eurofood. The Court then cites what the ECJ in Eurofood has ruled in consideration 66.[6] Regarding the decision to impose an injuction on the debtor, it is a fact that D has not been heard and that the Freiburg's court decision does not contain any grounds. Then follows: "This is not manifestly against public policy in the meaning of Article 26, whilst the Austrian Supreme Court has decided that even when the court, which opens main proceedings in the meaning of Article 3(1) has not given any reason for its international jurisdiction, this is not manifestly contrary to public policy. This must also apply here. Therefore the judgment of Freiburg must be recognised. The judgment of the District Court Innsbruck is null and void."

Comment

Recognition

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[4] Oberlandesgericht Innsbruck 8 July 2008, ZIP 2008, 1647.

[5] § 3(2) InsO: "If several courts have jurisdiction, the court first requested to open the insolvency proceedings shall exclude any other jurisdiction."

[6] "66. Concerning more particularly the right to be notified of procedural documents and, more generally, the right to be heard, …….., these rights occupy an eminent position in the organisation and conduct of a fair legal process. In the context of insolvency proceedings, the right of creditors or their representatives to participate in accordance with the equality of arms principle is of particular importance. Though the specific detailed rules concerning the right to be heard may vary according to the urgency for a ruling to be given, any restriction on the exercise of that right must be duly justified and surrounded by procedural guarantees ensuring that persons concerned by such proceedings actually have the opportunity to challenge the measures adopted in urgency."

The system of recognition, followed in the Insolvency Regulation, is based on the principle of mutual trust (recital 22). This principle is an attempt to reflect the concept of awareness that Member States should have in terms of each others proceedings, as such proceedings appear in Annexes A and B. Member States know (are presumed to know) in advance, which proceedings they shall recognize. In the Preamble "the principle of mutual trust" is projected as being decisive in the event of concurrence of (alleged) international jurisdiction. According to my understanding the preamble links "trust" with reliance on (automatic) recognition. However, it is my contention that any international scope and effect of judicial authority (to open proceedings) cannot be derived from a rule which relates to the recognition of that specific judgment. Such scope and effect should be related to a rule concerning the judicial authority – which precedes the judgment (to be taken) and therefore its recognition. The Regulation enables a direct realization of judicial authority. The common ground for "mutual trust" most probably is Article 10 EC Treaty.

Where international jurisdiction exists the idea of divestment unfolds directly and a liquidator will be appointed. The courts in other Member States are, by way of universal effect, theoretically confronted with an application for insolvency proceedings which does not fully meet the criteria of Art. 1(1) InsReg. The wording of Article 16(1) "…. shall be recognized" (in Dutch: "*wordt erkend*", in German: "*wird anerkennt*", and French: "*est reconnue*") does not adequately reflect the legal meaning of "automatic" - whereby no further action (e.g. an additional judgment in another country or publication in another Member State) nor any form of preceding court judgment in another country is required for recognition to take effect. It is submitted that no time elapses between the time of the opening of main proceedings in one Member State and the recognition of such proceedings in other Member States.

The Innsbruck decision has been welcomed in Germany[7], as it confirms the view that because a provisional liquidator is seen as a person that (partly) divests the debtor and therefore the opening decision is to be recognised. The view, developed in England that all three types of provisional liquidators (which are known in the German insolvency legislation) are not to be recognised[8], is not correct. The Innsbruck court recognises the proceeding in which the type which is called the "strong" liquidator is appointed.

Public policy

Any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual. Thus Article 26 InsReg. A general consequence is that the foreign judgment cannot be the subject of a review in respect of substance (know as: *révision au fond*). All questions regarding the substance of the judgment must be discussed before the courts of the State which opened the main insolvency proceedings. In the State where recognition or

[7] Mankowski, NZI 11/2008, 700ff; Paulus, EWiR 2008, 653.

[8] See Borchier Holdings Ldt. v. Exner [2006] EWHC 2594 (Ch.), [2007] B.C.C. 127 [Ch.D., Warren J.] and Moss, [2006] 19 Insolvency Intelligence 97, at 100.

enforcement is requested, the court is only permitted to consider whether the foreign judgment will have effects which are contrary to State public policy pursuant to Article 26. Another consequence is that there is no provision concerning verification of the international jurisdiction of the court of the State of origin (being the court in the State in which proceedings were opened and which has jurisdiction under Article 3): "The courts of the requested States may not review the jurisdiction of the court of the State of origin, but only verify that the judgment emanates from a court of a ….. State which claims jurisdiction under Article 3".[9]

Public policy is related to the public policy derived from national law, and therefore the concept does not necessarily have a Community-wide uniform content. Public policy is based on the fundamental principles of the law of the State in which its effects are to be felt and involves, in particular, constitutionally protected rights and freedoms, and fundamental policies of this State. Any possible conflict with "public policy" should be assessed at the time of recognition of the opening judgment. It should be reviewed not in an abstract manner, but on the basis of the concrete circumstances of the case.[10] In comparison to the Brussels Regulation 2002, the Insolvency Regulation appears to focus on two aspects of public policy, i.e.: "in particular its fundamental principles or the constitutional rights and liberties of the individual." A third distinction can be identified with respect to the effect of invoking public policy: under the Brussels Regulation the consequence of a decision being contrary to public policy leads to total rejection, whereas under the Insolvency Regulation: "[P]ublic policy may result in total or partial rejection of the foreign judgments."[11] The flexibility accorded under the English text of the Insolvency Regulation is not sufficiently reflected in the Dutch text (*indien*) or the French text (*lorsque*), but is more easily identified in the German text (*soweit*).

Several courts have carried out assessments on the basis of principles of due process.[12] It should be noted that the opening the German insolvency proceeding in this specific case according to German law does not require the debtor to be heard, where in Austria for certain insolvency proceedings there is no opportunity to be heard, which is seen as not contrary to Article 6 ECHR.[13] The Dutch legislator has provided an additional procedural provision to smoothen the efficient application of the Insolvency Regulation. Dutch legislation is based on the need for ease of the assessment to be made by a court and for this reason Article 4(4) and Article 214(2) Dutch Bankruptcy Act provides "the request should contain such data to enable the court to assess whether it has international jurisdiction" as meant in the Regulation. In the Elucidation it is mentioned that, in general, this information may be brief. There is no sanction as the Elucidation assumes that the petitioner would provide the necessary data without such a sanction.[14] The mere lack of providing this fact has led the Austrian Supreme Court in 2005 to decide that even when the court, which opens main proceedings in the meaning of Article 3(1) has not given any reason for its

[9] Virgós / Schmit Report (1996), para. 202.

[10] Virgós / Garcimartín, The European Insolvency Regulation: Law and Practice, Kluwer Law International 2004, para. 404: Wessels, InternationalInsolvency Law, Kluwer 2006, para. 10817; Mankowski, NZI 2008, 704.

[11] See Virgós/Schmit Report (1996), para 209.

[12] Wessels, o.c., para 10820ff.

[13] Mankowski, NZI 2008, 704, with references.

[14] Parliamentary documents nr. 28 654, nr. 5.

international jurisdiction, this is not manifestly contrary to public policy. The Innsbruck court applies the same rule, which – with respect – is contrary to the idea the a court should ex officio assess its (international) jurisdiction. Is'n it a requirement for the better facilitation of judicial cooperation in the meaning of Articles 61(c) juncto Article 67 EC Treaty to ex officio assess and report (briefly) the result of such a test.[15]

[15] Wessels, o.c., para. 10554ff.