Briefing

Corporate Turnaround and Insolvency

BURGES SALMON

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To recognise foreign proceedings or not – two recent contrasting decisions under UNCITRAL and the EU Regulation

Although the EU Insolvency Regulation and the UNCITRAL Model Law have been with us for some time, decisions involving the court's recognition of foreign proceedings continue to evolve and will – of necessity – turn on the specific facts of every case. We investigate two recent decisions which came up with very different results.

The background – Re OGX Petroloeo E Gas S.A. [2016] EWHC 25

OGX Petroleo (**OGX**) was a Brazilian company which entered into a restructuring plan in Brazil. OGX had chartered a ship from two parties, and when it ran into financial problems it began to renegotiate the charter terms, whilst at the same time petitioning for judicial reorganisation in the Brazilian Court. The court papers indicated that the new charter would **not** be the subject of the plan, and so the charterers were omitted as creditors. The judicial reorganisation was approved and a new charter was duly entered into, which provided for arbitration in London.

When the new charter fell into arrears, the charterer duly applied for arbitration in London. OGX then applied for recognition of the judicial restructuring under English law using the UNCITRAL Model Law, which had the effect of automatically staying the arbitration proceedings.

The background – Kornhaas v Dithmar [2015] EUEC C- 594/14

In this case, a company called Kornhaas Montage und Dienstleistung Limited (Kornhaas) was an English company which mainly operated - and had a branch - in Germany. Simona Kornhaas (**SK**) was a director. Main insolvency proceedings were opened in Germany against Kornhaas, and the liquidator, Thomas Dithmar (**TD**), pursued a claim against SK under paragraph 64 of the German company law, which states that managing directors of an insolvent company must apply for insolvency proceedings to be commenced within three weeks of the company becoming insolvent (as "insolvency" is understood under German law), or else face personal liability for payments made by the company after it became insolvent.

The issues – both cases

In *OGX*, the court was required to make a determination for recognition of foreign main proceedings after the ex parte application was made. The court asked for an explanation of any adverse effects which recognition may have on third parties who were not represented at the hearing. OGX refused, saying that it had adduced sufficient evidence to allow recognition, and that factors affecting the automatic stay were irrelevant.

In *Kornhaas*, TD was successful in his claim in the lower court of Germany. When SK brought appeals against that decision, the German Federal Court applied to the Court of Justice of the European Union (**CJEU**) for a ruling on whether the claim was governed by German law or by English law, given that an English company was involved.

What did the courts decide?

In OGX, the parties had - by the time of the High Court hearing – come to an agreement to lift the automatic stay in order to allow the arbitration to proceed. Nevertheless, the court ruled that – had it been required to make a determination – it would have exercised its discretion to vary or lift the stay on proceedings for public policy reasons, emphasising that in any application for recognition under UNCITRAL, full and frank disclosure to the court on the effects of recognition was expected. OGX should have told the court that the claims under the charter were not included in the judicial reorganisation plan rather than seek a collateral advantage through non-disclosure.

In *Kornhaas*, the CJEU ruled that German company law applied to the company by operation of Article 4(1) of the Insolvency Regulation. The claim was an action directly arising from insolvency proceedings. As the insolvency proceedings had been opened in Germany, its rules were to be applied as to the consequences of the director's failure to open proceedings when required, and accordingly under Article 3 German law was to be applied. The CJEU also considered whether the application of legislation of a member state to an entity incorporated in another member state infringed the "freedom of establishment" principles in the Lisbon Treaty (Articles 49 and 54). However, the court decided

that no infringement existed, given that the German legislation was only applied at the point in time at which insolvency occurred, and did not impact upon legal capacity or minimum capital requirements (both of which are examples which the courts have previously ruled infringed the Treaty).

What does this mean for practitioners?

These cases are useful in that they highlight the difference in nature between the EU Insolvency Regulation – which, when main proceedings are opened within a member state, automatically applies the laws of that member state to other EU jurisdictions in which an insolvent person or entity operates – and the UNCITRAL Model Law (as applied by the Cross-Border Insolvency Regulations 2006), under which an application is made to foreign courts in order to recognise the foreign main proceedings, and the court's discretion is involved in deciding whether to do so or not.

Of course, the variable element in the EU Regulation is that of COMI, and evidence can always be adduced to rebut the presumptions governing the centre of main interests, or indeed to show that COMI has shifted.

No doubt this will remain a fruitful area of debate for some time to come, and these cases serve as a useful reminder to practitioners of the variables involved.

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