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Trans-European insolvency proceedings

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Trans-European insolvency proceedings

BY DOMINIK GAŁKOWSKI

Amid the economic crisis, entrepreneurs should carefully consider European provisions regulating bankruptcy issues, i.e. Council Regulation (EC) No. 1346/2000 of 29 May 2000. Under these provisions, the declaration of insolvency of a company in one member state may be carried out by the court of another member state.

To declare insolvency in a different member state than the one in which the statutory registered seat of the debtor is dependent on, the location of the centre of main interests (COMI) must be established. Indeed, the location of the company's registered seat, as mentioned in its statute, is not always the company's headquarters or the place where it conducts business activities. This is what we call 'forum shopping', which involves the transfer of the estate or court proceedings from one member state to another, in order to obtain the most favourable legal situation. In order to guarantee the creditors' protection against the possibility for debtors to use forum shopping, the possibility for a court to declare the insolvency of a company has been introduced, depending on the COMI. The regulation also establishes the presumption that the COMI location is the

registered seat mentioned in the company's statute. The recognition of the jurisdiction by the court of a state different than the statutory registered seat shall be dependent on rebutting this presumption.

Establishing the location of the debtor's main centre of interests has been at the source of much controversy. In the judgment in case no. C 341/04 (Eurofood IFSC Ltd), the European Court of Justice confirmed that "the presumption laid down in the second sentence of Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, whereby the centre of main interests of that subsidiary is situated in the Member State where its registered office is situated, can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which location at that registered office is deemed to reflect." The ECJ has indicated that such a situation may take place, specifically in the case of the so-called 'company-post box', which does not conduct any activities on the territory of the member state, in which it has its registered seat. Attention has also been drawn to the fact that if the company in fact conducts its activities in a state in which its statutory seat is located, then the possibility that the economic decisions are or may be controlled by a superior company having its registered seat in a different member state, is not sufficient to rebut the presumption established in the regulation. It should be noted that a court's decision on the declaration of insolvency may only take place by means of appealing against such a judgment, pursuant to the relevant provisions of the state's procedures. In the event of doubts in this scope, motioning the ECJ with a prejudicial enquiry may prove necessary.

The regulation is of the stance that the introduction of uniform and universal insolvency proceedings for all EU member states is not necessary – for this reason it does not provide detailed procedural regulations, only indicating the minimum requirements for insolvency proceedings, which will vary on a local basis. The administrator mentioned in the judgment on the declaration of insolvency is authorised

to exercise all the entitlements granted to him/her, depending on the country instigating the proceedings.

The judgment in the subject of declaring insolvency, pursuant to Article 3 of the Regulation, is subject to automatic recognition in all remaining EU states, from the moment it becomes effective in the state instigating the proceedings. This means that it is not necessary to conduct any additional proceedings in the debtor's state. However, the regulation introduces a security system, allowing the member state to refuse to recognise insolvency proceedings instigated in another member state, in case recognition would contradict its public policy, fundamental principles or rights, as well as freedom of individuals, granted by the constitution. In the above cited judgment, the ECJ expressed the opinion that the refusal to recognise the judgment on the declaration of insolvency may constitute a violation, by the court, of the basic right of being heard, entitled to the participants of the proceedings.

The obligation of immediately informing all creditors, whose place of residency or registered seat is located in other member states, rests with the court that issued the judgment on the debtor's insolvency. Notification on this takes place through an individual notification, which must also contain information on the deadlines, the consequences of failing to do so, as well as the bodies or institutions relevant to accept submissions of statements of claims. Creditors are of course entitled to submit their claims in relation to the debtor.

The regulation foresees the institution of so-called secondary insolvency proceedings (Article 27 of the regulation) – this means proceedings instigated in the state of the debtor's statutory seat or branch. Such proceedings must be conducted according to the legal provisions of this state and must only cover the estate of the debtor located on the territory of the said state. Importantly, when examining a motion for the instigation of secondary proceedings, the court is exempt from the duty of examining whether the debtor is insolvent. The right to instigate such proceedings is held by the court administrator in the main proceedings as well as by any other person entitled to lodge a motion for the dec- ▶▶

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laration of insolvency in the state where the secondary proceedings are to be instigated. It is also not possible to examine the jurisdiction of the state whose court declared the debtor's insolvency in such proceedings. Furthermore, the regulation states that secondary proceedings must encompass the liquidation of the debtor's estate.

Undoubtedly, in a situation in which businesses' operations increasingly extend beyond the borders of one state, entrepreneurs have

a tendency to use differences between individual legal systems to maximise their legal situation in relation to creditors. As such, the possibility of declaring insolvency by a court of a different state than that in which the debtor's statutory seat is located, introduced by the regulation, should be deemed as a solution strengthening trade security. However, in order for this mechanism to function effectively, courts must avoid overtly rash declarations of insolvency. ■



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