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New enforcement in France of Council Regulation of 29th May 2000 on insolvency proceedings: the Singapore syndrome !

International bankruptcy law has been deeply modified pursuant enforcement in national legislations of the Council Regulation n° 1346/2000 of 29th May 2000 on insolvency proceedings.

The Regulation has set out a joint system in which the court of "*the centre of a debtor's main interests*" has jurisdiction to open "*main*" insolvency proceedings (see : article 3-1 of Council Regulation of 29th May 2000), whereas Courts of other Member States where the debtor has establishments shall have jurisdiction, under specific conditions, to open "*secondary*" proceedings against these establishments which in such case must only be winding-up proceedings (see : article 3-3 of Council Regulation of 29th May 2000 and judgment of the Court of Appeal of Versailles, France, dated 4th September 2003).

The effects of the "*main*" proceedings aim at encompassing all the debtor's assets located in the territories of the Member States, in absence of establishments, whereas the effects of the "*secondary*" proceedings are limited to the assets located in the territory of the Member State in which the secondary proceeding has be opened.

As few French and foreign Courts have ruled about enforcement of that Regulation, the recent judgment delivered by the Commercial Court of Nanterre (France) on 19th May 2005[1], related to the media and spectacular bankruptcy of British car manufacturer MG ROVER, deserves our attention.

[1] T. Com. Nanterre, 19 mai 2005, SAS Rover : Juris-Data n°2005-271011 ; Actualités des Procédures Collectives, n°11 – 1er juillet 2005

This judgment of the Commercial Court of Nanterre enforces the said Council Regulation of 29th May 2000 and reminds us (1°) the principle of full recognition of judgments delivered by Courts of other Member States and (2°) what is the extent of supervisory by a Court of a Member State of a foreign decision opening insolvency proceedings against a company having its registered office in that State.

In our case, the High Court of Justice of Birmingham, United Kingdom, has opened an insolvency proceeding against the English company MG ROVER GROUP LTD.
That Court opened also a "*main*" insolvency proceedings against one of its subsidiary, SAS ROVER FRANCE, a company under French law, entered into the Trade and Company Register of Nanterre (France) and having its registered office in France.
Maybe furious because the fate of this French company "took French leave"…, the French Public Prosecutor attempted to challenge that judgment.

With reference to article 3-1, paragraph 2 of Council Regulation providing that "*in the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary*", the French Prosecutor challenged the legality of the insolvency proceedings opened by judgment delivered by the High Court of Justice of Birmingham against SAS ROVER France, insofar as according to him, English origin of the company capital and British nationality of the main supplier (i.e. MG ROVER Group Ltd) are not good enough criterions to state that "*the centre of main interests*" is located in United Kingdom.

And referring also to article 26 of said Regulation that provides as follows: "*Any Member State may refuse to recognize 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*", the Prosecutor requested the unenforceability of the judgment of the High Court of Justice of Birmingham, being concerned about employees' fate of the important French subsidiary as well as payment of their wages, and pointing out the risk of total disorganization of ROVER dealer network in France.
France is presently very concerned about unemployment issues.

The Commercial Court of Nanterre dismissed that argumentation and confirmed that the High Court of Justice of Birmingham has full jurisdiction to open insolvency proceedings against SAS ROVER France.

The said decision reminds us the following two important provisions of the Council Regulation as follows :

1. Firstly : the new principle, as stated in article 16 of the Council Regulation, i.e. the general principle of recognition of any judgment opening insolvency proceedings, whereas up to now judgment of bankruptcy had to be recognized in another Member State within the scope of special proceedings such as "*exequatur*" in France.

As a matter of fact, even if the Commercial Court of Nanterre points out it is aware that pursuant to article 3-1 of the Council Regulation, "*the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary*" and "*the centre of its main interests shall be the place of the registered office in the absence of proof of the contrary*", it also reminds that "*in this special case, the English judge (…) has been convinced that the centre of interests of ROVER France is in Longbridge*" and that the said decision shall be recognized in France.

It is not the responsibility of the judges of a Member State to challenge a judgment delivered by another Member State or to carry out additional checks concerning the assessment requirement of the place of "*the centre of a debtor's main interests*", as the Prosecutor argued : English judges supremely decided that "*the centre of main interests*" of ROVER FRANCE is in the United Kingdom, and the said decision is enforceable in all the other Member States of the European Union.

It shall be pointed out that this general principle solves all jurisdiction conflicts that may arise when courts of two different Member States of the European Union decide to open insolvency proceedings against the same debtor, the one arguing that the statutory registered office of the debtor is located in its territorial jurisdiction, the other stating that "*the centre of a debtor's main interests*" is physically located in its territorial jurisdiction. Thus, chronological criterion shall apply : First come, first served ! The first proceedings opened in a Member State of the European Union shall automatically be recognized in all other Member States.

From the point of view of experts, this principle may support some *law shopping* in accordance with the objective pursued by actors of insolvency proceedings.

2. Secondly : the general principle mentioned above is moderated by provisions of article 26 of the Council Regulation (see above), which shall be considered as a "*safeguard clause*", a kind of a reminder of protectionism, enabling to refuse the recognition of decisions delivered by other Member States of the European Union in case their "*effects* [are] *manifestly contrary to the State's public policy*".

> " French judges say we shall trust in our neighbor and his skills … even if he is a British national. "

In this specific case, having stated that English administrators of MG ROVER Group Ltd had promised SAS ROVER France would honor payments due to its employees in their term, and that MG ROVER dealers and MG ROVER Group had come to an agreement related to recovery of business activity, the Court strictly applied article 26 of the Council Regulation and decided that the recognition of the judgment delivered by the High Court of Justice of Birmingham and its enforcement in France are not "*manifestly*" contrary to the French public policy.

Thus, only a control of the compliance of the foreign decision with a State's public policy can be carried out by the jurisdiction of another Member State in which this decision will have consequences (in this specific case, France).

Both provisions of the Council Regulation, established by the French Court of Nanterre, are justified by a very important idea of the Council Regulation : Relations between Member States shall be based on mutual trust, which is the basis of the European experience, from Adenauer to Berlusconi, from General de Gaulle to Tony Blair.
French judges say we shall trust in our neighbor and his skills … even if he is a British national.

The French Prosecutor, who forgot these principles, saw the insolvency proceedings of ROVER FRANCE go across the Channel to our British friends, such as did the Olympic Games of 2012 in London.

This is what we call the Singapore syndrome.

How to lodge a claim before court within insolvency proceedings in Austria

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Since the EC Council regulation No 1346/2000 of 29 May 2000 on insolvency proceedings has come into force, any creditor who has his habitual residence, domicile or registered office in a Member State, has the right to lodge claims in the insolvency proceedings opened in another Member State (article 32 and 39).

The following article should give you a short information, how to lodge a claim within insolvency proceedings in Austria:

Purpose for filing a claim:

A creditor who seeks to be satisfied by the bankrupt's estate must file his claim against the estate in bankruptcy proceedings even if a lawsuit is pending and even if a judgement has already been rendered.

Kind of claims:

Item of claims are proprietary rights being due to the creditor already at the time of the opening insolvency proceedings. The claim can also be covered by a preferential right, a so-called "right in rem". Rights in rem (e.g. lien, mortgage) are third parties rights and entitle the creditor to separate this right from the debtor's assets. If a creditor has a right in rem and does not file his claim, this does not influence the existence of the preferential right.

When and Costs:

The opening of an insolvency proceedings in Austria is published in the bankruptcy edict. Information about the opening and about the progress of the proceedings may be viewed free of charge in the insolvency data file accessible under the internet address: www.edikte.justiz.gv.at .Claims have to be filed within the filing-term being indicated in the bankruptcy edict. In case of a belated filing the creditor must bear the costs of an extraordinary examination hearing which has bean created by that lateness. In any case – independent of the amount of claim - the application fee amounts to 17 Euro and can be settled by payment into the postal giro account with the bankruptcy court.

Where and How?

Claims must be filed with the court which has made the decision of opening the bankruptcy (bankruptcy court). The application itself must contain the amount of the claim (in Euro), the basic facts and the pieces of evidence which can be produced to prove the alleged claim. The application and any enclosed documents must be lodged in 2-fold.

According to article 42 of the council resolution no. 1346/2000, any creditor who has his habitual residence, domicile or registered office in a member state of EU (with the exception of Denmark) can lodge their claim in the official language of their state. In this case the filing of claims must contain the heading "Anmeldung einer Forderung" ("Lodgement of a claim") in German. The court may also request a translation of the application from the creditor.

The claim may be filed by the creditor himself or through an attorney. You can find a form for the filing of claims in insolvency proceedings on the homepage of the Federal Ministry of Justice under: www.bmj.gv.at . I may also draw your attention to the two largest Austrian Creditor Protection Organisations, which are also allowed to lodge claims for creditors:

KSV Kreditschutzverband von 1870
Zelinkagasse 10, 1010 Wien
web: www.ksv.at
e-mail: ksv@ksv.at

AKV Alpenlaendischer Kreditorenverband
Schleifmuehlgasse 2/2, 1040 Wien
web: www.akv.at
e-mail: office@akveuropa.at

I hope, I could give you a summary of the terms, which are essential for a legally valid lodgement of claim in an Austrian bankruptcy proceedings. If you need further information in insolvency subjects don't hesitate to contact me.

Unexpected personal liabilities for foreign directors of Dutch legal entities.

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In the Netherlands the law provides for a far-reaching personal liability for directors of a limited liability company in case of bankruptcy of the company when the company has neglected its duty to file the annual accounts. To my knowledge other EU-jurisdictions do not provide for personal liability on this ground. In practise I regularly notice (foreign) directors being surprised by the risk of being held liable on this ground.

Like in all EU jurisdictions in general a director of a limited liability company is not liable for debts of the company. In the Netherlands, and I assume in most of EU-jurisdictions, there are exceptions to this principle. One of these exceptions is, to my knowledge, unique.

According to article 2:248 of the Dutch Civil Code, on the bankruptcy of a company the director is liable to the estate for the amount of the obligations to the extent that these cannot be satisfied out of the liquidations of other assets if

- the management has manifestly performed its duties improperly; and
- it is plausible that this is an important cause of the bankruptcy.

So far there is no need for the director to be afraid since usually it is very hard for a liquidator to prove that the director has performed its duties improperly and that this caused the bankruptcy.

However Dutch law provides for a reversal of the burden of proof. In case the company did not comply with the legal obligation to file its annual accounts with the Chamber of Commerce in time, the management is considered to have manifestly performed its duties improperly. This means it is impossible for the director to prove that he performed his duties properly. The improper performance is definite! And it gets even worse for the director. The definite mismanagement is presumed to be an important cause of the bankruptcy.

In practise this means the director of the company is liable for all debts of the company when the company filed its annual accounts too late unless the director can prove that the bankruptcy is not caused by his mismanagement. Regularly I hear directors, who are held liable by the liquidator, say in their defence that the bankruptcy is not caused by the late filing of the annual accounts. However this is not what the director has to prove. He has to prove the bankruptcy is not caused by his mismanagement.

The only way the director can prove the bankruptcy is not caused by his mismanagement is by proving there are external factors causing the bankruptcy of the company. For example a vanished market due to a war or an unexpected bankruptcy of an important debtor. Last years 9-11 was a frequently mentioned external factor by directors.

Case law shows it is nearly impossible for a director to prove that the bankruptcy is not caused by his (mis)management. There is plenty of case law concerning directors' liability in the Netherlands. In case law there are only few examples of directors succeeding in proving the bankruptcy is not caused by their mismanagement.

Many people, especially directors, consider this burden of proof to be unfair. A few years ago a director filed the annual accounts one month too late and now this means he is liable for all debts of the company. The idea behind this far-reaching rule is to prevent abuse of limited liability companies.

International aspect.

Foreign companies being active in the Netherlands, frequently own a Dutch subsidiary, a Dutch limited liability company. Besides a Dutch director often a foreign director of the parent company is registered with the Dutch Chamber of Commerce as a director of the Dutch subsidiary. This means in case of bankruptcy the foreign director will risk personal liability in case the annual accounts are not filed in time.

The consequences are severe but the solution is relatively simple: make sure the annual accounts are filed in time.