SUMMARY

2010/53: How a "secondary insolvency" procedure can protect assets from a foreign receiver (IT)

<p>Under EU Regulation 1346/2000 it is possible to open secondary insolvency proceedings even if the establishment situated in the State where the secondary proceedings are to be opened is the only one owned by the debtor subject to the main insolvency proceedings.</p>

Summary

Under EU Regulation 1346/2000 it is possible to open secondary insolvency proceedings even if the establishment situated in the State where the secondary proceedings are to be opened is the only one owned by the debtor subject to the main insolvency proceedings.

Facts

This case concerns the Italian printing company Illochroma Italia s.r.l. ("Illochroma Italia"). It was a wholly owned subsidiary of a French company (the "French parent"). At some point in time Illochroma Italia relocated its registered office from Italy to France at the private address of the legal representatives of the Belgian ultimate holding. The printing plant and the employees remained in Italy and only its registered office moved to France.

Between April and July 2008 the *Tribunal de Commerce de Roubaix-Tourcoing*, in France, ordered a moratorium on Illochroma Italia's debts (*redressement judiciaire*), later followed by receivership (*liquidation judiciaire*). This was possible, given that Illochroma Italia, despite having all of its assets, and therefore its sole *establishment*, in Italy, had its registered office - which is normally considered to coincide with the *"centre of main interests" ("C.O.M.I.")* - in France. The expressions *"establishment"* and *"centre of main interests"* are defined in

Regulation 1346/2000 (the "Regulation"). An *establishment* is defined as *"any place of operations where the debtor carries out a non-transitory economic activity with human means and goods"*. Article 3(1) of this regulation provides: *"The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. 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."*

On 20 October 2008, at the request of a number of Italian creditors (most likely including one or more employees), the *Tribunale de Ivrea* in Italy opened *secondary insolvency proceedings* as provided in Article 3(2) of the Regulation, which provides: *"Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State."* The court based its decision to open secondary insolvency proceedings in Italy on the fact that (a) the courts in the member state in which the debtor has its *C.O.M.I.* (in this case, France) have the power to open "main" insolvency proceedings pursuant to Article 3 of the Regulation; (b) Article 16 provides that a decision by a court in one member state to open insolvency proceedings shall be recognised by, and is directly effective in, every other Member State, without any formalities being required; (c) courts in other Member States cannot open another main insolvency proceeding against the same debtor, nor can they question the legality of the decision to open the main insolvency proceedings, not even on the grounds that the court in question mistakenly assumed that it had jurisdiction; (d) it is, however, possible for secondary insolvency proceedings to be opened in another member state where the debtor has an "establishment", in which case the assets in that member state are liquidated primarily for the benefit of the local creditors.

The receiver appointed by the French court - representing Illochroma Italia s.r.l..- appealed with the Court of Appeal in Turin against this decision by the Italian court, arguing that the sole "establishment" of Illochroma Italia was in Italy, so that the Italian court lacked the power to open secondary proceedings.

Judgment

The Court of Appeal recognised the French receiver's right to appeal the Italian court's decision to open secondary insolvency proceedings in Italy, but it dismissed the appeal, ruling that there was nothing in the Regulation to prevent the opening of secondary insolvency proceedings in Italy, even if this was the country were the only assets of the debtor were situated.

Commentary

Had there not been a secondary insolvency, practically all of Illochroma Italia's assets could have been liquidated in favour of the French creditors, and the Italian creditors would have been subject to the French rules. Was Illochroma Italia's registered office moved to France with a view to this scenario? The published judgement does not reveal this. All we know is that, thanks to the secondary insolvency, the company's assets located in Italy (apparently its only assets) could be liquidated according to Italian law, which accords the employees the highest level of preference over other creditors. In addition, it allows employees to claim seniority-based severance payments, if these are not paid by the employer, as per Italian law (so-called TFR benefits) from INPS, the Italian social security institute.

There is another point to make. In Italy, if a company has been declared insolvent the prospective transferee is not bound by the rules on transfers of undertakings: he is free to hire only a part of employees and is not obliged to grant them all the rights they had with the previous employer. Although this would also have been the case in the absence of a secondary insolvency (the French judgement had direct effect in Italy), it is more obviously so with an Italian secondary insolvency court order. In this regard, it may be noted that Italian law makes it possible to derogate from the transfer of undertaking rules, not only in the event of a court-ordered insolvency but also in the event that an administrative body declares a company to be in a "state of crisis". The ECJ has recently (9 June 2009, case C-561/07) held that this provision of Italian law is not in compliance with the Acquired Rights Directive 2001/23/EC.

Subject: Insolvency

Parties: Illochroma Italia s.rl. *"in liquidation judiciaire"* - v - *Fallimento* Illochroma Italia s.r.l. and others

Court: Court of Appeal of Turin

Date: 10 March 2009

Counsel: Reginaldo, Passalacqua (Illochroma Italia s.rl. *"in liquidation judiciaire"*) and Ambrosini (*Fallimento* Illochroma Italia s.r.l.and others)

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