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Case Study 23 Hypothetical Case Study[1]

StylishHotelGroup is a hotel group with its COMI in Ireland. It has a range of corporate entities in a group structure. Some of these companies are property ownership companies, some are operational. Typically the property ownership companies have 1-5 employees, whereas the operational companies in the group have on average 100 employees (operating the hotels).

In the period 2005-2010 the Group engaged in considerable expansion and borrowed over €500 million euro from its main banker. This loan eventually became a non-performing loan which was temporarily taken over by the Irish state agency (NAMA) but was then sold on to GermanBank plc.

In 2017 StylishHotelGroup and GermanBank entered into a contractual debt settlement agreement which wrote down the total amount owed on the loan and provided for a longer repayment plan. Although concluded in Ireland the contract contained a choice of German law clause. ['the 2017 agreement']

In 2018, finding itself unable to comply with the terms of the 'the 2017 agreement' StylishHotelGroup decided to avail of the Irish preventive restructuring process- and petitioned the Irish High Court to have an Examiner appointed.[2] Most of the trade creditors were supportive of the application to have an Examiner appointed but GermanBank objected strongly.

The High Court refused to appoint an Examiner on the grounds that there was no reasonable prospect of all of the companies in the group receiving the required investment to survive. However, the parent company appealed to the Irish Court of Appeal and an Examiner was appointed to all the relevant companies in the StylishHotelGroup despite the objections of GermanBank and despite the presence of the existing '2017 agreement' whereby this bank had already agreed to a write down of its debt.

The Examinership process is very similar to the process envisaged by the European Directive on Preventive Restructuring 2019/1023 in its most robust form. It involves the imposition of a stay or moratorium on all actions against the company and any related company (i.e. member of the group) for a determined period of 3 months, which can be extended by the court. It also provides for intra and cross class cram- down on approval by the court.

The Examinership has commenced. Unhappy with the prospects of further write down, GermanBank seeks to bring an action on foot of 'the 2017 agreement' to enforce this prior agreement in the court in Germany. The Irish companies argue that the Examinership proceeding in Ireland takes precedence.

GermanBank argues that 'the 2017 agreement' must exclude the possibility of the companies applying for the Examinership process as GermanBank have already taken a discounted debt repayment

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[1] This case study was first presented for consideration by the Judicial Wing and by the Turnaround Wing at INSOl Europe Annual Conference, Copenhagen September 2019 by the JCOERE Team. We would like to thank particularly, The Honourable Judge Michael Quinn, The High Court of Ireland and Judge Nicoleta Nastase, Romania for their assistance in clarifying this case study. The case study itself is derived from an Irish case *Re Kitty Hall Ltd*. [2017] IEHC and [2017] ICEA 247. Some adjustments to the facts have been made including the insertion of the German choice of law clause and the move on the part of the German Bank seeking to enforce the 2017 Agreement in a German court. In reality the compromise or scheme proceeded and was approved by the Irish High Court in December 2017, Baker J.

[2] First introduced under the Companies (Amendment) Act 1990 and now contained in Part X of the Companies Act 2014.

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proposal under this ‘2017 agreement’. There is no specific statement to this effect in the agreement. The Irish court had rejected this argument in its initial decision to appoint an Examiner.

For information the Irish Examinership process, although pre-dating the new EU Directive 2019/1023 by thirty years, was modelled on the US Chapter 11 and contains many features of the Directive in its most radical form. In particular it is possible that as the Examinership or rescue progresses, the GermanBank debt (which represents 98% of the companies’ debts) will be written down a second time and the debt repayment agreement could be substantially altered by the process. This is of immediate concern to GermanBank and consequently they wish to enforce the 2017 agreement in the German court. In contrast the Irish companies argue that the possibility of rescuing the entire group as a viable entity is reliant on the company availing of the preventive restructuring process (the Irish Examinership process) and re-arranging its debt structure with the agreement of its creditors:-

It might be of interest to note the following statement regarding the Irish preventive restructuring process known as Examinership from the Irish Court of Appeal in the case on which this case study is based:-

“78. Measured, therefore, against the statutory objectives of Part 10 of the 2014 Act, …[the Examinership process]… I can accordingly see no real difference in principle between the two types of contractual agreements so far as the appointment of an examiner is concerned. Of course, it may be said that such an application for examinership is inconsistent with prior contractual agreements and commitments on the part of the petitioning company or companies, but, as I have already sought to explain, this is true almost by definition of every application for examinership.

79. Putting this another way, I cannot find anything in the 2014 Act which enables a court considering an application for examinership to distinguish between the inevitable breach of a loan agreement (with, for example, a promise to repay a loan by a given date) on the one hand and a breach of the obligations contained in a debt settlement agreement regarding the orderly disposal of assets for debt reduction purposes on the other. One cannot really beautify by fancy words or nice phrases that which for some - and for secured lenders in particular - must be an unpalatable feature of the examinership process, namely, that it involves the judicial variation and dishonouring of all types of commercial contracts.

80. The fact, therefore, that an application for examinership would be inconsistent with the performance of the obligations imposed on a company under the terms of a settlement agreement cannot in itself - and I stress these words - be a dispositive consideration for a court determining whether to appoint an examiner under s. 509(1) of the 2014 Act, precisely because the entire examinership system is premised on the assumption that pre-existing commercial contracts (of whatever kind) will be overridden, varied, negated and dishonoured in the wider public interest of rescuing an otherwise potentially viable company.”

Issue 1

In light of Articles 19 and 20 and Articles 42-44 is the German court obliged to recognise the Irish rescue proceedings and co-operate with the Irish court thus allowing main proceedings with a stay to continue even though

a. **this affects other proceedings being opened elsewhere and**
b. **would operate quite drastically on the rights of the German creditor?**

If yes, how would an obligation to co-operate work in this context?

In your experience, if relevant what sort of issues would typically arise which would require co-operation?

The first issue is the applicability of **Article 19 of the EIR-R (European Insolvency Regulation- Recast)** which imposes the obligation to recognise “any judgment opening insolvency proceedings handed

down by a court of a Member State which has jurisdiction pursuant to Article 3…. from the moment that it becomes effective."

The second issue relates to the obligations imposed on courts and insolvency practitioners to co-operate in insolvency proceedings under **Articles 42- 44 and Articles 57-59 of the Recast Regulation 2015/848.** These relate in the first instance to the facilitation of "the coordination of main, territorial and secondary insolvency proceedings concerning the same debtor", and in the second instance to the facilitation of "the effective administration of the proceedings" where the proceedings relate to "two or members of the same group".

Issue 2

If the German court recognises the Examinership process which it most likely will, this will mean that the stay operated under the Irish Examinership process will operate against the GermanBank.

Then the question is if the GermanBank proceeds in the German court what will the approach of the German court be?

Is it possible to open secondary or territorial proceedings which might allow for enforcement of the 2017 agreement against the principle of the stay?

Do the co-operation obligations affect the decision to open secondary proceedings…will they make a difference?

Does the obligation to co-operate add an additional constraint on the German court?

Alternatively is the obligation to co-operate something less significant than the initial question of recognition.

For example does the obligation to co-operate simply mean that if the German court sought clarity on how the Examinership process would proceed, the Irish court might be obliged to co-operate with this request?

Would this involve an obligation to provide information on the process in general and/or on the specific process?

Issue 3

Alternatively, GermanBank seeks to enforce the debt settlement agreement- 'the 2017 agreement' as a **contract subject to German law**. The GermanBank intends to argue before the German court that this action in the German court relates to a specific contract and is not primarily related to insolvency and so the Recast Regulation does not apply and that the German court is free to hear this action and enforce 'the 2017 agreement', despite the Examinership process proceeding in Ireland. Similar arguments have been made in some recent cases which have been considered by the CJEU.

Does this argument sideline the Regulation?

Bear in mind the Irish proceedings are opened and the Irish stay affects all actions.

Should the German court co-operate to make the stay effective thus facilitating the rescue?

Please see existing case law on this issue. [3]

[3] **Case C-535/17 NK v BNP Paribas Fortis** [**CJEU 6 February 2019**].

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Prior to the relevant insolvency proceedings money was transferred to Fortis bank by whom? - This amounted to an act of embezzlement. During the insolvency proceedings conducted in the NL proceedings were brought against the bank. Under Dutch law the liquidator can bring a single action against a bank to repay money in tort 'Peeters- Gatzen-vordering (PGV). (This is similar to a claim arising out of mistaken payments). In Dutch law, this is an action in tort, which can be brought by individual creditors / a liquidator and/ or anyone affected. The defendant bank, NK Fortis, said it was a tort claim and therefore should be brought in in Belgium. The relevant issue is whether the action is closely connected to the insolvency proceedings and therefore within the scope of the Dutch insolvency proceedings or is an action in tort, and therefore one which can be treated separately. Because it is normal for a liquidator to bring this claim the Dutch view was the former, that Dutch court had jurisdiction.

The CJEU took a different approach. It decided that just because the liquidator brings the claim it does not mean it is an insolvency procedure. It is still a tort and because individual creditors can bring the claim the Belgian court could have jurisdiction. The case considers the important interface between the EIR [Article 4(1) and Article 13 of Council Regulation (EC) No 1346/2000] and the Brussels Regulation [Article 1(2)(b)- Council Regulation (EC) No 44/2001] and is the subject matter of a separate case study in this data set.

Case C- 337/17 Feniks sp zoo v Azteca Products & Services CJEU 4 October 2018

Feniks was a creditor of Coliseum (a general contractor with whom Feniks had an investment agreement regarding a construction project in Poland). Coliseum was technically insolvent in that it was unable to pay subcontractors, but proceedings had not yet been opened. Coliseum sold property (in Poland!) to Azteca (Spain) in partial fulfilment of prior claims by Azteca. This transaction would normally be subject to some sort of clawback action under an insolvency process generally speaking. Under Polish law any creditor (and not just an insolvency practitioner or appointed liquidator) can bring a claw back action. Feniks as a creditor of Coliseum brought action against Azteca to clawback money before the Polish court on the basis of Article 7(1) (a) Judgment Regulation 1215/2012. Azteca argued that the correct forum was the Spanish court arguing for a strick application of Article 4(1) of the same Regulation.

The question for the CJEU was whether an *actio pauliana*, whereby the person entitled to payment of a debt requests that an act by which his debtor has transferred an asset to a third party and which is allegedly detrimental to his rights be declared ineffective in relation to the creditor, is covered by the rule of international jurisdiction provided for in Article 7(1)(a) Judgment Regulation 1215/2012.?

And the response from the CJEU was that an *actio pauliana* which is based on the creditor's rights created upon the conclusion of a contract, falls within 'matters relating to a contract' of Article 7(1) (a) Judgment Regulation. In terms of the interface between the Recast Regulation and these provisions of the judgement regulation there is a lack of certainty and clarity as to the borderline between insolvency matters and other causes of actions. However, in this case the CJEU reiterated the general principles in the following statement:-

"Para 29. Therefore, the question arises as to whether the main proceedings fall within the scope of Regulation No 1215/2012 or rather, whether they fall within the scope of an insolvency procedure governed by Regulation No 1346/2000, applicable ratione temporis to the main proceedings.

Para 30. In this regard, it should be recalled that the Court has held that Regulations No 1215/2012 and No 1346/2000 should be interpreted in such a way as to avoid any overlap between the rules of law that those instruments lay down and any legal vacuum. Accordingly, actions excluded under Article 1(2)(b) of Regulation No 1215/2012 from the application of that regulation because they come under 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings', fall within the scope of Regulation No 1346/2000. Correspondingly, actions which fall outside the scope of Regulation No 1346/2000 fall within the scope of Regulation No 1215/2012 (judgment of 20 December 2017, Valach and Others, C-649/16, EU:C:2017:986, paragraph 24 and the case-law cited)."

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