INS INSOLVENTIERECHT UPDATES

ANNOTATIE

Rotterdam District Court, 25 November 2016, ECLI:NL:RBROT:2016:9090 (Hanjin Shipping Europe)

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Annotatie bij Rechtbank Rotterdam, 25-11-2016, ECLI:NL:RBROT:2016:9090 (INS-2016-0406)

Hanjin's rehabilitation and bankruptcy is sweeping the world. Last Friday, 25 November 2016, the Rotterdam District Court (ECLI:NL:RBROT:2016:9090) had to decide on a request to open secondary insolvency proceedings regarding Hanjin Shipping Europe GmbH & Co. KG ('Hanjin Europe'). So, after Japan, the US, the UK, China and Singapore, the Netherlands has become the latest in a growing list of jurisdictions to grant recognition or assist in coordinating matters related to Korean cargo shipper Hanjin Shipping's rehabilitation proceedings.

Hanjin Europe has entered '*vorläufiges Insolvenzverfahren*' ('provisional insolvency proceedings') in Germany (a proceeding not listed in Annex A to the European Insolvency Regulation 2000), for which Dr Dietmar Penzlin has been appointed as '*vorläufiger Insolvenzverwalter*' ('provisional liquidator'). The Rotterdam District Court presents the facts: Hanjin Europe has its registered office in Hamburg, Germany, and operates an establishment in Rotterdam, employing 59 persons for activities such as loading, unloading and transfer for shipping under the name of Hanjin Shipping Netherlands. Also located in the Netherlands is an ING bank account with a balance of € 78,804.53. Insolvency proceedings were opened in Hamburg on 26 October 2016, the court appointing Penzlin as provisional liquidator, with the Court's instruction to him (amongst others) to find out where the debtor's centre of main interests (COMI) is and whether main insolvency proceedings have been opened in other Member States. By order of 21 November 2016 of the Hamburg Court, the provisional

liquidator was empowered to request for the opening of secondary insolvency proceedings within the meaning of Article 29 European Insolvency Regulation 2000 (EIR 2000) in the Netherlands, Belgium, France and the Czech Republic. Moreover, an e-mail has been shown from Moo Kyoon On, statutory director of Hanjin Europe, expressing his confirmation of the request.

The Rotterdam District Court decided the following (I added the numbers and the italics):

1 *Proceeding not on Annex A, liquidator listed in Annex C* The liquidator may request secondary proceedings in the main insolvency proceedings. '*Insolvenzverfahren*' is listed in Annex A; the '*vorläufiges Insolvenzverfahren*' is not. However, applying ECJ's 10-yearold, but nevertheless important decision in Eurofood (C-341/04, ECLI:EU:C:2006:281) (in short: a proceeding not mentioned on Annex A, 'liquidator' listed on Annex C) the court decided that the conditions to be recognised as main insolvency proceedings have been met.

2 *Liquidator instructed by the Hamburg District Court to file for secondary proceedings* The German court decided that the COMI of Hanjin Europe is in Germany, based on the presumption that can be derived from the registered office. The provisional liquidator has also been given the task of examining whether the COMI is located in Germany. The Rotterdam District Court observes that the judgment of the German court on the COMI seems ambiguous. Upon further review of this request, the District Court determined that it will have to follow this opinion, as objective factors showing that the COMI could be located elsewhere cannot be established at this time. The provisional liquidator is listed on Annex C. The Rotterdam District Court continued to state that it follows from the judgment of the Hamburg District Court that the debtor has divested its assets (at least partially). This leads to the conclusion that the proceedings opened in Germany are opened in a Member States where the debtor's COMI is. The provisional liquidator is therefore entitled to apply for secondary proceedings, the District Court concluded.

3 *Establishment* The District Court said that Hanjin Europe has an establishment in Rotterdam, and that therefore the Dutch District Court can open secondary insolvency proceedings. Article 27 EIR provides that secondary proceedings may be permitted '... without the debtor's insolvency being examined in that other State', i.e. the Netherlands. The District Court determined that the wording of this provision leaves some room for scrutiny. In this case it is also relevant since the two decisions taken do not contain any definitive judgment as to the insolvency of Hanjin Europe. In the German provisional proceedings, the provisional liquidator received an instruction from the District Court to investigate the condition of the estate. In the request for opening of secondary proceedings, the provisional liquidator stated that Hanjin Europe has applied for insolvency proceedings, and that it is expected that it will

be finally granted on or around 1 December 2016. The provisional liquidator estimated that there will not be sufficient assets in the estate to cover the salaries of the staff under the terms of notice. Given the above, the Rotterdam District Court at this moment is satisfied regarding the status of insolvency of Hanjin Europe.

4 *Interest* The District Court continued by stating that there is also an interest for the opening of secondary insolvency proceedings. The provisional liquidator stated that the salaries of the employees from November 2016 onwards cannot be paid. It is a monthly amount of about € 150,000. The German Federal Employment Agency does not compensate Dutch employees in case of insolvency due to unpaid wages. The provisional liquidator needs a secondary procedure in order to settle the lease and employment contracts in the Netherlands and to liquidate the Dutch assets, the District Court concluded. The opening of secondary proceedings then followed.

A few remarks

1 *Proceeding not on Annex A, liquidator listed in Annex C* In the Eurofood case, the French Government submitted that, since the definition of 'insolvency proceedings' in Article 2(a) and Annex A of EIR 2000 does not include the appointment of a 'provisional liquidator' (in this case such an official from Ireland), such an appointment cannot lead to an 'insolvency proceeding' within the meaning of the Regulation. Advocate General Jacobs (Opinion of 27 September 2005, case C-341/04 Eurofood IFSC Ltd) rejected both submissions: '84. The effect of Article 2(a) is that 'the collective proceedings referred to in Article 1(1)' are 'listed in Annex A'. There is consensus among commentators on the Regulation that '... once the proceedings have been included in the list, the Regulation applies without any further review by the District Courts of other Member States'. In Eurofood, compulsory winding up by the District Court in Ireland is included in Annex A. Jacobs does not consider that the application of the Regulation to such proceedings may be put in doubt on the ground that certain aspects of the definition in Article 1(1) are not satisfied. Regarding the French government's submission, the Advocate General considers: '87. Again however that argument seems to me to betray a misunderstanding of the scheme of the Regulation. Compulsory winding up by the District Court in Ireland is listed in Annex A. The provisional liquidator, mentioned in the list in Annex C, was appointed in the context of such a proceeding. Those factors to my mind suffice.' The Rotterdam District Court follows the same path.

2 *Liquidator instructed by the Hamburg District Court to file for secondary proceedings* Prior to the Eurofood case, it was generally held that the insolvency practitioner who has been appointed according to national law as a temporary or provisional liquidator – e.g. appointed after the request for the opening of main insolvency proceedings, but before the actual

opening – is not permitted to request the opening of secondary proceedings (on the basis of Article 29(a) EIR 2000, see Virgós/Schmit Report (1996), no. 212 and no. 262). With regard to EIR 2000, however, the European Court of Justice in Eurofood held : 'In that respect, it should be noted that Article 38 of the Regulation must be read in combination with Article 29, according to which the liquidator in the main proceedings is entitled to request the opening of secondary proceedings in another Member State. That Article 38 thus concerns the situation in which the competent District Court of a Member State has had main insolvency proceedings brought before it and has appointed a person or body to watch over the debtor's assets on a provisional basis, but has not yet ordered that that debtor be divested or appointed a liquidator referred to in Annex C to the Regulation. In that case, the person or body in question, though not empowered to initiate secondary insolvency proceedings in another Member State, may request that preservation measures be taken over the assets of the debtor situated in that Member State. That is, however, not the case in the main proceedings here, where the High Court has appointed a provisional liquidator referred to in Annex C to the Regulation and ordered that the debtor be divested.' As a result – although some German authors disagree – it has been concluded that a provisional liquidator is eligible to invoke Article 29(a) EIR 2000. In such a case the provisional liquidator has autonomous power and it does not need an instruction from its District Court. It seems that the Rotterdam District Court is of the same view, based on its own building up of the facts that the COMI is in Germany. The other view would be that the provisional liquidator's acts are based on a 'power of attorney' of the German District Court. Such a view would have as a consequence that the Rotterdam District Court must decide whether that power of attorney (in the form of a judicial instruction to the German provisional liquidator) can be characterised as a 'judgment deriving directly from the insolvency proceedings and is closely linked with them' in the meaning of Article 25 EIR 2000. With its 'autonomous' power to file for secondary insolvency proceedings, the agreement of the GmbH's director in the e-mail, while being a nice piece of scenery, has no legal value.

3 *Establishment* Although the result of the Rotterdam's District Court decision is justified, it is not correct as to the question of recognition. It should have drawn the logical and necessary consequence from its view (in 1) that the German proceedings are main insolvency proceedings. I haven't seen a case in which the element of Article 27 EIR 2000 '... without the debtor's insolvency being examined in that other State' has played a role in a case with similar circumstances. The only reason is that the District Court is inconsistent. If the foreign proceeding is (to be regarded as) a main proceeding, recognition should follow automatically (Article 16 EIR 2000). The principle of mutual trust does not allow a District Court to scrutinise the other District Court's decision.

It is to be regretted that the District Court is so short on 'establishment' for two reasons. The District Court should ex officio assess whether such an establishment is indeed in present in the Netherlands. Of course, that seems rather obvious, with 59 active employees. However, the District Court missed the opportunity to give some guidance on which definition to use. Article 2(h) EIR 2000 states that an establishment is 'any place of operations where the debtor carries out a non-transitory economic activity with human means and goods'. This vague notion solidified and promoted to a more substantial one in the Interedil case (CJEU 20 October 2011 C-396/09, ECLI:EU:C:2011:671), providing that the term 'establishment' within the meaning of Article 3(2) EIR 2000 must be interpreted as requiring the presence of a structure consisting of a minimum level of organisation and a degree of stability necessary for the purpose of pursuing an economic activity. The presence alone of goods in isolation or bank accounts does not, in principle, meet that definition. And in paragraph 63: '.... in order to ensure legal certainty and foreseeability concerning the determination of the district courts with jurisdiction, the existence of an establishment must be determined, in the same way as the location of the centre of main interests, on the basis of objective factors which are ascertainable by third parties.' Without this explicit determination, the District Court seems to be a follower of the vague notion (which by the way is also represented in the EIR (recast) 2015, where the Interedil definition has not been included).

4 *Reasons for request* There is also an interest for opening insolvency proceedings, the Rotterdam District Court determined. It has been debated in the literature whether someone who files a request for opening secondary proceedings has to demonstrate such an interest. The prevailing opinion is that such a requirement does not exist. For the persons mentioned in Article 29(b) EIR 2000, with a right to request the opening of secondary proceedings, such a requirement does not exist either, e.g. the right of the creditors to bring about proceedings is not limited by the requirement of a specific interest, see Virgós/Schmit Report (1996), no. 227. There is no doubt, however, that 'local interests' (secondary proceedings serve to protect these, see recital 19) are indeed at stake.

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