

Limits on mutual recognition under the EU Bank Recovery and Resolution Directive

A recent High Court judgment sheds light on provisions of the EU Bank Recovery and Resolution Directive (**BRRD**) that divide responsibility between home and host jurisdictions in the resolution of a European bank. The High Court has taken a strict line as to which resolution measures will take effect in English law under the mutual recognition requirements of the BRRD.

Summary

In the insolvency of an EEA bank, the Winding Up Directive for Banks (**WUD**) gives primacy to insolvency proceedings of the home Member State. The BRRD has amended WUD to apply the same principle to special resolution actions (such as transfers of assets and liabilities) taken by home Member States under their national bank resolution laws. In *Goldman Sachs International v Novo Banco SA* [2015] EWHC 2371 (Comm), the court recognised the effectiveness of a Portuguese statutory transfer to a bridge bank of a liability under an English law facility agreement, but interpreted the scope of the mutual recognition requirements in Article 66 of BRRD narrowly. In particular, the court declined to give effect to subsequent administrative decisions of the resolution authority that called into doubt the transfer of the liabilities in question.

Background

In June 2014, a Luxembourg entity (**Oak**) entered into a facility

agreement with a Portuguese bank, Banco Espírito Santo (**BES**). The agreement was governed by English law and was subject to the jurisdiction of the English courts. On 3 July 2014, BES drew down under the facility. A month later, on 3 August 2014, Bank of Portugal (the Portuguese bank resolution authority) used statutory powers under 2012 Portuguese bank resolution legislation to transfer most of BES's assets and liabilities to a bridge bank, Novo Banco SA (**NB**).

The Bank of Portugal's measure transferred all liabilities of BES to NB except for "excluded liabilities". On 22 December 2014, the Bank of Portugal issued a ruling stating that there were "serious and well-grounded reasons" for believing that the Oak loan was an excluded liability, concluding that the loan had therefore not transferred to NB. In February 2015, the Bank of Portugal affirmed its December ruling, adding that "any margin of doubt or uncertainty" as to whether the Oak loan had been transferred to NB could only be resolved by the courts.

The first repayment under the facility was due at the end of December

2014 but was not paid. In February 2015, Oak assigned its claim under the facility agreement to various assignees (the **Claimants**). Shortly afterwards, the Claimants accelerated the loan and began proceedings against NB in the English courts in order to recover the sums due.

Novo Banco does not deal directly with the substantive claim but only with NB's application to set aside the proceedings on the basis that the English court had no jurisdiction. For these purposes, it was common ground between the parties that the original August 2014 transfer should be recognised as legally effective in England under regulation 5(1) of the Credit Institutions (Reorganisation and Winding up) Regulations 2004 (even though the amendments giving effect to the BRRD did not take effect until January 2015). These Regulations provide that "directive reorganisation measures" taken in other EEA Member States have effect in the UK as if they were part of the general law of insolvency of the UK. The key issues for the Court were: (i) whether the Oak loan was an

excluded liability for the purposes of the August statutory transfer; and (ii) whether the December decision of the Bank of Portugal should also have effect in English law.

Decision

The High Court rejected NB's application. For jurisdictional purposes, the court has only to decide which party has the better of the argument on the issue. The court decided that the Claimants had the better of the argument that the Oak loan was not an excluded liability - indeed, NB did not positively assert the correctness of the Bank of Portugal's decisions in this regard.

The major issue was whether the Bank of Portugal's December ruling should have effect in UK law. NB argued that the December ruling was a BRRD "reorganisation measure" under Article 66 of BRRD because it constituted the exercise of resolution powers and that it should therefore be recognised as legally effective in other Member States. The court rejected this argument. The statutory transfer in August was a reorganisation measure but, whatever its effect in Portuguese law, the December ruling had no formal status under BRRD. It was not a reorganisation measure, nor

was it a "re-transfer" under article 40(7) of the BRRD.

The court commented that where the BRRD requires host states to defer to home states and to apply home state law, it does so clearly and unequivocally (for example, in Article 66(6)), adding that:

"The consequence of NB's argument is that any action taken by the resolution authority which is effectual as a matter of the domestic law of the resolution authority's home state (even if it is only effective unless and until it is set aside) is to be recognised in all other Member States. That is not what Article 66 states. It is also a remarkably wide recognition measure which would lead to significant variations in the measures to be recognised as between Member States."

The court also rejected NB's secondary argument that the court should decline to exercise such jurisdiction as it had on, amongst other grounds, the principle of non-justiciability. NB argued that the Bank of Portugal's December decision was an act of state and, as such, that it was not justiciable in the English courts. The court rejected this because the December decision was not an act of a state but the action of a designated resolution authority for

the purposes of the BRRD. The court also doubted whether the act of state doctrine could apply where the court had jurisdiction under the EU's Brussels I Regulation on jurisdiction and the enforcement of judgments.

Relevance of the decision

This is the first case since BRRD implementation in which an English court has had to consider the effectiveness of a statutory transfer of an English law agreement made by the resolution authority of another Member State. In recognising the transfer but rejecting NB's application to dismiss proceedings, the court has indicated where the line may be drawn for the purposes of mutual recognition under Article 66 of the BRRD.

The decision suggests that where an act or decision of another EEA resolution authority finds a clear and explicit basis in the text of the BRRD then it will be given effect in England. If not, then acts and decisions (like the December ruling of the Bank of Portugal) will not be recognised in England, regardless of their legal effect under domestic law in the home state.

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