CLIFFORD
CHANCE

Briefing note November 2016

Broad international recognition afforded to BRRD resolution measures

Whether assets have or have not been transferred to a bridge bank under the BRRD depends primarily upon the law governing the resolution measures. In order to achieve the objectives of the BRRD, the Court of Appeal has given a generous interpretation to what constitute resolution measures and to English law's obligation to recognise those measures.

The general principle of English private international law is that foreign legislative measures cannot affect liability under a contract governed by English law. Only English legal measures can do so.

But there are exceptions. One major exception is provided by the EU's Bank Recovery and Resolution Directive (2014/59/EU), under which the courts of EU member states are obliged to recognise resolution measures taken in a bank's home state even if those measures affect the rights or obligations of third parties and regardless of their governing law. In the *New Zealand Superannuation Fund v Novo Banco SA* [2016] EWCA Civ 2371, the Court of Appeal took a wide view as to what resolution measures were entitled to recognition, reversing the first instance judgment.

New Zealand Superannuation Fund v Novo Banco SA concerned the jurisdiction of the English courts over a claim against Novo Banco, the bridge bank to which most of Banco Espirito Santo's assets were transferred in August 2014 by the Portuguese resolution authority, Banco de Portugal. The claim arose from a loan agreement entered into by BES, and depended upon liability for the loan having been transferred by Banco de Portugal to Novo Banco. If liability had been transferred, the English courts had jurisdiction under the jurisdiction clause in the loan agreement; but if liability had not been transferred, there was no claim against Banco Novo over which the English courts could have jurisdiction.

At first instance, Hamblen J decided that the measures taken by Banco de Portugal in August 2014 were effective to transfer the liability to Novo Banco under the Portuguese implementation of the BRRD and that the English courts were obliged to recognise that transfer. A declaration by the Banco de Portugal in December 2014 that the August resolution had not transferred the liability did not purport to be a resolution measure under the BRRD or to transfer the liability back to BES. As a result, it was not entitled to recognition in the UK even though it was effective under Portuguese law to ensure that the liability remained with BES (subject to the Portuguese courts deciding otherwise).

The Court of Appeal reversed Hamblen J's decision, taking a significantly broader approach driven by what it saw as the policy objective that resolution measures effective under the laws of one EU member state should be given the same effect under the laws of all others (though Sales LJ's reasoning differed somewhat from that of Moore-Bick and Gloster LJJ).

Key issues

- Resolution measures should be given the same effect in English law as they have in the relevant domestic law
- This requires a broad approach, not considering in detail the legitimacy of each individual measure

The Court of Appeal concluded that the December declaration meant that, under Portuguese law, the liability had not been transferred by the August decision, and the English courts were obliged to recognise that position. Even if the liability had initially been transferred in August, it was not necessary for the December measure to be a formal measure taken under the BRRD transferring the liability back to BES; it was only necessary that it be effective under Portuguese law to ensure that the BRRD measure taken in August did not result in the liability's transfer.

Even if that was incorrect, the Court of Appeal decided that the English

courts were obliged to recognise the December declaration under the UK's implementation of the EU's Credit Institutions Reorganisation and Winding-up Directive (2001/24/EC), an argument not addressed to Hamblen J. This Directive obliges the English courts to recognise "measures which are intended to preserve or restore the financial situation of credit institutions" even if the measures affect third party rights and whether or not the measures are taken under the BRRD.

The Court of Appeal decided that burden-sharing measures are reorganisation measures under the Directive. The August decision was a reorganisation measure because its aim was to stabilise BES pending its winding up, and the December declaration, which clarified the meaning of the August resolution, was sufficiently closely connected to that resolution also to be regarded as a resolution measure.

Conclusion

Hamblen J's approach was to consider each measure taken in Portugal: if it was a resolution measure under the BRRD, it was entitled to recognition in England; if it was not a resolution measure within the meaning of the BRRD, it was not entitled to recognition. The key question was whether each step was within BRRD.

In contrast, the Court of Appeal was driven by what it saw as the broad function of the BRRD and other EU legislation, namely ensuring that resolution measures taken in one EU member state have the same legal effect in all other member states as they do in the bank's home state. The focus was less on individual measures and more on whether the measures as a whole were resolution measures and, if so, giving international recognition to the local law consequences of the measures. Only that way, the Court of Appeal thought, could consistency be achieved across the EU.

Contacts

Simon James
Partner

T: +44 20 7006 8405
E: simon.james
@cliffordchance.com

Habib Motani
Partner

T: +44 20 7006 1718
E: habib.motani
@cliffordchance.com

Ian Moulding
Partner

T: +44 20 7006 8625
E: ian.moulding
@cliffordchance.com