SUMMARY

Goldman Sachs International (Appellant) v Novo Banco SA (Respondent)

Guardians of New Zealand Superannuation Fund and others (Appellants) v Novo Banco SA (Respondent)

[challenging the recognition of measures taken by a foreign resolution authority in accordance with its national law implementing the Bank Recovery and Resolution Directive ('BRRD')[1] and the Reorganisation and Winding up Directive ('WupD')[2]]

UK Supreme Court, Judgment of 4 July 2018, [2018] UKSC 34

⇒ On appeal from: Court of Appeal (Civil Division), Judgment of 4 November 2016, [2016] EWCA Civ 1092, Case No: A3/2015/3007 and A3/2015/3008;

⇒ On appeal from: High Court of Justice Queen's Bench Division Commercial Court, Judgment of 7 August 2015, [2015] EWHC 2371 (Comm), Case No: 2015-213 and 2015-215.

1. Background

a. Facts

On 30 June 2014 *Oak Finance Luxembourg S.A.* granted a loan amounting to approximately $ 835 m. ('Oak liability') to the Portuguese bank *Banco Espírito Santo S.A.* ('BES'). Of this sum, $ 784.564.000 have been drawn down on 3 July 2014.

According to the express choice of law under clause 34 in the respective loan facility agreement ('Agreement') the contract shall be governed by English law. Further, clause 35.1 sets out that the English courts shall "have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement (including any dispute relating to any non-contractual obligation arising from or in connection with this Agreement and any dispute regarding the existence, validity or termination of this Agreement) ".[3]

The first repayment instalment was due on 29 December 2014. On 30 July 2014 already, BES had reported significant losses for the first half of 2014 to the Portuguese Central Bank *Banco de Portugal* ('BdP'). Consequently, on 3 August 2014 BdP exercised its powers as the competent domestic Resolution Authority under the BRRD by making use of the bridge institution tool and issuing a resolution order[4] ('August decision'). On the basis of the August decision BdP set up a bridge bank, *Novo Banco S.A.* ('NB'), the Respondent herein, and ordered all assets and liabilities of BES – except of certain liabilities listed in

[1] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council, OJ L 173/190, 12 June 2014.

[2] Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions, OJ L 125/15, 5 May 2005.

[3] See the judgment of 7 August 2015, para. 7.

[4] According to Article 2(60) of the BRRD, "'bridge institution tool' means the mechanism for transferring shares or other instruments of ownership issued by an institution under resolution or assets, rights or liabilities of an institution under resolution to a bridge institution". This mechanism allows resolution authorities to separate the critical assets and liabilities of an ailing bank from its sound assets and liabilities and to transfer only the latter to the bridge bank.

general terms only, but supposedly including the Oak liability – to be transferred to NB. By a declaration dated 22 December 2014 ('December decision'), BdP specified that, since the Oak liability was comprised by the statutory exception in Article 145-H(2)(a) of the Portuguese Banking Law[5], retroactively as of 3 August 2014 it has not been transferred to NB and has therefore to be retransferred to BES.

The Appellants herein, Goldman Sachs International ('GSI') on the one hand and the Guardians of New Zealand Superannuation Fund and others on the other hand, are the assignees of Oak's rights.

b. First Instance and Appeal

(1) High Court of Justice, [2015] EWHC 2371 (Comm)

Referring to the jurisdiction clause provided in the Agreement, on 26 February 2015, the Appellants invoked Article 25 of the Brussels I Regulation[6] and brought actions for recovering capital and interest repayments due under the Agreement against NB before the High Court.[7] NB by contrast, applied for the proceedings before the English court to be set aside, in the first place, and alternatively, sought to have them stayed pending a decision by the Portuguese administrative court. NB's grounds were the following: On the basis of BdP's August decision and its December decision the Oak liability had never been transferred to NB so that NB had never become party to the Agreement, consequently, the jurisdiction clause could not be applied to NB and the High Court had no jurisdiction to entertain the case.

The relevant issues the High Court had to decide upon were[8]

i. whether the claim fell within the material scope of the Brussels I Regulation and if so, whether the English court had jurisdiction to entertain it pursuant to Article 25 of the Brussels I Regulation;

ii. In case that the English court had jurisdiction, whether it should decline to exercise that jurisdiction and,

iii. if it should not decline to exercise jurisdiction, whether the court should grant a stay of the proceedings.

Regarding the question of jurisdiction (→ issue i.) the High Court's line of reasoning was the following:

- Firstly, the court considered the December decision "not [to be] a necessary part of the Claimants' claim" but so to be the August decision, "since [the latter] is relied upon as effecting a

[5] As shown in para. 44 of the judgment of 7 August 2015, Article 145-H(2)(a) of the Portuguese Banking Law, in the version in force at the time of resolution, stipulates that no obligations of the original credit institution may be transferred to the bridge bank if the respective shareholders' participation at the time of the transfer is equal or greater than 2 % of the share capital. The respective provision is meanwhile incorporated in Article 145-Q(3) of the revised Portuguese Banking Law. Article 145-Q(3) also prohibits to subject a liability owed to an entity holding 2 % or more of the original share capital of the institution under resolution to a transfer, however, "unless it is shown that they [the persons or entities having had a direct or indirect shareholding equal to or exceeding 2 % of the capital of the credit institution] were not, for act or omission, responsible for the financial difficulties of the credit institution and have not contributed, for act or omission, to that situation".

[6] Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351/1, 20 December 2012.

[7] Additionally, the Appellants have initiated administrative law proceedings against BdP in Portugal – GSI on 5 March 2015, Guardians of New Zealand Superannuation Fund and others on 13 April 2015 – challenging the December decision and aiming at suspending its effect.

[8] See the judgment of 7 August 2015: para. 64 introducing these issues, para. 65 to 123 examining and evaluating them.

statutory transfer of the Facility Agreement to NB".[9] However, in the view of the High Court, "the claim made [was] one in debt […] based on private law rights conferred by the Facility Agreement" and therefore not an administrative but "a civil and commercial matter" in the sense of Article 1 para. 1 of the Brussels I Regulation falling within the material scope of that Regulation.[10]

- Secondly, according to the court, the critical question of "whether NB (as distinct from BES) can be taken "to have agreed" the Jurisdiction Clause for the purposes of Article 25" of the Brussels I Regulation, depended on whether NB as the "second party has succeeded to the rights and obligations of the original party (BES)"[11] to the Agreement.

  In this context, the court stated "that the August decision is a decision to which effect must be given as a matter of English law" since it "involves a "transfer" that is required to be given effect under Article 66 [of the BRRD]"[12]. Consequently, already as a result of the August decision, NB had become the successor of BES in relation to the Oak liability and thus party to the Agreement and subject to the therein included jurisdiction clause so that the English courts had jurisdiction pursuant to Article 25 of the Brussels I Regulation.

  Justice Hamblen was of the opinion "that the Claimants have […] the better of the argument that as a matter of fact the Oak liability was not an Excluded Liability and that the rights and liabilities under the […] Agreement were accordingly transferred to NB"[13]. Since the High Court considered the Oak liability as not falling under the exception of Article 145-H(2)(a) of the Portuguese Banking Law and thus regardless of the effect of the December decision and of whether this decision had to be recognised pursuant to Article 66 of the BRRD, the Oak liability could not be deemed retransferred to BES by the December decision.

- According to the High Court, the December decision, furthermore, had no effect under English law anyway, and was not to be recognised under Article 66 of the BRRD in the UK because it was no transfer of assets but solely "a statement that there has been no transfer" that did not contain the exercise of resolution powers provided for in the BRRD.[14]

Finally, the High Court also rejected NB's statement that the court should decline to exercise its jurisdiction (→ issue ii.) on the grounds of "the principle of non-justiciability or act-of-state"[15] as well as NB's application for a stay of the proceedings (→ issue iii.) in absence of "rare and compelling circumstances"[16]. The decision of the High Court was in favour of the Appellants.

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[9] Para. 70 and 71 of the judgment of 7 August 2015.
[10] See para. 71 of the judgment of 7 August 2015; Further, in para. 72 the High Court states that the claim, though having arisen from the exercise of a public power, had not been brought against a public authority or a body exercising public powers but against NB.
[11] Para. 75 et seq. of the judgment of 7 August 2015.
[12] Para. 82 and 83 of the judgment of 7 August 2015.
[13] Para. 85 of the judgment of 7 August 2015.
[14] See para. 94, 96 (9) and 103 of the judgment of 7 August 2015.
[15] Para. 107 et seq. of the judgment of 7 August 2015.
[16] Para. 114 et seq., in particular para. 118 and 119 of the judgment of 7 August 2015.

(2) Court of Appeal, [2016] EWCA Civ 1092

NB filed an appeal against the judgment of the High Court. Unlike within the proceeding before the High Court, for the first time besides Article 66 of the BRRD, Article 3 of the WupD ("Adoption of reorganisation measures – applicable law") was taken into consideration.

Pursuant to Article 3(2) of the WupD "[t]he reorganisation measures shall be applied in accordance with the laws, regulations and procedures applicable in the home Member State"; once they become effective in the Member State where they have been taken, "[t]hey shall be fully effective in accordance with the legislation of that Member State throughout the Community". Reorganisation measures in the sense of Article 2 of the WupD as amended by Article 117(2) of the BRRD "include the application of the resolution tools and the exercise of resolution powers provided for in [the BRRD]", hence the use of the bridge institution tool according to Articles 40, 41 of the BRRD.

Whereas it was now common ground that the English courts must recognize and give effect to the August decision as a reorganisation measure under Article 3 of the WupD effecting a transfer for the purposes of Article 66 of the BRRD, the parties were divided as to whether the December decision itself purporting to specify the effect of the August decision, must be recognised and given effect by the English courts.
Importantly, according to the Court of Appeal, recognizing the August decision included awarding it the effect that it had in Portuguese law at the relevant date, namely when the Appellants had commenced the proceedings, that is to say on 26 February 2015.[17] And on 26 February 2015, as a result of the December decision, the August decision had a more limited effect in Portuguese law because the December decision claimed the August decision not to have transferred the Oak liability to NB.[18]

The Court of Appeal ruled that not only the August decision is a reorganisation measure but the December decision too – although being "no more than one element in a process leading to [the] orderly winding up [of BES]" – "is to be regarded as, or as part of, a reorganisation measure and is entitled to universal recognition under the Reorganisation Directive" (herein abbr. as WupD), because it clarified the effect of the August decision and was very closely connected to the latter.[19]
That is how, by drawing upon the principle of universal recognition[20] and contrary to the High Court, the Court of Appeal decided in favour of NB.

[17] Lord Justice Moore-Bick, para. 27, 28 and Lord Justice Sales, para. 43, 44 of the judgment of 4 November 2016.
[18] See Lord Justice Moore-Bick, para. 28, 29 of the judgment of 4 November 2016.
[19] Lord Justice Moore-Bick, para. 34 of the judgment of 4 November 2016 as well as cf. para. 29.
[20] In the view of Lord Justice Moore-Bick, para. 34 of the judgment of 4 November 2016, "the December decision […] is entitled to universal recognition under the Reorganisation Directive" because otherwise, it would "undermine the scheme of universal recognition of measures taken by the home Member State to deal with failing financial institutions which is fundamental to the scheme of European law in this field."

2. UK Supreme Court, Decision of 4 July 2018, [2018] UKSC 34

GSI and the Guardians of New Zealand Superannuation Fund and others appealed the Court of Appeal's judgment.[21] In its judgment of 4 July 2018, the Supreme Court unanimously dismisses the Appellants' appeal and rules in line with the previous instance for the benefit of NB that the English courts have to recognise and give effect to the December decision on the basis of Article 3(2) of the WupD. The issues considered within the proceeding before the Supreme Court are

(1) whether the compulsory application of a reorganisation measure according to the law of its home Member State (in the present case the law of Portugal) under Article 3(2) of the WupD includes England's obligation to determine the effect of the August decision on the transfer of liabilities to NB by the effect that the subsequent December decision had in Portuguese law

(2) and/or – respecting the alternative case put forward by NB and BdP – whether the December decision itself is a reorganisation measure requiring recognition by the English courts

(3) and – respecting the alternative case raised by the Appellants – whether the December decision, even if otherwise entitled to recognition in England, must be disregarded on the basis of being only provisional pending the final decision of a Portuguese administrative court[22].

The Supreme Court emphasizes that in the present case "the relevant provisions are those dealing with mutual recognition of the legal effects of measures taken in accordance with the "tools" and the provisions dealing with challenges to those measures in the courts of the home member state"[23]. The primarily relevant provision therefore, is not Article 66 of the BRRD but Article 3 of the WupD as amended by the BRRD determining the applicable law to be applied to a reorganisation measure in England.[24]

The court first underlines the importance of the purpose of the WupD and its Article 3 by pointing at recital (119) of the BRRD after which the WupD ensures "that all assets and liabilities of the institution, regardless of the country in which they are situated, are dealt with in a single process in the home member state"; the court's argumentation then follows the line that the reorganisation process must be taken "as a whole" and that the legal effects attaching to it under the law of the home Member State must be applied in every other Member State.[25] According to the Supreme Court it is "[in]consistent with either the language or the purpose of article 3 [of the WupD] that an administrative act such as the December decision, which affects the operation of a "reorganisation measure" under the law of the home state, should have legal consequences as regards a credit institution's debts which are recognised in the home state but not in other member states".[26]

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[21] The hearings before the Supreme Court (access the video recordings here) were held on 17 and 18 April 2018.

[22] The administrative court's decision on the questions whether GSI was a true lender or a 2 % shareholder in BES, see para. 30 of the judgment of 4 July 2018.

[23] Para 16 of the judgment of 4 July 2018.

[24] The judgment of 4 July 2018, para. 22.

[25] Para. 24 of the judgment of 4 July 2018.

[26] The judgment of 4 July 2018, para. 24. In para. 25 and 26 the Supreme Court then refers to the judgments in the cases LBI hf v Kepler Capital Markets SA (C- 85/12) ECLI:EU:C:2013:697 and Kotnik v Državni Zbor Republike Slovenije (C-

As a second point, the Supreme Court notes that "Article 3 [of the WupD] does not only give effect to "reorganisation measures" throughout the Union" but "requires them to be "applied in accordance with the laws, regulations and procedures applicable in the home member state"".[27] The court concludes that in this legal framework, "it cannot make sense for the courts of another member state to give effect to a "reorganisation measure" but not to other provisions of the law of the home state affecting its operation".[28]

On the foregoing grounds as concerns issue (1), the Supreme Court rules that, contrary to the Appellants' case, the effect of the August decision cannot be recognised without regard to the December decision; the latter is neither an interpretation of the August decision nor an amendment of it nor a retransfer of the Oak liability transferred to NB by the August decision but it is a "ruling that under the terms of article 145-H(2) of the [Portuguese] Banking Law […] the Oak liability had never been transferred" to NB.[29] Following the courts below, the Supreme Court, however, does not consider the correct analysis of the December decision decisive so long as "it is accepted (as it is) that as a matter of Portuguese law [this decision] is conclusive of that point unless and until annulled by a Portuguese administrative court". In fact, the agreed propositions of Portuguese law and the requirement of Article 3(2) of the WupD oblige the English courts

- to recognise the December decision that has an effect in Portuguese law and affects rights under an English law contract,
- consequently, to treat the Oak liability as an excluded liability that has never been transferred to NB
- and to admit that NB was therefore never party to the jurisdiction clause in the Agreement.[30]

Issue (2) about whether the December decision itself – looked at in isolation from the August decision – is a reorganisation measure has, in the view of the court, no longer to be considered.[31]

Finally, the Supreme Court also rejects the Appellants' alternative case (3) that the December decision is of provisional nature by deeming it binding in Portuguese law unless and until it is set aside by a Portuguese court.[32] Moreover, the court is of the opinion that "[n]o other conclusion would […] be consistent with the Directives", with Article 3(1) of the WupD prescribing that "the administrative or judicial authorities of the home Member State shall alone be empowered to decide on the implementation of […] reorganisation measures" such as the August decision as well as with Article 85(4)(a) of the BRRD stipulating that "an appeal shall not entail any automatic suspension of the effects of the challenged decision".

Petja Ivanova (Member YRG), 13 November 2018

526/14) ECLI:EU:C:2016:570, both on Article 3 of the WupD, in order to accentuate the significance of the principle of mutual recognition in the event of bank failures and to underpin its own line of reasoning.

[27] The judgment of 4 July 2018, para. 27; See also supra p. 4 of this summary.

[28] Para. 27 of the judgment of 4 July 2018.

[29] The judgment of 4 July 2018, para 28.

[30] See para 28 of the judgment of 4 July 2018; cf. in part also para 33.

[31] Para 29 of the judgment of 4 July 2018.

[32] The judgment of 4 July 2018, para. 31 et seq.