CHSHCEE Newsletter

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Insolvency & Restructuring | New Austrian case-law: No prima facie proof for illiquidity

In one of its recent decisions, the Austrian Supreme Court examined the highly practical issue of plausible evidence regarding the inability of a debtor to pay its debts.[1] It was discussed whether or not the burden of proof should be reduced if it can be shown that the debt is uncollectable.

Inability to pay debts

Under the Austrian Insolvency Act, the opening of insolvency proceedings presupposes either the illiquidity (*Zahlungsunfähigkeit*) or over-indebtedness (*Überschuldung*) of the debtor.[2]

Illiquidity is assumed in particular when the debtor ceases to pay its debts. Austrian case-law qualifies illiquidity as a permanent lack of funds preventing the debtor from discharging (all) its debts that have fallen due for repayment. It is this element of permanence that distinguishes the inability to pay debts from a mere delay in payment (*Zahlungsstockung*). The latter refers to a short period of time only (approximately three months) and is not regarded as illiquidity within the meaning of the Austrian Insolvency Act.

The Austrian Supreme Court has already developed an insolvency test on the basis of which a permanent lack of funds is assumed in those cases where the debtor is only able to pay less than 95% of its debts that have fallen due (i.e. the debtor suffers from a liquidity gap of more than 5%).[3] However, this assumption may be refuted if it can be shown that liquidity may be restored within the above mentioned period of three months.

Burden of proof

In the Supreme Court's above mentioned recent decision 8 Ob 117/15m, the creditor argued that the continuous non-payment of social security contributions and the simultaneous enforcement[4] of said claims does provide a sufficient indication of the debtor's inability to pay its debts. By means of establishing the uncollectibility of due debts in connection with the later financial collapse of the company, the creditor *prima facie* would have also proven the debtor's illiquidity.

Prima facie evidence

The concept of prima facie evidence aims at reducing the burden of proof. This means that the claimant simply needs to provide evidence of sufficient weight to justify a reasonable inference by the judge with regard to the existence of a fact on the basis of a general understanding of the event in question. In other words, the scenario at issue has to be considered more likely than any other scenario.[5] Generally speaking, prima facie evidence may only be used in cases in which it is not reasonable to ask for the submission of specific evidence (i.e. in a situation in which not only the respective claimant but anyone would suffer from a lack of evidence).

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[1] OGH 25.11.2015, 8 Ob 117/15m.
[2] Cf. Articles 66 and 67 of the Austrian Insolvency Act.
[3] OGH 19.01.2011, 3 Ob 99/10w.
[4] This was done in accordance with the Austrian Enforcement Act.
[5] *Rechberger* in *Fasching/Konecny*[2] Vor § 266 ZPO mn 56 et seq.

Conclusion – No prima facie evidence for illiquidity

In the decision at hand, the Austrian Supreme Court ruled there is no room for prima facie evidence with respect to the question of whether or not a debtor is in fact illiquid by only proving that certain debt (due) is uncollectable, even though such evidence is substantiated by the subsequent financial collapse of the debtor.

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CHSHCEE | Belarus

Belarus opens its doors to foreign depositary receipts

Edict No. 84 issued by the President of the Republic of Belarus "On the Issue and Circulation of Shares by using Foreign Depositary Receipts" (the "Edict") was adopted on 3 March 2016 and will enter into force on 11 September 2016. It will provide Belarusian companies with the possibility of transferring their shares to a foreign depository bank – an issuer of foreign depositary receipts ("FDR"), which would then distribute the respective shares among foreign investors. In fact, the Edict will introduce a new way of investing in Belarusian companies.

Which companies may use FDR?

Only listed Belarusian open joint stock companies (the equivalent of public corporations) may make use of FDR. It is not possible for closed joint stock companies (the equivalent of privately-held corporations) and other types of legal entities such as limited liability companies to make use of FDR.

Are there any restrictions on using FDR?

Shares may be transferred to an issuer of any type of FDR: ADR (American Depository Receipts), EDR (European Depository Receipts), and GDR (Global Depository Receipts). However, the cumulative number of shares transferred to any issuer of FDR may not exceed 25% of the total number of shares issued by a relevant Belarusian open joint stock company.

Moreover, it is specifically forbidden for FDR to be used for shares in Belarusian banks, non-banking financial institutions as well as any company (irrespective of its activity) that under Belarusian law qualifies as a member of a bank holding ("Banks"). The same restriction applies to any company holding 5% or more of the shares in any Bank.

Do Belarusian antimonopoly rules apply to FDR?

Any transactions in or with FDR including, but not limited to, the acquisition of shares in exchange for FDR are explicitly excluded from the requirement to obtain approval from the Belarusian antimonopoly authority.

How are holders of FDR represented at shareholders' meetings?

A foreign depository bank – an issuer of FDR – has the right to represent holders of FDR (i.e. indirect shareholders) at general shareholders' meetings of a relevant Belarusian company. As a default rule, it has the right to vote on behalf of holders of FDR at its sole discretion unless a holder of FDR instructs it otherwise.

Are there any tax benefits?

There are a number of tax benefits for issuers and holders of FDR. In particular, the following types of income are not taxable in Belarus until 1 January 2020:

- dividends;
- income derived from transactions in shares, which were distributed by means of FDR;
- income derived from exchanging FDR for the underlying shares.

The above-mentioned tax benefits apply as long as the respective FDR is not paid off.

Summary

Although depository receipts have been used for decades in many countries, for Belarus it is undoubtedly a new and progressive instrument that could be used by foreign investors. Taking into account financial instability as well as the constantly changing legal environment in Belarus, FDR will give foreign investors the opportunity to minimize or even exclude certain country-related risks. Therefore, the Edict is welcomed by the business community as it will potentially contribute to improving the investment climate in Belarus.

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CHSHCEE | Bulgaria

New Public Procurement Act

A new Public Procurement Act (PPA) has been adopted with effect from 15 April 2016. The new act transposes into Bulgarian law several EU directives, including Directive 2014/24/EU on public procurement and Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors. Some of the new PPA provisions will become effective at a later stage (in 2017 or 2018). Some of the most important changes introduced by the new PPA, as compared with the repealed law on public procurement, are highlighted below:

- More types of procurement procedures are available under the new PPA. It defines 13 different types of procurement procedure (six in the repealed PPA), which should allow the contracting authorities to take a more diverse approach when awarding public contracts.

- Contracting authorities are more precisely defined in the PPA. Provision is also made so that several contracting authorities (e.g. a group of municipalities) can join forces to acquire supplies/services through a central purchasing body.
- Before launching a procurement procedure, the contracting authorities may conduct so-called preliminary market consultations with experts or market participants, including with potential tenderers. As required by the EU procurement directives, such consultations are allowed so long as they do not have the effect of distorting competition and do not result in a violation of the principles of equal treatment and transparency.
- The contracting authorities may pay subcontractors directly where the nature of the contract allows for this, i.e. for services, supplies or works which can be delivered independently. In such cases, the main contractor would be entitled to object to these payments if it considers them undue.
- The PPA defines new thresholds for various types of tender procedure.
- No participation guarantees will be paid by the tenderers. Only performance guarantees are provided which cannot exceed five percent of the contract value.
- The possibilities relating to changes in executed procurement contracts are more detailed.
- The PPA introduces new contract award criteria. In keeping with the requirements of the EU procurement directives, the only basis for awarding a public contract will be “the most economically advantageous offer”, including the life-cycle costing of the product/service.

As from July 2017, contracting authorities will use a uniform and centralized web-based electronic platform when awarding public contracts.

The new PPA provides for and regulates in detail the conduct of electronic auctions.

Some details on the application of the PPA are further specified in the Regulation on the Implementation of the PPA adopted by the Council of Ministers in April 2016.

The new PPA aims to increase the efficiency of and competition in procurement processes in line with the principles of the EU treaties for the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles of equal treatment and transparency.

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Current issues regarding the protection of investments in the EU from the perspective of investment arbitration

There has been much discussion about the protection of investments in the EU and investment arbitration, in particular due to the opposing views of the European Commission and the arbitration tribunals resolving cases against the Czech Republic and other CEE countries.

Investment law

Bilateral investment treaties ("BIT") are legal instruments that protect long-term investment projects from typical risks and provide foreign investors with stability and predictability in an investment-friendly climate. BITs have become common legal instruments that afford protection to foreign investors. The highest number of new BITs was registered in the 1990s. At that time, the Czech Republic also entered into many BITs, in particular with Austria, Germany, the Netherlands, the United Kingdom, and other states, in order to attract foreign investors into a business environment based on a market economy. Many of these BITs are still in force.

Attitude of the European Commission

In June 2015, the European Commission initiated infringement proceedings against five Member States (Austria, the Netherlands, Romania, Slovakia and Sweden) requesting that the intra-EU BITs concluded between them ("intra-EU BIT") be terminated. Its main argument was that intra-EU BITs are incompatible with EU law. In particular, the European Commission argues they run contrary to the single internal market (i.e. against the free movement of capital and freedom of establishment) by conferring peculiar rights on some EU investors (for example, compensation for expropriation, provision of state aid, etc.). Hence, intra-EU BITs are discriminatory against other investors in the EU on the basis of nationality. Arbitration conducted on the basis of arbitration clauses contained in intra-EU BITs also expresses a lack of trust in the national courts.

Results of investment arbitrations

The Czech Republic and Slovakia argued in their investment disputes that (i) intra-EU BITs had become invalid upon these states becoming members of the EU; and that (ii) intra-EU BITs were substituted by EU law. Therefore, the arbitral tribunals do not have competence to decide on a dispute arising from intra-EU BITs. However, the tribunals in Eastern Sugar v. Czech Republic, Binder v. Czech Republic and Achmea (formerly Eureko) v. Slovakia rejected these arguments. In the latter case, the Higher Regional Court of Frankfurt (Germany) rejected the arguments of Slovakia against the arbitration award and held in December 2014 that the intra-EU BIT remained applicable and the arbitration clause contained in the BIT was compatible with EU law. Slovakia appealed against this decision to the German Supreme Federal Court and this matter was already referred to the Court of Justice in Luxembourg which will assess the legality of intra-EU BITs.

The main arguments to be assessed regarding the question of whether intra-EU BITs are invalid

In summary, the main arguments in favour of the invalidity/inapplicability of intra-EU BITs are as follows: (i) intra-EU BITs violate EU law and are against the single internal market, in particular, they are discriminatory against EU investors on the basis of nationality; (ii) provisions of intra-EU BITs were substituted by EU law because they were concluded by the same states and concern the same matter; (iii) there is mutual trust

among Member States regarding their judicial systems, and therefore, there is no room for investment arbitration; (iv) Member States are not allowed to refer their disputes whose subject-matter falls within the EU competence to any judicial body other than the Court of Justice in Luxembourg; (v) Member States should mutually develop a favourable investment environment within the EU (and not enforce "older" intra-EU BITs).

The main arguments to be assessed regarding the question of whether intra-EU BITs are valid

The main arguments which are in favour of the validity/applicability of intra-EU BITs are as follows: (i) investors entered into their investments with a legitimate expectation and by putting their trust in the validity and enforcement of the conditions stipulated in the intra-EU BITs; (ii) the investors in the 1990s could not clearly foresee the future development of the single internal market and the provisions of EU law which now conflict with the intra-EU BITs; (iii) the intra-BITs are still effective and they are part of the Member States' legal framework; (iv) the quality of the judicial system, probability and pace of enforcement of investors' rights are not the same throughout the EU; (v) investment law is a specific system of law based on different principles than those of international law or EU law; (vi) the arbitration tribunal has a right to rule upon its own jurisdiction and to decide if an arbitration clause presented in intra-EU BITs is valid (under the principle "*Kompetenz/Kompetenz*" or "*competence de la competence*").

Conclusion

We assume that it will be a matter of considerable interest to observe how this matter develops further and which arguments prevail. Providing that intra-EU BITs are considered invalid/inapplicable, we have to keep in mind their surviving clauses under which certain provisions remain in force for a specified period of time following termination of the intra-EU BIT. In our view, the circumstances of each case are crucial. In any case, investors should be given an option to bring their claims before an arbitration tribunal established on the basis of an arbitration clause in a particular intra-EU BIT.

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Damages and competition law: better options for victims of infringements

The deadline for transposing into national law Directive 2014/104/EU of the European Parliament and of the Council on actions for damages on the basis of infringements of competition law will expire at the end of this year. In order to meet this deadline, preparatory work in the legislative process started in Hungary in the autumn of 2015, and our law firm has had the privilege of participating in it in several forums (including the Hungarian Competition Law Association). The following is an overview of certain key issues associated with actions for damages under competition law.

Claims for compensation in connection with infringements

In line with the case-law of the European Court of Justice, the objective of the Directive is to ensure that every person who suffers harm as a result of a competition law infringement is able to receive full compensation.

This means that an investigation into an infringement by a national competition authority will not necessarily end with the imposition of a fine, and there will be a good chance that individuals and companies that suffered injury as a result of the infringement will file an action for damages. The new rules will probably present challenges for the management of companies, regardless of whether they caused or suffered the injury.

The definition of injury and the amount of compensation

It is not easy to define what qualifies as injury or harm caused by a competition law infringement or to determine the amount of compensation payable. As a general rule, the Directive states that the compensation must cover the actual loss and lost profits of the injured party plus interest. However, determining what losses are deemed to have been caused by the infringement will almost certainly vary from case to case. Quantifying the harm done will also be complicated by the argument generally used by infringers that the companies that suffered the harm have "passed on" its effects to their own consumers by raising their prices.

Member States that have already introduced legislation to implement the Directive use different calculation methods to quantify the harm done by an infringement, which will probably present quite difficult challenges not only for the infringers and their victims but for Hungarian courts as well. The national legislation in Hungary attempts to circumvent this problem by introducing the rebuttable presumption that a horizontal cartel influences prices at a rate of 10%.

Disclosure of documents

To reduce information asymmetry between infringers and injured parties, the Directive includes detailed rules on how and under what conditions injured parties can access the evidence collected by competition authorities.

However, the practical application of these rules can create problems in Hungary because the practice to date has been for courts only to allow the local competition authority to provide access to documents if the applicants specifically identified the documents they wanted to look at. This can be difficult in competition law litigation as injured parties often have no idea at all what information the infringers or the Hungarian Competition Authorities possess.

Actions for damages and the leniency policy

Another important issue is the conflict that exists between the objectives of the leniency policy and the desire to ensure that victims of competition law infringements receive adequate compensation. It would be really useful for injured parties if they could read leniency statements, but this would greatly limit the efficiency of the leniency policy and in turn make the discovery of cartel activities harder.

It appears that in this conflict of (public and private) interests, the EU has decided, at least for the time being, in favour of the leniency policy, since the Directive states that national courts may not order the disclosure of leniency statements and settlement submissions to injured parties. This does not mean, however, that companies which are exempt from a fine on the basis of a leniency statement will also be exempt from their liability to pay compensation because their participation in the infringement will be officially established in the competition authority's decision, regardless of the application of the leniency policy.

Conclusions

After the transposition of the Directive into national law, executives of companies that suffer losses as a result of a competition law infringement will have to ponder whether they should start an action for damages against their business partners. On the other hand, a company that is the defendant in such a lawsuit will have to explore what legal and economic arguments can be used to rebut the presumption concerning the amount of the loss or otherwise reduce its liability for damages.

In summary, the introduction of the new legislation will present new challenges and opportunities for the management of companies that are the perpetrators or the victims of a competition law infringement. There are many open questions concerning these challenges and opportunities, but it already seems clear that the growing opportunities for injured parties will expose infringers to greater risks.

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CHSHCEE | Romania

The benefits of admitting to an infringement of competition rules

The latest revision to the Romanian Competition Act has introduced an amendment to the regulation which makes it possible for companies to admit to infringing competition rules.

Under the new regulation, a company may admit that the allegation made against it regarding the infringement of competition rules is true so as to benefit from a reduction in the fine to be imposed on it for such anti-competitive practices. The novelty consists in the fact that the company has the obligation to admit to the infringement of competition rules before the hearing before the Competition Council.

If the company admits to the infringement of competition rules, it may receive a reduction in the fine of between 10% and 30%, however not lower than 0.2% of its total turnover calculated for the year prior to the imposition of the fine.

Conditions for granting leniency to companies which admit to infringing competition rules

Leniency may only be granted by the Competition Council to companies which admit to infringing competition rules upon the express request of the company making such an admission. The Competition Act requires the company to admit to its infringement of competition rules in a clear and irrefutable manner. In addition, the company needs to provide the Competition Council with a statement regarding the maximum amount of the fine that the company is willing to pay.

Leniency in the form of a reduction in the fine to be imposed is not granted if the company appeals against the administrative decision of the Competition Council by disputing the existence of the infringement of competition rules. Thus, the fine to be imposed is still subject to a reduction in those cases where an appeal is launched against the administrative decision on other grounds.

Where the company contests the existence of the infringement of competition rules, the court may – at the request of the Competition Council – withdraw the benefit of the fine reduction and consequently set the fine to be imposed.

Conclusion

The new regulation on admitting to an infringement of competition rules aims to firmly determine the moment up to which the respective company may admit to infringing competition rules, i.e. only before the hearing before the Competition Council.

Admitting to an infringement of competition rules may be advantageous to the respective company as it allows the company to benefit from a simplified procedure and a predictable fine calculation.

The company in question needs to diligently analyze the legal benefit to be gained from a reduction in the fine, bearing in mind that it should only admit to having infringed competition rules before the hearing before the Competition Council without having had access to the file on the investigation conducted by the Competition Council.

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CHSHCEE | Slovak Republic

Cross-border Secondments

Act No. 351/2015 Coll. on Cross-border Cooperation concerning the Posting of Workers in the Framework of the Provision of Services ("*Zákon o cezhraničnej spolupráci pri vysielaní zamestnancov na výkon prác pri poskytovaní služieb*") came into force ("**Act**") on 18 June 2016. This Act was adopted in relation to Directive 2014/67/EU of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. The Act will also amend certain other legislation which governs or relates to the secondment of workers. Secondment is defined as follows in Article 5 Section 4 of the Slovak Labour Code, as amended:

For the purposes of the transnational provision of services, workers are deemed to have been seconded if:

a) they are posted on account and under direction of the undertaking making the posting (as a cross-border service provider), under a contract concluded between the undertaking making the posting (as a cross-border service provider) and the party for whom the services are intended, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting,

b) they are posted to an establishment or undertaking controlled or owned by the undertaking making the posting or between controlled entities, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting, or

c) they are posted to an undertaking or placement agency on a temporary basis, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting.

The Act lays down how the National Labour Inspectorate and labour inspectorates should cooperate with the competent authorities in other member states of the European Union with regard to the supervision of compliance with regulations relating to secondment, the duties imposed on (foreign) employers to which workers are posted ("**employers in the host country**") and those on domestic (i.e. Slovak) employers making the posting ("**domestic employer**"), and penalties for violations of the Act. Under the Act, the employer in the host country is obliged to notify the National Labour Inspectorate, either in writing or electronically, of:

- the business name and registered seat, identification number and commercial or other register where the undertaking is registered,
- the envisaged number of seconded employees,
- the personal data of seconded employees,
- the day on which the secondment begins and ends,
- the place of work and the work to be performed,
- a description of the service to be provided by the seconded employee in Slovakia,
- contact person for the purposes of delivery of correspondence relating to secondment which must be present in Slovakia during secondment

no later than the day the employee is seconded.

Furthermore, the employer in the host country is obliged to:

- keep the employment contract or other document proving that there is an employment relationship with a seconded employee at the place of work,
- keep a record of when the seconded employee has worked (timesheets),
- keep detailed records of wages paid to the seconded employee

and submit all the documents listed above to the National Labour Inspectorate upon its request, translated into Slovakian if so requested.

The National Labour Inspectorate will provide information on secondments subject to a justified request made by a foreign competent authority. The National Labour Inspectorate can also be asked to conduct an investigation into a certain secondment in Slovakia.

Article 5 Section 9 of the amendment to the Slovak Labour Code, adopted in connection with the Act, will impose an obligation on the domestic employer to whom the employee is seconded requiring it to guarantee it will pay any unpaid wage owed to the seconded employee. The domestic employer will have to pay a wage, or part of any wage, not duly paid to the seconded employee by the employer in the host country. Payment must be effected within 15 days of the request being made to the domestic employer. The employer in the host country is obliged to provide the Slovak company with proof that the seconded employee was paid his/her wage, and if the wage was not paid, the hosting employer must provide the information necessary for the domestic employer to effect payment of the wage owed.

With respect to the amendment to the Slovak Labour Code, we would also like to point out that the domestic employer, while providing services from Slovakia to another member state, is entitled under Article 5 Section 12 of the Slovak Labour Code to post its employees to perform work in the framework of the provision of services in the territory of the member state. For such secondment, the Slovak Labour Code requires a written contract which mainly has to stipulate the following:

- the day on which the secondment begins and ends,
- a description of the work to be performed,
- the place of work,
- the applicable wage conditions.

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