

Supreme Court decides Olympic Airlines case – and the meaning of establishment for European Regulation on Insolvency

On 29 April the English Supreme Court declined an appeal by the trustees of a pension scheme in relation to Olympic Airlines SA, the former state-owned Greek airline. The trustees sought to argue that the English court did have jurisdiction to wind up Olympic Airlines SA as a secondary insolvency proceeding (it was already the subject of Greek main insolvency proceedings).

Their reason for doing so was linked to the necessity of having an English insolvency process on foot for the purposes of accessing the Pension Protection Fund (PPF), the UK pensions' lifeboat. (See text box at the end of this briefing for more details on the PPF). That purpose was however made redundant by a change to the pension legislation implemented after the Court of Appeal's decision in this case. Now as a result of the Pension Fund (Entry Rules) (Amendment) Regulations 2014 (the Amended PPF Entry Regulations) the commencement of a foreign insolvency proceeding will be a recognised trigger for accessing the PPF, but will only apply in this particular case (i.e. the amendments are limited in their effects, to Olympic Airlines SA) only where there are foreign insolvency proceedings and where an English winding up order has been set aside. So while the practical effects of the Supreme Court's decision were no longer important for the employees of Olympic Airlines in terms of entry to

the PPF per se it was still relevant in terms of value received because if successful, it would mean that entry to the PPF would be at the date of the original liquidation order in 2010, as opposed to 2014 under the Amended PPF Entry Regulations.

The case does however provide some useful general analysis on how the English Courts will interpret "establishment" for the purposes of the European Regulation on Insolvency Proceedings (the Regulation) that is at least until changes to the definition of establishment to be made by the Recast Regulation come into effect sometime in 2017. (See text box at the end of this briefing for more details on the Regulation).

The Supreme Court's focus was purely on whether Olympic Airlines SA had an "establishment" in England at the time of the presentation of the winding up petition. Establishment is defined under the Regulation as "any place of operations where the debtor carries out a non-transitory economic

Key issues

- Meaning of establishment for purpose of European Regulation on Insolvency Proceedings - need to show operating business
- Effects of decision reduced for Olympic Airlines by Pension Protection Fund (Entry) Rules Amendment 2014
- Amendments to the meaning of establishment definition in European Regulation on Insolvency Proceedings – extends jurisdiction to cover recently defunct operations.

activity with human means and goods". In this case it was held that the internal administration involved in winding up the affairs of a defunct insolvent entity would not satisfy the definition for these purposes. The Supreme Court held that the definition

envisages a fixed place of business where business is carried on with third parties. In this respect the decision appears to import some of the rationale usually employed when considering the concept of centre of main interest (COMI) also under the Regulation and used to determine the jurisdiction for main insolvency proceedings. In this respect it refers to the EJC decision in *Interdil Srl (in liquidation) v Fallimento Interdil Srl (case C-396/09)* in coming to its conclusion that for the purposes of "establishment" it is necessary to show some subsisting business activity ascertainable by third parties. The Supreme Court held that since there was no external business in this case, there was no point of principle calling for a reference to the European Court. It is interesting that in coming to this conclusion, the Supreme Court decision is seemingly at odds with the spirit of the amendment to the definition of "establishment" which is to come into effect in 2017. In this regard the amendment provides "any place of operations where a debtor carries out or has carried out in the three month period prior to the request to open main proceedings a non-transitory economic activity with human means and assets". There is no reference to this proposed change, in the Supreme Court's decision, but in any event this would not have assisted the employees of Olympic Airlines since the petition for winding up was not presented until almost 9 months after the commencement of the Greek liquidation.

Pension Protection Fund (PPF)

The PPF pays compensation to members of eligible defined benefit schemes if the scheme's sponsoring employer has been the subject of a qualifying insolvency event and the scheme has insufficient assets itself to provide benefits at least at PPF compensation levels.

Following a qualifying insolvency event, schemes which apply to enter the PPF go through an assessment period, during which the PPF applies the detailed eligibility criteria. This period lasts at least one year, during which various restrictions apply to the operation of the scheme.

The compensation payable to the members is prescribed by legislation and the PPF is funded by a system of levies on eligible occupational pension schemes.

The PPF entry provisions in the Pensions Act 2004 are predicated on UK insolvency proceedings.

Pension Protection Fund (Entry Rules) (Amendment) Regulations 2014 mean that the trustees of the pension scheme for Olympic Airlines can access the PPF. It is not envisaged that they apply more generally.

European Regulation on Insolvency Proceedings (The Regulation)

The Regulation does not provide uniform substantive law provisions for members of the EU.

Jurisdiction: It codifies how a member state should determine whether it has jurisdiction to open insolvency proceedings. Once these factors have been determined, the procedural rules of the member state in which proceedings are opened will generally apply.

Recognition: The Regulation also provides for the automatic recognition of insolvency proceedings throughout the EU.

Scope: It is confined to parties with their centre of main interests (COMI) within a member state of the EU. It therefore applies to entities whose place of incorporation may be outside of the EU, but whose centre of main interests is within a member state. The Regulation does not apply to banks, credit institutions, insurance companies, investment undertakings which hold funds or securities for third parties or collective investment schemes.

Main proceedings: The primary jurisdiction for insolvency proceedings, as provided by the Regulation, is the court of the member state where the debtor's COMI is located. In the case of a company or other legal person, in the absence of proof to the contrary, there is a rebuttable presumption that this is where the registered office of the company is located.

Secondary proceedings: The Regulation allows for the courts in countries other than the home state to open "territorial" insolvency proceedings or, after the commencement of main proceedings "secondary" proceedings, in the event that such debtor possesses an establishment in the territory of such other member state.

Establishment: This is defined in Article 2(h) of the Regulation as "any place of operations where a debtor carries out a non-transitory economic activity with human means and goods". This is due to change in 2017 with changes to the Regulation to allow a look back period of 3 months from the commencement of the main proceedings, so that as long as there has been an establishment within 3 months prior to the commencement of the main proceedings secondary proceedings may be commenced.

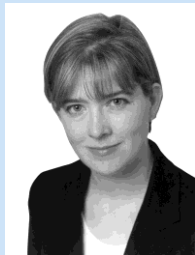
The applicable law of such territorial or secondary insolvency proceedings will be the law of that other member state. Territorial insolvency proceedings or secondary insolvency proceedings are limited in scope to the debtor's assets in that member state and so will not extend beyond the member state where they are opened. Furthermore, under the current Regulation, secondary proceedings are limited to winding-up proceedings but this will change once the amendments to the Regulation become effective in 2017, which provide for an extension to the types of proceedings available to pre-insolvency and rescue proceedings).

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