

From East to West: Avoiding unjust forum shopping in Estonia and Ireland

Anto Kasak and Kedli Anvelt follow the sweet trail from Estonia to Dublin in this interesting case



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The Estonian Chocolate brand “Kalev” is one of the most recognised trademarks in Estonia. Unfortunately, Oliver Kruuda, the person who was behind this trademark, is also well known, but not in such a good light.

He was a very successful businessman till recently, when he tried to escape from obligations arising in Estonia by relocating himself to Dublin with the hope of having a fresh start within a year under Irish insolvency law. Luckily, the Estonian and Irish Courts implemented national laws and the European Insolvency

Regulation (EIR) correctly, meaning this little trick by an Estonian businessman did not succeed.

Basic facts and the Estonian judgment

The Creditor filed a petition against Mr Kruuda (“the Debtor”) with the Tartu County Court of Estonia on 14 May 2021, seeking a declaration of bankruptcy against the Debtor. The Tartu County Court appointed an interim trustee and restrained the Debtor’s rights to transfer assets and applied a general stay to enforcement proceedings on 7 June 2021.

Without any knowledge of

the Estonian courts, around the same time, the Debtor turned to an Irish Court, which declared the Debtor’s bankruptcy on 28 June 2021. Of course, the Debtor did not inform the Irish Court either about the bankruptcy proceeding in Estonia. Later, on the 1 July 2021, the Debtor informed the Tartu County Court about the declaration of bankruptcy in Ireland and petitioned for the termination of the Estonian bankruptcy proceeding. Nevertheless, the Tartu County Court declared the bankruptcy of the Debtor on 19 October 2021.

The Appeal Court of Tartu sustained the aforementioned

order of the Tartu County Court on 22 January 2022, but amended the grounds of the order. The High Court of Bankruptcy of Ireland discharged the aforementioned order of adjudication by the Irish Court on 27 June 2022. Therefore, according to the EIR, the Debtor's bankruptcy proceeding was opened in Estonia on 7 June 2021.

Opening of main proceedings under the EIR

One of the key issues in this case is the question about opening the main proceeding - which court opened the main bankruptcy proceeding for the Debtor and when. Was it the appointment of the interim trustee and restraint order by the Tartu County Court on 14 May 2021 or the declaration of bankruptcy over the Debtor by the Irish Court on 28 June 2021?

Similar to German insolvency law, the Estonian Bankruptcy Act opens the proceeding of declaration of bankruptcy by following two steps: (i) the appointment of an interim trustee; and (ii) the declaration of bankruptcy. Pursuant to the national law of Estonia, the appointment of an interim trustee is not equivalent to a declaration of bankruptcy and bankruptcy is declared only by a court order for a declaration of bankruptcy.

However, EIR Article 1 stipulates that the main proceeding is opened if the proceeding is listed in Annex A and an insolvency practitioner who is listed in Annex B is appointed and the debtor is at least partly divested of its assets. EIR Article 2(7) sets out that the judgement opening insolvency proceeding includes the decision of any court to open insolvency proceedings or to confirm the opening of such proceedings and the decision of a court to appoint an insolvency practitioner. EIR Article 2(8) supplements this by stating that the time of the opening of

proceedings means the time at which the judgment opening insolvency proceedings becomes effective, regardless of whether the judgment is final or not.

The Estonian bankruptcy proceeding is listed in Annex A of the EIR as "*pankrotimenetus*". The interim trustee appointed by Tartu County Court is also listed in Annex B of the EIR as "*ajutine pankrotihaldur*". Therefore, the formal criteria are fulfilled. The Tartu County Court appointed an interim trustee and restrained the Debtor's rights to transfer assets and applied a general stay to enforcement proceedings on 7 June 2021. Thus, control over the Debtor's assets and supervision of the Debtor's economic activity was transferred to the interim trustee. Taking into consideration the aforementioned aspects, the main bankruptcy proceeding of the Debtor under the EIR was opened by the order of the Tartu County Court on 7 June 2021, even if the appointment of an interim trustee is not a declaration of bankruptcy under national law. Therefore, the main proceeding of the Debtor was opened in Estonia on the 7 June 2021 and the Irish Court had no right to open the main proceeding of the Debtor.

The Irish Judgement

On 27 June 2022, the High Court of Bankruptcy of Ireland discharged the order of adjudication by the Irish Court of 28 June 2021. The High Court of Bankruptcy of Ireland found that the Debtor had been significantly culpable in failing to bring the information about the Estonian bankruptcy proceeding to the Court's attention. This information was highly material to the Court in the matter of deciding the declaration of the bankruptcy over the Debtor.

The order would not have been probably given if the Court had known the aforementioned information. Even though the High Court of Bankruptcy of Ireland fully analysed the cross-

border insolvency aspects of the case, the main reason for discharging the order of adjudication was the fact that the Debtor did not supply the Court with essential information and, as it was the Debtor's obligation, which he failed to do, this was sufficient to discharge the order of adjudication.

Conclusion

The opening of the main proceeding under the EIR is possible without a declaration of bankruptcy under the national law. Even if the national law requires the appointment of an interim trustee before the declaration of bankruptcy, the appointment of an interim trustee might be the opening of the main proceeding, if the circumstances set out in Articles 1 and 3 of the EIR are fulfilled. The mere fact that an interim trustee is appointed is not sufficient to regard such kind of proceeding as main proceeding under the EIR. Firstly, an opened proceeding shall be listed in Annex A of the EIR. Secondly, an appointed interim trustee shall be listed in Annex B of the EIR. Thirdly, the assets of debtor should be at least partly divested. Fourthly, the assets and affairs of a debtor shall be subject to supervision by court. Of course, other elements of the EIR shall also be followed, for example the COMI etc. ■



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