

Cross-border transaction avoidance: The Aktsiaselts METUS-EST case and the challenge to Estonian and Swedish courts

Anto Kasak reports on the cross-border insolvency case, a challenge for both Swedish and Estonian courts



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The Estonian Court declared the bankruptcy of Aktsiaselts METUS-EST (register code 10195826) on 5 July 2023. The Swedish court declared the bankruptcy of MetuSweden AB (register code 556843-1281) on 2 August 2023. MetuSweden AB is 100% Aktsiaselts METUS-EST daughter company.

The Swedish bankruptcy trustee of MetuSweden AB was of the opinion that payments made to the Estonian mother company Aktsiaselts METUS-EST before the declaration of the bankruptcy in the total sum of SEK 18,044,311 are subject to transaction avoidance rules according to Swedish bankruptcy law.

The Estonian bankruptcy trustee of Aktsiaselts METUS-EST was of the opinion that, even if these payments are subject to the Swedish transaction avoidance rules, the same payments are not avoidable under Estonian transaction avoidance rules.

Nevertheless, as the Recast European Insolvency Regulation 2015 (EIR Recast) applies, the outcome of the case may be fascinating, albeit an interesting fact that the Estonian and Swedish transaction avoidance

rules are very similar, not to say identical, as the law used as the model for Estonian transaction avoidance rules was Swedish law.

Ascertainment of proceedings

In this case, both insolvency proceedings involve foreign elements, making them cross-border insolvencies under the EIR Recast. According to Article 7(1) of the EIR Recast, the *lex fori* applies to both parallel insolvency proceedings. This means that the insolvency proceedings over the Estonian company Aktsiaselts METUS-EST are governed by Estonian law, while the insolvency proceedings in respect of the Swedish company MetuSweden AB are governed by Swedish law. Therefore, we have two main insolvency proceedings, first, the main insolvency proceedings in respect of Aktsiaselts METUS-EST opened under Estonian law and, second, the main insolvency proceedings over MetuSweden AB opened under Swedish law.

Jurisdiction

Article 6 (1) of the EIR Recast provides that: “the courts of the Member State within the territory of which insolvency proceedings have been opened in accordance

with Article 3 shall have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them, such as avoidance actions.” Taking into consideration that Article 6(1) is not optional, all transaction avoidance claims filed by the Swedish company MetuSweden AB are to be filed in the Swedish court under that provision of the EIR Recast.

Applicable law

Article 7(2)(m) stipulates that: “[the] *lex fori* shall apply to the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors.” So, according to the Article 7(2)(m), the transaction avoidance claims filed by the Swedish company MetuSweden AB with the Swedish court under Article 6(1) are to be governed by Swedish law.

However, Article 16 of the EIR Recast also provides that: “Article 7 (2) m shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that the act is subject to the law of a Member State other than of the State of the opening of proceeding and the law of the Member State



does not allow any means of challenging that act in the relevant case.”

Since payments that were made to the Estonian Company went via an Estonian bank, the *lex causae* might be in this case Estonian law. If the *lex causae* is Estonian law, payments made by the Swedish daughter company MetuSweden AB to the Estonian mother company Aktsiaselts METUS-EST are not avoidable under Article 16 of the EIR Recast, especially if these payments are not avoidable under Estonian transaction avoidance rules.

Conclusion

In the opinion of the Estonian bankruptcy trustee of Aktsiaselts METUS-EST and in that of the author (as far as familiar with all the facts of this case), the payments made by MetuSweden AB to Aktsiaselts METUS-EST are not subject to Estonian transaction avoidance rules, because these payments were not made to the detriment of the general body of creditors under Estonian law and Supreme Court

practice. Since the transaction avoidance rules in Estonia and Sweden are similar, not to say identical, the Estonian Supreme Court practice is very clear about the assumption of transaction avoidance that is to the detriment of the general body of creditors.

Despite this opinion, this is a most interesting case for the Swedish court to solve, because, even if Estonian and Swedish laws are similar, the Supreme Court practice might be different. If the *lex causae* is Estonian law, the Swedish court has to take into account, not only Estonian law, but also Estonian Supreme Court practice.

On the other hand, if the Swedish court grants satisfaction to the claim of MetuSweden AB against Aktsiaselts METUS-EST, it is still a claim in the Estonian main insolvency proceedings involving Aktsiaselts METUS-EST. Article 7(2)(g) of the EIR Recast stipulates that claims against the debtor's insolvency estate and the treatment of claims arising after the opening of insolvency proceedings shall be governed by the *lex fori*.

The interpretation of this

article means that the treatment of claims in the Aktsiaselts METUS-EST insolvency proceeding are governed by Estonian law. Therefore, all claims lodged against METUS-EST, including the potential claim from MetuSweden AB, will be governed by Estonian law. According to the Estonian Bankruptcy Act, if MetuSweden AB wins the transaction avoidance case, they will still be ordinary creditors without any preference whatsoever.

Overall, this case will be no doubt provide a challenge for both Swedish and Estonian courts. ■

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