AGROKOR

Croatian Extraordinary Administration Proceedings recognised by the High Court in England.
Sberbank challenge rejected.

9 November 2017

Ante Ramljak, Extraordinary Commissioner of Agrokor d.d., was represented by Kirkland & Ellis International LLP

All information contained in this presentation is publicly available.
Kirkland & Ellis International LLP and Agrokor d.d. do not make representations as to its accuracy.

Executive Summary

- Ante Ramljak, Extraordinary Commissioner (**"Extraordinary Commissioner"**) of Agrokor d.d. ("**Agrokor**"), applied for recognition of the Croatian Extraordinary Administration Proceeding ("**EAP**") in England and Wales in respect of Agrokor on 27 July 2017 ("**English Recognition Application**") under the Cross-Border Insolvency Regulations 2006 ("**CBIR**").
- The English Recognition Application was contested by Sberbank of Russia ("**Sberbank**") on 31 July 2017, the first time a recognition application has ever been challenged in England, and a hearing took place over four days at the Royal Courts of Justice in London commencing 23 October 2017.
- HHJ Paul Matthews ("**Judge**") presided over the issues (which are addressed in detail below).
- Expert witnesses Judge Andrija Eraković (appointed by Agrokor) and Professor Alan Uzelac (appointed by Sberbank) provided expert reports and gave oral evidence on matters of Croatian law during the hearing.
- **On 9 November 2017 the Judge found in favour of the Extraordinary Commissioner on every issue**, granting recognition of the EAP in England and Wales, staying all actions brought by creditors in England and Wales and dismissing all of Sberbank's objections to the English Recognition Application.

Sberbank's Objections to the English Recognition Application

Sberbank raised the following objections to the English Recognition Application, all of which were dismissed by the Judge:

1. The EAP is not a *"foreign proceeding"* within article 2(i) of the CBIR, because:

   (i) the EAP is not undertaken pursuant to a *"law relating to insolvency"*;

   (ii) the purpose of the EAP is not reorganisation or liquidation;

   (iii) the EAP is not a *"collective proceeding"*;

   (iv) the EAP is not *"subject to control or supervision by a foreign court"*; and

   (v) the EAP is a single group proceeding in respect of both Agrokor and all of its controlled and affiliated companies, which is outside the scope of the CBIR.

2. Even if the EAP was a *"foreign proceeding"*, recognition of the EAP would be manifestly contrary to English legal public policy because the EAP is manifestly contrary to fundamental principles designed to ensure a fair insolvency proceeding, including the right to practical and effective access to a legal remedy and the right to private property.

Objection 1(i): The EAP is not conducted pursuant to a *"law relating to insolvency"*

Judgment in Agrokor's favour:

- The Judge rejected this objection on the basis that a proceeding may be conducted pursuant to a *"law relating to insolvency"* where insolvency is just one of the grounds on which the proceeding can be commenced, even if insolvency need not actually be demonstrated and there is another basis for initiating the proceeding.

- The EAP was initiated under Article 4 of the Law on Extraordinary Administration Proceeding for Companies of Systemic Importance for the Republic of Croatia ("**EAL**") on the basis either of insolvency or impending insolvency. Dismissing the approach adopted by the courts in Serbia and Montenegro, the Judge also noted that the fact that a subsidiary or affiliate which is not insolvent may be joined to the proceeding does not mean that the proceeding is not brought under a law relating to insolvency, nor does the fact that the test for proving insolvency may easily be met mean that the law is not a law relating to insolvency.

Sberbank's position in summary:

- The state of actual or impending insolvency is deemed proven by use of an irrebuttable presumption and because these conditions are easily demonstrated by the debtor, the EAL cannot be a law relating to insolvency within the meaning of the Model Law.

- Further, the fact that there is no requirement to demonstrate insolvency in respect of the controlled or affiliated companies demonstrates that the EAL is not a law relating to insolvency.

Agrokor's position in summary:

- The EAP was initiated under Article 4 EAL (which Article refers explicitly to the Croatian Bankruptcy Law, an insolvency law) which requires either insolvency or impending insolvency to commence the proceedings and so the EAL is clearly a law relating to insolvency.

Objection 1(ii): The EAP is not for the purpose of reorganisation

Judgment in Agrokor's favour:

- The Judge rejected this objection as he considered that the EAP is clearly intended to facilitate the restructuring of companies of systemic importance to the Republic of Croatia.
- Agreeing with Judge Andrija Eraković's expert opinion, the Judge disagreed with Sberbank that the EAP does not respect the principle of minimum protection of creditors.

Sberbank's position in summary:

- The sole purpose of the EAL is to protect systemically important companies.
- The EAP does not respect the principle of minimum protection of creditors which is a fundamental aim of reorganisation as opposed to liquidation.

Agrokor's position in summary:

- The objectives of protecting the going concern status of a company and of reorganising a company's affairs are not mutually exclusive. The EAP has both objectives and therefore falls within the definition.
- The EAP respects the principle of minimum protection of creditors because the protection is incorporated by virtue of Articles 43(16) and 43(21) of the EAL, which import Article 336 of the Croatian Bankruptcy Law into the EAL.

Objection 1(iii): The EAP is not a *"collective proceeding"*

Judgment in Agrokor's favour:

- The Judge rejected this objection on the basis that *"it cannot be said that this is not a "collective" proceeding"*.
- The Judge in fact states that Sberbank's *"objection* […] *is not that this proceeding is not collective enough; rather that it is **too** collective* […] *because it allows persons who are creditors of another entity to claim a share in the assets of the debtor.*"

Sberbank's position in summary:

- *"Collective"* means relating to the debtor and its own creditors, and not the debtor and creditors of others. The claims registered in the EAP are not just those against Agrokor and the process includes all assets and liabilities of the group, so it cannot be said that the proceeding is *"collective"* with respect to an individual debtor.

Agrokor's position in summary:

- The EAP relates to all assets and liabilities of Agrokor and its controlled and affiliated companies, and creditors prove their claims against those entities and vote on the proposed settlement agreement, hence the proceeding is *"collective"* because it considers the rights and obligations of *all* creditors.

Objection 1(iv): The EAP is not *"subject to control or supervision by a foreign court"*

Judgment in Agrokor's favour:

- The Judge rejected this objection on the basis that the EAP is under the control and supervision of the court, through its direct authority to make certain orders in the EAP, and its authority to supervise the Extraordinary Commissioner.
- The Judge noted that the relevant test here is whether the EAP is subject to the control and supervision of the court and not whether the government of the Republic of Croatia has a role to play (which, he concedes, would be unsurprising in any event given *"it is the government's job – or one of them – to look after the economy of a country"*).

Sberbank's position in summary:

- The assets and affairs of Agrokor are not subject to the effective control or supervision of the Croatian court as the government of the Republic of Croatia has too much influence and control over the EAP. Accordingly, the EAP cannot qualify as *"foreign proceedings"* under the CBIR.

Agrokor's position in summary:

- The assets and affairs of Agrokor are *"subject to the control and supervision"* of the Croatian court, as expressly provided for by the EAL and the relevant provisions of the Croatian Bankruptcy Law.

Objection 1(v): The EAP is a Group proceeding, outside the scope of the CBIR

Judgment in Agrokor's favour:

- The Judge rejected this objection on the basis that there is nothing in the CBIR to prevent recognition of a foreign proceeding which is initiated in respect of a group of companies but where the recognition is sought in relation only to a particular individual debtor.

Sberbank's position in summary:

- The Model Law, and hence the CBIR, is drafted to envisage a proceeding in respect of a single debtor and this is supported by the legislative guidance published by the UNCITRAL working groups. However, the EAP is a proceeding brought in a foreign court in respect of a *group* of companies.
- In this way, the proceeding being recognised must be collective to fall within the scope of the Model Law, i.e. between a debtor and its creditors, and not between a debtor and another's creditors, as is the case for the EAP because it is a group proceeding.

Agrokor's position in summary:

- There is no basis in the Model Law, the CBIR, UNCITRAL guidance, textbooks or case law, to suggest that where a debtor is part of a group of companies, or subject to a group proceeding, that such proceeding cannot be recognised in relation to that debtor.

Objection 2: The EAP is manifestly contrary to English public policy

Judgment in Agrokor's favour:

- The Judge rejected this objection on the basis that there is no violation of English public policy, let alone a 'manifest' violation, in merely recognising the EAP as a foreign main proceeding within the CBIR.
- The Judge noted, in particular, that the fact that the priorities of the EAP in reorganising or liquidating a company are different from those which would apply under English law is not enough to make this finding.

Sberbank's position in summary:

- The EAL and the EAP do not adequately ensure rateable distributions to creditors and do not ensure a minimum level of protection, both of which are violations of fundamental aspects of English public policy.

Agrokor's position in summary:

- The public policy test is a very high bar and is rarely, if ever, successful and "manifestly" is a word that rarely appears in any other such public policy test so must mean an even higher standard applies under the CBIR.
- The question of whether the *parri passu* principle is violated will only be in issue when considering the effect of recognition of the settlement agreement, so is not an issue relevant to this application. In any event, there are numerous situations where this principle has been disapplied or modified, suggesting it is not an inviolable principle of English public policy.
- There is also no disapplication by the EAL of the principle of minimum protection of creditors as the right of appeal for creditors under section 339 of the Croatian Bankruptcy Law is imported into the EAL.

Key Quotes from the Judgment

Granting Sberbank permission to appear on the English Recognition Application, at paragraph [17] of his judgment, the Judge emphasised:

> ***"For the sake of completeness, I add, however, that I was told on behalf of the applicant* [Agrokor] *that other creditors support the application, and that in this respect the respondent* [Sberbank] *is "out on a limb"."***

Referring to the expert witnesses, at paragraph [29] of his judgment, the Judge noted:

> ***"On the whole, on practical matters of how courts would actually cope with bankruptcy situations, I usually preferred the approach of Judge Eraković* [appointed by Agrokor] *to that of Prof Uzelac* [appointed by Sberbank]."**

Responding to points raised by Sberbank relating to the Republic of Croatia's involvement in the Proceeding, at paragraph [91] of his judgment, the Judge stated:

> ***"The fact that the structure of the Extraordinary Administration Law gives significant powers to the government of Croatia is both hardly surprising, and nothing to the point. It is hardly surprising, because this law is concerned with companies of strategic importance to the economy of Croatia that get into financial difficulty, and the government has a role to play in such cases. It is after all the government's job – or one of them – to look after the economy of a country."***

Disclaimer

*The information contained herein has been prepared by Agrokor d.d. and its direct and indirect subsidiaries (the **Group** or **Agrokor**). The information contained herein is provided for information purposes only.*

This document and its contents are confidential and may not be retransmitted, further distributed to any other person or published, in whole or in part, by any medium or in any form for any purpose.

No reliance may be placed for any purposes whatsoever on the information contained in this document nor on its completeness, accuracy or fairness. No representation nor warranty, express or implied, is made or given by or on behalf of any company in the Group nor their respective directors or employees or any other person as to the accuracy, completeness or fairness of the information or opinions contained in this document. No company in the Group nor any of their respective directors or employees undertakes any obligation to provide the recipient of this document with access to any additional information or to update this document for any additional information or to correct any inaccuracies in any such information which may become apparent. No independent verification has been undertaken in respect to this document.

This document contains statements about future events and expectations that are forward-looking statements. These statements typically contain words such as 'expects' and 'anticipates' and words of similar import. Any statement in this document that is not a statement of historical fact is a forward-looking statement that involves known and unknown risks, uncertainties and other factors which may cause actual results, performance or achievements to be materially different from any future results, performance or achievements expressed or implied by such forward-looking statements. None of the future projections, expectations, estimates or prospects in this document should be taken as forecasts or promises nor should they be taken as implying any indication, assurance or guarantee that the assumptions on which such future projections, expectations, estimates or prospects have been prepared are correct or exhaustive or, in the case of the assumptions, fully stated in the document.

No company in the Group assumes any obligations to update the forward-looking statements contained herein to reflect actual results, changes in assumptions or changes in factors affecting these statements. Special attention should be given to the fact that projections can vary in both positive and negative ways and are subject to uncertainty and contingencies, many of which are outside of the control of Agrokor.

No company in the Group nor any of their respective directors or employees accepts any liability whatsoever for any direct, indirect, special or consequential loss arising from any use or reliance of this document or its contents.