

Communication concerning the decision of the Curia of Hungary
in the civil case n° Gfv.VII.30.236/2012/5

The predecessor of the claimant, commissioned by an Austrian company, the second defendant in the present case, undertook to issue letters of credit for third persons. According to the claimant, on 9 June 2003 the second defendant gave to the claimant, as a guarantee, shares in P. Bank which it held, in the event that P. Bank might be required to pay the amounts covered by the letters of credit.

In its partial decision n° Gfv.IX.30.214/2005/7 dated 6 December 2005, the Supreme Court ordered the Hungarian State, the first defendant, to purchase the shares in P. Bank that were replaced by shares in E. Bank. The Hungarian State fulfilled its obligation by purchasing the shares in question and paid into court the amount set by the Supreme Court.

Insolvency proceedings were opened against the second defendant in Austria on 5 December 2003 and published on 4 February 2004.

The claimant brought an action in which it sought a declaratory judgement to the effect that it had a right over the security deposit paid into court.

Based on Article 157, point a) of the Code of Civil Procedure, the first instance court removed the case from the register after having found that the Austrian law on insolvency proceedings did not permit an action to be brought against an economic operator in liquidation in respect of the assets relating to the insolvency, which implied a total prohibition on bringing an action. There are exceptions to this prohibition, but an action seeking a declaratory judgement on the right over security deposit does not constitute an exception.

The second instance court confirmed the order of the first instance court on the ground that Article 4, paragraph (1) of the Council Regulation (EC) N° 1346/2000 of 29 May 2000 on Insolvency Proceedings (hereinafter referred to as the Regulation) within the meaning of recital 23 in the preamble to the Regulation allows the inference to be drawn that by virtue of Article 4, paragraph (2), point f) of the Regulation, the law of the Member State in which the insolvency proceedings were opened is to be applicable to the insolvency proceedings and their effects.

The Supreme Court referred to the European Court of Justice for a preliminary ruling. In its judgement C-527/10 of 5 July 2012, the ECJ ruled that “Article 5, paragraph (1) of the Council Regulation (EC) N° 1346/2000 of 29 May 2000 on Insolvency Proceedings must be interpreted as meaning that that provision is applicable, in circumstances such as those in the main proceedings, even to insolvency proceedings opened before the accession of the Republic of Hungary to the European Union where, on 1 May 2004, the debtor’s assets on which the right *in rem* concerned was based were situated in that State, which is for the referring court to ascertain”.

Following the judgement of the ECJ, the Curia of Hungary quashed the final decision and ordered the first instance court to conduct a new procedure and render a new decision. According to the Curia, the ECJ unambiguously stated that in the present case the provisions of the Regulation shall be applied. The Curia had to ascertain based on the preliminary ruling of the ECJ whether, according to Article 4 of the Regulation, the law of the Member State that opened the main proceedings had to be applied, or the case shall be judged based on Article 5 of the Regulation.

Interpreting Article 5 of the Regulation within the meaning of recital 25 of the preamble to the Regulation and the Virgós-Schmit Report, the Curia ruled as follows:

According to Article 5 of the Regulation “the opening of insolvency proceedings shall not affect the rights *in rem* of creditors or third parties in respect of assets belonging to the debtor which are

situated in another Member State at the time of the opening of the proceedings.” This exception to the main rule means that the proceeding concerning the enforcement of the rights *in rem* can and shall be conducted based on the general rules of civil procedure. The above-mentioned provision of Article 5, paragraph (1) of the Regulation implies that the creditor can demand the enforcement of the rights *in rem* as if the main proceedings had not been opened and the debtor had not been subject to insolvency proceedings. Consequently the enforcement of the creditor’s rights *in rem* is not affected by the national insolvency legislation to be applied in the main proceeding and by the restrictions on bringing actions included in national insolvency legislation.

Since the asset constituting the security deposit was in Hungary, a Member State other than the Member State opening the main proceedings, the opening of the insolvency main proceeding in Austria in respect of the second defendant does not have an effect on the enforcement of the creditor’s rights *in rem*.

The rules of substantive law are normally to be determined by the law of the state where the asset is situated (recital 25 of the preamble to the Regulation). In order to determine in the present case whether the security deposit existed or not, the rules of Hungarian civil law shall be applied. The Hungarian courts have jurisdiction to proceed with the action of the second defendant based on Article 5, paragraph (1), point a) of the Council Regulation (EC) N° 44/2001. According to Article 62 of the Decree-Law n° 13 of 1979 on International Private Law (hereinafter referred to as the Decree-Law), the proceeding shall be conducted according to Hungarian procedural law.

The Curia argued that if the national law contains provisions on the debtor’s disposing capacity and representation, those have to be taken into account in the proceedings [Article 64, paragraph (1) of the Decree-Law]. According to Article 18 of the Decree-Law governing the status of the defendant in the proceedings, the legal capacity of a legal person, its commercial status, the rights derived from its personality and the legal relationships between its members shall be determined in accordance with its personal law. The personal law of a legal person shall be the law of the State in the territory of which it is registered.

Pursuant to Austrian national law, the debtor has no disposing capacity during the insolvency proceeding, an action can only be brought against the bankruptcy administrator. In its motion the claimant indicated not the bankruptcy administrator, but the company subject to the insolvency proceeding as second defendant.

According to Article 157, point a) within the meaning of Article 130, paragraph (1), point g) of the Code of Civil Procedure, the proceeding shall be dismissed if the claimant did not involve this person in the action in spite of being so ordered. According to this provision, the court can dismiss a claim without a writ of summons only if the claimant failed to involve the person against whom the action can be brought based on the relevant legislation in spite of being so ordered. Therefore the proceeding can be dismissed according to Article 157, point (a) of the Code of Civil Procedure only in such an event.

Based on the documents of the case, the Curia established that the first instance court – due to its different legal viewpoint – did not inform the claimant that the action can be brought against the person specified by the relevant legislation and did not call upon the claimant to involve the person in the proceeding. Having failed to provide the necessary information, the court could not have dismissed the proceeding on the ground that the claimant failed to involve the person specified by law in the proceeding.

Budapest, the 16th of January 2013

Civil Department of the Curia of Hungary