

FIRST PAST THE POST

THE ENFORCEMENT RACE

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This article is about a recent decision of the King's Bench Division, *OOO Nevskoe v UAB Baltijos Šalių Industrinio Perdirbimo Centras and Bilderlings Pay Ltd*. It is useful reading for FIRE practitioners in relation to judgment debt/arbitration award enforcement in multi-jurisdictional disputes, particularly where there is a looming spectre of insolvency of the judgment/award debtor.

The decision deals specifically with a third party debt order (TPDO) against an English-incorporated financial institution in relation to a European judgment debtor who owed money pursuant to an arbitral award. It raises some important and interesting points for practitioners to think about and be aware of when advising in these disputes.

As we all know, the race to (usually limited) assets in a jurisdiction where enforcement is not prohibitively difficult or expensive can be an aggressive one and an awareness of this case is important.



The facts

The Claimant was a Russian-incorporated agricultural supplier (Nevskoe), which supplied wheat to a Lithuanian-incorporated company (UAB) in late 2020 and early 2021. UAB failed to pay for the wheat and Nevskoe obtained an arbitral award against it in a GAFTA arbitration in Lithuania. The award was for over 5.4 million euros.

During the arbitration, Nevskoe obtained a freezing injunction against UAB under section 44 of the Arbitration Act 1996 in England, granted without notice on 18 June 2021 and continued on notice a week later.

The asset disclosure given by UAB pursuant to the freezing order showed that UAB's only asset was around 627,000 euros in an account

held in England with the third party (Bilderlings).

The arbitral award was recognised in England prior to enforcement.

UAB went into an insolvency process in Lithuania on 31 March 2022, following action taken against it by another creditor, and a court-appointed Insolvency Administrator appointed over it.

On 26 August 2022, Nevskoe issued an application for a TPDO in relation to the funds held with Bilderlings and the Master made an interim TPDO on 4 September 2022, with the date for the final TPDO hearing set for 3 November 2022. The interim order was served on UAB on around 27 September 2022.

On 27 October 2022, UAB's Insolvency Administrator applied in England for the Lithuanian insolvency proceedings to be recognised under the Cross-Border Insolvency Regulations 2006 (CBIR) and notified Nevskoe of this on 28 October 2022. The hearing of the recognition application was set for 4 November 2022, the day after the final TPDO hearing.



What was (and was not) in dispute

Neither party thought there was any real likelihood that the recognition proceedings under the CBIR would be refused on 4 November 2022.

It was agreed between the parties that if the interim TPDO was not made final before recognition was granted under the CBIR, there could be no final TPDO because of the stay on proceedings imposed by paragraph 20(1) of Schedule 1 to the CBIR. (Nevskoe would then have simply been another unsecured creditor of UAB and would have had to prove in its insolvency alongside others.)

It was also agreed that in order for a final TPDO to be made:

- There must be a debt due from the third party to the debtor;
- The third party must be within England and Wales;
- The debt must be situated within England and Wales; and
- The Court must consider it right or just to make the order, taking into account all the circumstances of the case (i.e. the Court has a discretion to exercise).

At the final TPDO hearing on 3 November 2022, UAB's Insolvency Administrator objected to the making of the final TPDO, on the basis that the recognition proceedings which had already been issued ought to be allowed to take their usual course (including the inevitable stay on Nevskoe's enforcement action that would be imposed once recognition was granted).

Nevskoe argued in summary that:

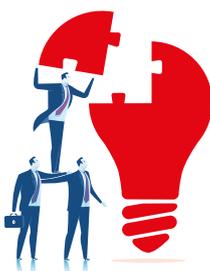
- it had acted diligently and should be entitled to the fruits of that diligence, on the basis that where there are no domestic insolvency proceedings opened (such that the distribution policy set out in the insolvency legislation is not yet engaged), the general policy is "first past the post" in a competition between creditors over assets in England and Wales;

- UAB had engaged in "trickery" and delayed both the arbitration and enforcement of the award and this was exacerbated by UAB's director frustrating payment to Nevskoe and then being identified as a preferential creditor in UAB's insolvency to be paid out ahead of Nevskoe;
- UAB's Insolvency Administrator had not acted diligently or expeditiously in obtaining recognition.



What did the Court decide?

The Court made the TPDO final, applying the "first past the post" principle referred to above, given that the recognition order had not yet been made in England in respect of UAB's Lithuanian insolvency. Certain conditions were attached before payment could be made to Nevskoe by Bilderlings (because there was a question raised at the hearing about whether Nevskoe had in fact assigned the debt to someone else).



Some tips for future cases

If you are acting for the judgment/award creditor in England and Wales:

- Keep an eye on all publicly available information in the local jurisdiction of the judgment debtor about possible insolvency
- Assess promptly what possible enforcement applications are open to you: TPDOs, charging orders over property, orders for sale etc.

- If you do not have much information about the debtor's assets, how can you get information? Could you get an asset disclosure order against the debtor or any third parties (such as banks, corporate service providers etc)? Can you get a CPR Part 71 examination order (if there is a director/officer of the judgment debtor within the jurisdiction of England and Wales)?
- Do not delay in issuing the applications that you want to – several can be made on paper and without notice in the first instance.
- Watch out for full and frank disclosure obligations on a without notice application.

If you are acting for the judgment/award debtor's foreign insolvency officer:

- Consider whether you should issue a recognition application in England and Wales. If the answer is "yes", consider under which regime your application should be made.
- Consider whether you should issue recognition proceedings in any other jurisdiction.
- Make recognition applications as quickly as possible and seek to have an expedited hearing to get the recognition order quickly if there is good reason to do so (eg where there is a final TPDO or final charging order hearing listed).
- If you find that the recognition order cannot be granted prior to something like a final TPDO hearing, it would be advisable to file proper evidence to explain why the Court should not exercise its discretion in favour of the creditor by the deadline in the CPR (which was not done by UAB in Nevskoe).
- Consider whether you should apply for any interim orders (eg the interim powers available under the CBIR pending the making of a recognition order).
- Consider whether you should ask for any conditions to be attached to any final order that is made prior to recognition.

