

PROTECTION OF CREDITORS

Case study: A Polish couple lives in Warsaw. During their years living together the married couple have incurred numerous debts. They decide to move to Finland, where they soon incur new debts.

For the recovery of the debts, what order of creditors will be established? What will happen to the couple's assets?

Detailed questions:

Question 1): *A person in debt leaves his/her country to move abroad. What rights does the creditor in the country of origin have?*

Question 2): *A person moves abroad and incurs debts. The creditors in the country of origin have privileged rights with respect to the debtor according to their national law. What are the rights of the creditors in the host country? How can the privileged creditors be defended?"*

Question 3): *A person with many debts in country A moves to country B, where He/she incurs further debt. Which country's creditors have priority? Does a system exist to defend individuals with excessive debts?*

SUMMARY OF ANALYSIS

The course of the enforcement proceedings necessary for the recovery of debts incurred by the Polish couple first domiciled in Poland and then in Finland as well as any other possible proceedings necessary for the establishment of other obligations of the couple are governed by regulations of the country where the proceedings have been instituted. This results from a widely recognized *lex fori processualis* rule. Thus, detailed issues related to the proceedings instituted as a result of the above-mentioned case study shall be resolved on the basis of either the Polish or the Finnish Code of Civil Procedure, depending under which system the enforcement proceedings are carried out.

Debtors' assets will be used to collect debts and satisfy their creditors' claims. It should be noted that the Polish Code of Civil Procedure does not list any provisions providing for special protection of the nationals or foreigners. If a judgment issued abroad is declared enforceable in Poland upon a foreigner's request (e.g. based on the **Council Regulation no 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters**, hereinafter referred to as Regulation no 44/2001 or in the case of countries outside the European Union, in accordance with Brussels Convention, bilateral agreement or Art. 1097 and following of the

Polish Code of the Civil procedure) or if he / she submits the European Enforcement Order featuring the enforceability clause issued in Poland, then he / she participates in the enforcement procedure **in accordance with the same rules** that are applicable to the Polish nationals. Irrespective of the parties' nationality, provisions specified in the division no 8 of the Code, i.e. Articles 1023 and following (articles) of the Polish Code of Civil Procedure, are applicable to the order of satisfying the creditors' claims.

Answers to the detailed questions:

1): *A person in debt leaves his/her country to move abroad. What rights does the creditor in the country of origin have?*

For the purpose of the analyzed case study, we should make a clear assumption that the Polish debtors have left Poland and that they are presently domiciled in Finland. Article 59 of the Council Regulation No 44/2001 provides for the following:

Art. 59.1 In order to determine whether a party is domiciled in the Member State whose courts are seized of a matter, the court shall apply its internal law.

2. If a party is not domiciled in the Member State whose courts are seized of the matter, then, in order to determine whether the party is domiciled in another Member State, the court shall apply the law of that Member State.

In accordance with Article 5 letter a) of the Council Regulation No 44/2001 saying that *"A person domiciled in a Member State may be sued in another Member State: (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question"*, our debtors in question, who are presently domiciled in Finland, may be prosecuted in Poland in relation to debts incurred by them in Poland. In this case Polish regulations shall apply to claims made against them.

For their debts to become due, the creditors in Poland should first of all institute the enforcement proceedings against their debtors. Pursuant to the *lex fori processualis* rule, the law of the country where the enforcement proceedings are carried out shall be applicable: if the enforcement proceedings are carried out in Poland, then the Polish law shall apply. Simultaneous enforcement proceedings are also possible: Polish creditors may institute the proceedings relating to debts incurred in Poland and Finnish creditors may do the same in Finland in relation to debts incurred in Finland. If the enforcement proceedings are carried out in Poland, then the order of creditors will result from the Polish Code of Civil Procedure. Under the Polish Code of Civil Procedure the pecuniary

claims may be enforced from debtors' assets: from their movable assets (by means of a sales procedure), money, earned income, bank accounts, other claims and other property rights (e.g. from shares in companies established under company law, securities, rights in division of assets), from real estate, fractional parts of real estate and of perpetual usufruct as well as from sea vessels. The order of satisfying creditors' claims, i.e. the division of the amounts recovered under the enforcement proceedings, is regulated in Article 1025 and following of the Polish Code of Civil Procedure. The division of the amount recovered is obligatory if there are at least two creditors. The division of amounts without draft terms thereof takes place if the amount recovered suffices to satisfy all creditors' claims and if it has not been enforced from real estate.

In the analyzed case study, if the debtors' assets were situated in Poland, then the enforcement would be effected from the assets in Poland, however, if their assets were also in Finland, then the enforcement could also be effected from the Finnish assets.

The fact that judgments issued in a Member State are recognized in the other Member States without any special procedure being required are of special importance. Article 33 par. 1 of the Council Regulation no 44/2001 provides that: *A judgment given in a Member State shall be recognized in the other Member States without any special procedure being required.* Therefore, the judgment issued by the Polish court would, if necessary, be applicable in Finland. Moreover, the **Regulation (EC) no 805/2004 of the European Parliament and of the Council of 21 April 2004 creating the European Enforcement Order for uncontested claims** (Official Journal L of 30 April 2004) provides for the establishment of the European Enforcement Order for uncontested claims to permit, by laying down the minimum standards, the free circulation of judgments, court settlements and authentic instruments throughout all Member States without any intermediate proceedings needing to be brought in the Member State of enforcement prior to recognition and enforcement. These claims can then be subject to the European Payment Order provided for in the **Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European Order for Payment Procedure** (Official Journal L 339, 30/12/2006 P.0001 – 0032). The European Enforcement Order and European Payment Order obtained abroad allow the possible enforcement of claim carried out abroad to be expedited, provided that the debtors' assets are situated in that country. If these two documents have been obtained, it is not necessary to carry out the exequatur procedure, i.e. the procedure for declaring the judgment enforceable in the country in which the enforcement is to be carried out.

If the Polish debtors are domiciled in Finland, then they can also be sued by the Polish creditors before the Finnish courts. Article 2 of the Council regulation no 44/2001 provides that:

- 1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.*
 - 2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.*
- In this case the claims against the Polish debtors shall be governed by the Finnish regulations.

Therefore, Polish creditors can choose if they want to sue their debtors in the Polish or in the Finnish courts. The decision relating to the above will determine the fact whether the Polish or Finnish law will be applied. If the debtors' assets are situated in Poland, then the Polish creditors certainly would choose to institute the enforcement proceedings in Poland. If debtors "escaped" with their assets to Finland, then the Polish creditors may carry out the enforcement proceedings in Poland, and then obtain European Enforcement Order or European Payment Order, or they may carry out the procedure in Finland right from the beginning.

Article 27 and following of the Council Regulation No 44/2001 governs the issues resulting from the pendency of matters involving the same claim and the same parties in the courts of different Member States.

Simultaneous jurisdictions of Polish and Finnish courts for the same matter is possible (it may also occur in respect of another country). In the situation where the proceedings involving the same matter have been initiated in both countries at the same time, the above-mentioned provisions of the Council Regulation No 44/2001 apply. Then, under the Polish law, the court may **stay the proceedings** and one of the courts may decline its jurisdiction.

As regards the situation above, in Poland **Art. 1099 of the Code of the Civil Procedure** would become applicable, which shall mean that the Court in question would reject the application and dismiss the case under proceedings that have already been instituted. However, it should be assumed that Article 27 and following of the Council Regulation No 44/2001 and Art. 1099 of the Polish Code of Civil Procedure will become applicable if one of the parties notifies the court of the fact that the same proceedings have been initiated in another State and thus that the matter in question is pending (*lis pendens*). Although Article 27 of the Regulation is automatically applicable, and thus without losing its applicability if no request has been lodged by one of the parties, it is hardly conceivable that a court would inquire of its own motion if the same proceedings have been instituted in another Member State.

Question 2):

A person moves abroad and incurs debts. The creditors in the country of origin have privileged rights with respect to the debtor according to their national law. What are the rights of the creditors in the host country? How can the privileged creditors be defended?

As an answer to this question, it should be indicated that the Polish law does not provide for provisions foreseeing privileged position of creditors in respect of their country of origin or of the country of incurring debt, i.e. in respect of the debt's "nationality". Consequently neither the debtors' nor creditors' or debt's nationality are of any significance here. The matters in question are resolved under the law of a country where the enforcement proceedings are carried out. From a legal point of view, in Poland the "privilege" is granted to these creditors who have taken the pains to carry out the court and enforcement proceedings and who have obtained the enforcement order. For this category of creditors, the Polish law lays down the order of satisfying their claims, which happens irrespective of their nationality and in accordance with the rules specified in the provisions of the Code of Civil Procedure described above (art. 1025 and following). At the same time it seems unlikely that this type of regulations could exist in other Member States, in particular taking into account the risk of discriminating citizens of the remaining Member States of the EU.

Question 3):

„A person with many debts in country A moves to country B, where he/she incurs further debts. Which country's creditors have priority? Does a system exist to defend individuals with excessive debts?“

It should be restated with all possible force that for the case study analysed, the Polish enforcement law does not provide for any priority of creditors. The possible priority results from the statutory classifications of obligations (compare the provisions of the Polish Code of Civil Procedure quoted above) and not from the classification of creditors in respect of their countries of origin.

As regards the protection of individuals against excessive debts, on 5 December 2008 the Polish Parliament (Sejm) amended the Polish Bankruptcy and Reorganization Law, by virtue of which the notion of a consumer bankruptcy has been introduced.

