FRANCE

Tunnelling through the wreckage

A recent landmark court decision involving Eurotunnel has triggered debate over the ramifications for insolvency proceedings. Benoît Fleury picks over the detail

The French Cour de Cassation – the highest court in the judiciary – last June handed down five landmark decisions in the Eurotunnel matter, reversing five earlier decisions by the Paris Court of Appeals in November 2007.

By doing so, the Cour de Cassation partly overturned longstanding French case law. Until then, creditors did not have standing to challenge the opening of French insolvency proceedings, except under specific circumstances. Decisions similar to those handed down by the French court could likely be rendered in future by jurisdictions in other EU member states.

On 2 August 2006, the Paris Commercial Court opened safeguard proceedings in favour of 17 companies belonging to the Eurotunnel group, including five companies incorporated in the UK. The Paris Commercial Court assumed its jurisdiction over these five UK companies on the grounds of article 3.1 of EC regulation 1346/2000 regarding insolvency proceedings, which provides that the competent insolvency court is the one where the debtor has its centre of main interests. The Paris Commercial Court found that the centre of main interest of these five UK companies was Paris, not at their registered office in the UK.

Centred in Paris?

To challenge the jurisdiction of the Paris courts over these five UK companies, certain creditors initiated proceedings in the Paris Commercial Court. In five judgments handed down in January 2007, the Paris Commercial Court found that the creditors had standing, but that their challenges were without merit. The creditors appealed.

Pursuant to five decisions dated 29 November 2007, the Paris Court of Appeals refused to review the merits of the case – in other words, whether the centres of main interest of the UK companies were in fact situated in Paris. It simply ruled that these creditors did not have standing to challenge the jurisdiction assumed by the Paris courts over the five UK companies.

The Paris Court of Appeal's ruling was based on French procedural rules and the narrow interpretation given thereof pursuant to a longstanding case law (dating to well before the EC regulation) and the opinion of a majority of French legal scholars.

Dramatic interpretation

According to this interpretation, creditors may challenge the judgment opening insolvency proceedings only if they are able to evidence that either the debtor acted fraudulently when it requested such opening or the opening of the proceedings has caused them a damage distinct from that suffered (or that could theoretically be suffered) by other creditors. As a consequence, based on such interpretation, creditors such as lenders or noteholders never had standing to challenge the opening of French insolvency proceedings.

This interpretation of French procedural rules had a dramatic effect when combined with the case law handed down by the European Court of Justice (ECJ) regarding the EC regulation.

In fact, the ECJ ruled in its *Eurofood IFSC Ltd* case that if an interested party considers that the centre of main interest of a debtor is situated within a member state (party to the EC regulation) other than where the main insolvency proceedings were opened, and therefore wishes to challenge the jurisdiction assumed by the court having opened the main insolvency proceedings, it must do so by initiating recourse proceedings in the member state of the opening court.

The Cour de Cassation reversed its interpretation under the visa of the EC Regulation and article 6.1 of the European Convention on Human Rights regarding the right to a fair hearing

In other words, in the Eurotunnel matter, the ECJ case law meant that creditors of the UK companies could challenge the jurisdiction assumed by the Paris courts in French courts only and using available French recourse proceedings. The combination of this ECJ case law and the narrow interpretation of the French procedural rules meant that, in practice, French or foreign creditors (lenders, bondholders) did not even have standing to challenge the jurisdiction assumed by French courts over a foreign debtor filing for insolvency proceedings in France.

In its landmark decisions of 30 June 2009, the French Cour de Cassation reversed its interpretation under the visa of the EC regulation and article 6.1 of the European Convention on Human Rights regarding the right to a fair hearing.

The Cour de Cassation ruled that creditors domiciled within an EU member state other than the one where the main insolvency proceedings were opened may not be deprived of the right effectively to challenge the jurisdiction assumed by the court having opened these main insolvency proceedings.

EC rules and principles

The Cour de Cassation does not specifically lay out its reasoning. However, one reasonable ground could consist of the fact that since the Paris courts had assumed jurisdiction based on the EC regulation (and not merely on French rules) they had to apply EC rules and principles (and not merely French rule) to determine whether this jurisdiction could be challenged.

The Cour de Cassation's decision focuses on the domicile of the creditors challenging the main insolvency proceedings and it only grants creditors

the right to challenge the jurisdiction of the court.

Creditors must be 'domiciled within an EU member state other than the one where the main insolvency proceedings were opened'. This should be interpreted as follows:

- the relevant criterion is not the creditor's nationality (or its country of incorporation) but its domicile, namely, the place of its registered office, of its head office or of its main establishment. In other words, the debtor can take advantage of its centre of main interest to request the opening of insolvency proceedings and the creditor can take advantage of its domicile to challenge the centre of main interest;
- creditors domiciled in France do not have standing to challenge the jurisdiction assumed by a French court, even over a foreign company.

However, one could argue that even for French domiciled creditors, whether the debtor files for insolvency proceedings in France or in another member state, this will most likely have consequences regarding their rights once the insolvency proceedings have been opened. Therefore, French domiciled creditors should have standing to challenge the jurisdiction assumed by French courts over a foreign company.

Choice of governing law

But examining the rights or duties of the creditors under local rules once the proceedings are opened is not at stake in the Cour de Cassation's decisions. What is at stake is whether the choice of jurisdiction and, consequently, the choice of the law governing the insolvency proceedings (regardless of the content of the law) in itself carries potential damage for the creditor.

The French Cour de Cassation's position could be interpreted as meaning that creditors domiciled in France are not at a competitive disadvantage if their debtor – indeed, even a foreign debtor – files for French insolvency proceedings. The justification would be that French domiciled creditors are acquainted with French jurisdiction and legislation and will not be prejudiced by the mere fact that French courts have assumed jurisdiction (and that French law will apply).

The Cour de Cassation only ruled that creditors 'may not be deprived of the right effectively to challenge the jurisdiction assumed' by the Paris court. The concern here is the mere right to challenge the jurisdiction assumed by the court having opened the main insolvency proceedings. The Cour de Cassation's decisions should, as such, not be read as granting standing to creditors (French or foreign) to challenge whether the conditions for the opening of insolvency proceedings are satisfied or the type of proceedings that have been opened.

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SPAIN

Damaging thoughts

Patricia Herrero García-Ramal looks at the evolving position in Spain regarding the need to prove damages in intellectual property actions

In Spanish civil actions the burden of proof falls on complainants and one of the core principles of case law in intellectual property and unfair competition cases was that the existence of damages must be evidenced and proved.

However, there is a second line of case law introduced by the Supreme Court that holds there are factual situations in which damages can be deemed to be a necessary consequence of the infringement. There are many Supreme Court judgments in this vein, with one of the most important being a ruling in 2005 (RJ 2005/5307), that found: 'It is very rare that an infringement does not provide any benefit to the infringer, or any loss to the plaintiff who seeks to put a stop to the unlawful activity, if one takes into account the economic interests that preside over these areas which are generally linked to corporate activities.'

More recently, a Supreme Court judgment in July 2008 (RJ 2008/4482) has set a new precedent in this issue, upholding the first line of thought. The court underscores that redress for damages cannot be presumed and that the party making the claim must evidence both the existence and the amount of such damages.

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However, the court exceptionally accepts the presumption of the existence of damages when they are a necessary or unavoidable result of the unlawful act, or an inescapable, natural, inevitable consequence of such act.

What the judgment outlines is that the *ex re ipsa* theory in intellectual property and unfair competition appears in several decisions, but as a presumption of the cause in singular and evident cases. Although some decisions tend to generalise this criterion, under no circumstances does case law admit the application of the *ex re ipsa* rule in all cases and it has never admitted the existence of a legal presumption of damages in a patent violation case.

Therefore, it is one thing to say that a case exceptionally shows the existence of damages without imposing on the claimant the burden of proof, and quite another to extend to