Lessons to be learnt from the ECJ Judgment of June 11th 2015 in the Nortel case

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Following the decisions of the Delaware and Ontario courts with respect to the allocation of the lockbox of the amount of US$7.5 billion, the European Court of Justice (ECJ) has just handed down its decision on the European side of the equation.

What are the issues at stake?

In January 2009, the High Court in London opened main proceedings for the 19 European subsidiaries of the Nortel group. Alan Bloom, Alan Hudson, Stephen Harris and Chris Hill from EY, appointed as the Joint Administrators, did everything to avoid the opening of secondary proceedings.

As in the Rover and Collins & Aikman cases, they promised to local creditors to apply the same ranking as if the secondary proceedings would have been opened.

Gabriel Moss, counsel to the Joint Administrators, made an application for a judicial cooperation.

In this respect, Justice Patten agreed to send a letter to the relevant European jurisdictions, so that the Joint Administrators could intervene to avoid the opening of secondary proceedings.

In May 2009, the Joint Administrators changed their mind. They did not want to pay for the redundancies of the 500 French employees to be laid off by Nortel Network SA (NNSA) and requested the opening of secondary proceedings in France.

As a consequence, the redundancies costs were advanced by the AGS, the State wages insurance.

The French employees went on strike and obtained an indemnity of 44 million Euros (37 million Euros were privileged) to be paid out of the proceeds to be received by NNSA in connection with the sale of its assets.

Contrary to all expectations, the global sale of the assets of the whole group reached an incredible amount of US$7.5 billion, demonstrating the efficiency of the Chapter 11 system and the coordination of proceedings.

This being said, five years later, the French employees are still waiting to obtain their indirect pro-rata share of the lockbox where the sale price was placed in escrow, demonstrating that the US litigation-driven liquidation procedure is not a model for Europe.

Getting impatient, the French employees sued the Liquidator of the French secondary proceedings of NNSA in order to obtain a first partial distribution.

The Joint Administrators, as a party in interest, were brought into the law suit and took the position that the pro-rata share of NNSA in the lockbox belong to the main proceedings.

They also argued that French courts do not have jurisdiction to decide over the location of assets that belong to secondary proceedings.

If the proceeds of the lockbox were distributed to the secondary proceedings, the employees would have a privileged claim under French law. On the other hand, if the main proceedings cashed in the money, the claim of the employees would be unsecured under English law, since the Joint Administrators did not want to confirm the application of French law ranking.

What are the main lessons to be learnt from the ECJ judgment?

First, the ECJ ruling confirmed the jurisdiction of the commercial court of Versailles to decide which assets belong to its secondary proceedings. The jurisdiction is alternative, not exclusive.

The picture of the assets belonging to secondary proceedings must be made on the day of the opening of proceedings. Any subsequent transfer to another state is irrelevant. Consequently, the fact that the French assets became a claim against the lockbox located in the US doesn't matter.

The ECJ also gave some guidance with respect to the interpretation of article 2) g of the EIR:

(i) **no reference should be made to national law,**

(ii) **article 2) g is applicable on a worldwide basis including all assets located outside the European Union,**

(iii) **the ECJ invited the commercial Court of Versailles to qualify the assets in order to find out to which category they belong to, namely;**

- tangible properties, which are located in the state where the assets are situated
- properties and rights ownership of or entitlement to, which must be entered in a public register, and which are located in the state where the public register is kept
- claims, which are located in the state of COMI of the debtor.

But what happens if an intangible asset does not fit into these three categories, like for example unregistered copyright? The ECJ ruling does not answer this question.

In the same way, the problem as to whether the secondary Liquidator has the exclusive power and authority to terminate ongoing contracts that are closely related to the activities of the establishment has not been put forward to the ECJ.

In the Nortel case, only the secondary Liquidator terminated the employment contracts, the leases and the license agreements under the supervision of the French court.

Secondary proceedings incurred the financial burden and potential liabilities in connection therewith, in particular the redundancy payments to the employees – which was the very reason why secondary proceedings were opened by the Joint Administrators in May 2009.

On the other hand, it is logical that the secondary proceedings are entitled to receive the benefits of such termination, if any.

The ECJ judgment on Nortel; the details

On 11 June the European Court of Justice handed down its decision on the French side of the Nortel bankruptcy, (see opposite) detailing amongst other things how assets and claims should be divided between the main (pan-European) insolvency proceedings and the secondary (French) proceedings.

France was the only jurisdiction in which Nortel entered secondary proceedings; all 17 other European jurisdictions fell under primary proceedings anchored in London with a team of joint administrators from EY led by Alan Bloom.

The ECJ decision concerned "the interpretation of Articles 2(g), 3(2) and 27 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1). "

The judgment

The conclusion of the ECJ's judgment ran: "Articles 3(2) and 27 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted as meaning that the courts of the Member State in which secondary insolvency proceedings have been opened have jurisdiction, concurrently with the courts of the Member State in which the main proceedings have been opened, to rule on the determination of the debtor's assets falling within the scope of the effects of those secondary proceedings.

"The debtor's assets that fall within the scope of the effects of secondary insolvency proceedings must be determined in accordance with Article 2(g) of Regulation No 1346/2000," said the judgement.

Nortel France Firms & Faces

Nortel's French subsidiary

Reinhard Dammann and **Mylène Boché-Robinet**, Clifford Chance, represented the Comité d'entreprise de Nortel Networks SA and others.

The French liquidator

Antoine Tchekhoff, **Edouard Fabre** and **Rajeev Sharma Fokeer**, FTPA, represented **Cosme Rogeau**, acting as court-appointed liquidator in the secondary insolvency proceedings in respect of Nortel Networks SA.

Nortel's EMEA administrators

Bruno Basuyaux and **Clément Dupoirier** of Herbert Smith represented Nortel's EMEA administrators, **Alan Bloom**, **Alan Hudson**, **Stephen Harris** and **Christopher Hill**, in the main insolvency proceedings in respect of Nortel Networks SA.

Other representatives

The Advocate General was **Paolo Mengozzi**. The French Government was represented by **F.-X. Bréchot** and **D. Colas**. The British Government was represented by **L. Christie**, and **Brian Kennelly**, a barrister with Blackstone Chambers. The EC was represented by **M. Wilderspin**.

Nortel judges refuse to 'reconsider' US$7 billion ruling

Judges in the US and Canada have rejected an attempt to overturn the ground-breaking decision they made on 12 May in favour of 33,000 ex-Nortel pensioners in the UK and another 20,000 in Canada who were hit by a deficit in their pension scheme when the telecoms giant entered bankruptcy in 2009.

On 6 July the Judges in both Canada and the US handed down their rulings on the complaints by Nortel's US estate and an ad hoc group of bondholders that had both filed motion for 'clarification and/or reconsideration' of the earlier decision allocating assets.

Significantly, this stopped short of constituting an appeal. Last year, the US and Canadian bankruptcy courts had been able to hold a unique parallel trial of the allocation proceedings, but there is no legal machinery to deal with a simultaneous appeal in both countries. The fear is that if a full appeal is launched against the original 12 May Allocation Decision, the US/Canadian trial process will collapse into more years of fruitless litigation.

So it was to the considerable relief of the pensioners and their advisers when Judge Gross of the Delaware bankruptcy Court and Justice Newbould of the Supreme Court of Ontario together rejected the request to 'reconsider' and have their Allocation Decision modified.

Judge Gross said:

"The Court understood the implications of its decision when rendering the Allocation Decision."

> Justice Newbould said that the figures put forward by the US parties in support of alleged manifest injustice were "misleading".

On the main point argued by the US parties, Justice Newbould concluded:

"I see no injustice in the result. I need not repeat what is contained in the reasons for judgment released on 12 May, 2015. Nothing argued on this motion leads me to consider that I erred in any way in those reasons."

The European administrators

The Nortel European operations are under the control of four joint administrators from EY led by Alan Bloom. Bloom commented on the latest decision on behalf of the administrators, saying:

"We are pleased that the judges have not delayed coming back to the parties following their reconsideration of the matters raised by various parties to the Nortel purchase price allocation litigation.

"We are hopeful that this will allow for an early distribution of the considerable sums held by the various estates and deposited in the lock box," said Bloom.

> "Creditors have waited long enough."

The Trustee of the Nortel UK pension scheme and the UK's Pension Protection Fund (PPF) were represented by Hogan Lovells. Angela Dimsdale Gill, head of pensions litigation at Hogan Lovells, commented on the latest decision:

"Naturally we are delighted that the Judges have confirmed their earlier decisions.

"We saw no possible basis for the modification of the judgments and the Judges have demonstrated that they are robust in their view that a pro rata distribution of the remaining Nortel assets is the fairest and most just result.

"We hope the matter can now be swiftly concluded and that all creditors can access what is rightfully theirs," said Dimsdale Gill.