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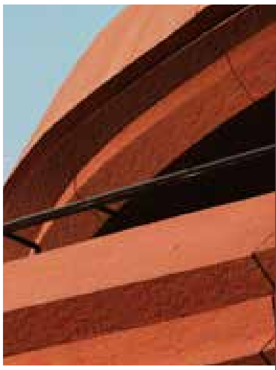

Litigation & Arbitration

Air Berlin's insolvency proceedings in Spain and claims arising from employment contracts

(Palma de Mallorca Provincial Court Judgment of 26 February 2026, ECLI: ES:APIB:2026:404)

The judgment, in line with the guidelines provided by the Court of Justice of the European Union on referral of questions raised, offers interesting insights into the interpretation of the relationship between universal insolvency proceedings and territorial insolvency proceedings.

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The Provincial Court of Palma de Mallorca allowed the appeal lodged by the insolvency practitioner of Air Berlin PLC & Co. Luftverkehrs KG (Air Berlin) against the judgment of a Business Court in the same city that upheld the action, brought by employees of the Spanish branch of the German company (Air Berlin Sucursal en España), for avoidance of an act of said practitioner. In doing so, the Provincial Court refers to the judgment of the Court of Justice of the European Union (C-772/22), which gives a preliminary ruling on questions raised in this same case.

Air Berlin was declared in a state of insolvency by the Charlottenburg District Court (Germany) in November 2017. In 2018, various court decisions were issued in Spain ordering the company to pay certain amounts to several employees of its Spanish branch who had been unfairly terminated. The employees lodged their claims (proof of debt) in the main insolvency proceedings in Germany, where they were treated as claims against the insolvent estate under German law. Subsequently, in the context of insolvency proceedings of a Spanish company, Aeropuertos S. L., Air Berlin received 1,061,291.86 euros, which were transferred to the fiduciary account of Air Berlin's insolvency practitioner. In November 2020, Air Berlin Sucursal en España was placed in insolvency proceedings at the request of the employees, whose claims were also considered claims against the insolvent estate in those proceedings. Several of those employees sought, within the framework of the Spanish insolvency proceedings, the avoidance of the transfer made to the German insolvency proceedings.

The judge presiding over the Spanish insolvency proceedings referred the matter for a preliminary ruling from the Court of Justice of the European Union (CJEU), which ruled as follows:

1) the assets situated in the State of the opening of the secondary insolvency proceedings comprise only the assets which are situated within the territory of that Member State at the time of the opening of those proceedings;

2) the insolvency practitioner in the main insolvency proceedings may remove the debtor's assets from the territory of a Member State other than that of the main insolvency proceedings, where it is apparent to that practitioner, first, that there are local creditors with claims arising from employment contracts that have been recognised by judgments and, second, that there is a protective attachment of assets ordered by an employment court of the latter Member State;

3) the insolvency practitioner in the secondary insolvency proceedings may bring an action to set aside against an act that was performed by the insolvency practitioner in the main insolvency proceedings.

The Provincial Court notes that Article 3(2) of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (EIR Recast) provides for the possibility of opening insolvency proceedings in the Member State where the debtor's main interests are situated (centre of main interests) and one or more in the Member State where the debtor possesses establishments. From the perspective of the assets available for distribution, the main proceedings are universal in scope, whereas the effects of the secondary proceedings are limited to the debtor's assets located in the Member State where the secondary proceedings were opened. However, the liabilities are universal, and creditors may lodge their claims in both sets of proceedings; the purpose of allowing for the opening of secondary proceedings is not solely to protect local interests. Furthermore, under the system established by the EIR Recast, the main proceedings have a dominant role in relation to the secondary proceedings.

In this context, the conclusion is that, as the CJEU had noted in its preliminary ruling, the assets situated in the State of the opening of the secondary insolvency proceedings comprise only the assets which are situated within the territory of that Member State at the time of the opening of those proceedings. Consequently, the amount transferred to the fiduciary account of the insolvency practitioner in the main proceedings prior to the date of the opening of the secondary proceedings does not form part of the latter's assets.

The action brought seeks to unwind the deposit of 1,061,291.86 euros into the fiduciary account of Air Berlin's insolvency practitioner, which determined the assignment of funds to the insolvency proceedings in Germany rather than to the payment of claims held by the Spanish branch's local employees. The appellant argues that this was not an act of the insolvency practitioner, but rather that the practitioner merely complied with the instructions of the court handling the insolvency proceedings of Aeropuertos S.L. The Provincial Court does not agree with this argument and concludes that the act in question is disputed not because of the deposit of the amount into the insolvency practitioner's account, but rather because of the use given to it, which was not to satisfy the claims of the local employees. It was a decision taken by the insolvency practitioner in the performance of its functions.

Furthermore, Article 21(1) EIR Recast authorises the insolvency practitioner appointed in the main proceedings to remove the debtor's assets from the territory of the Member State in which they are situated, subject to Articles 8 and 10 (concerning third parties' rights in rem of creditors and reservation of title, respectively) and as long as no other insolvency proceedings have been opened there and no preservation measure to the contrary has been taken there further to a request for the opening of insolvency proceedings in that State. These exceptions to the powers of the insolvency practitioner must be interpreted strictly, such that, as the CJEU has also noted, they do not include the existence of claims arising from employment contracts held by local creditors or a preventive attachment of assets.

The most relevant question is probably whether, when the action brought does not concern an act by the debtor but rather by the insolvency practitioner of the universal insolvency proceedings, this constitutes one of the actions to set aside that, pursuant to Article 21(2) EIR Recast, may be brought by the insolvency practitioner appointed in secondary proceedings. The CJEU answered in the affirmative because the class of persons against whom such an action may be brought is in no way limited, which allows the insolvency practitioner in the secondary proceedings to bring an action to set aside against an act of the insolvency practitioner in the main insolvency proceedings if it considers that action to be in the interests of the creditors. However, on the basis of Spanish law, inasmuch as the law of the State of the opening of proceedings referred to in Articles 7(2)(m) and 35 EIR Recast, it does not appear that actions to set aside —permitted under insolvency law — may be brought to challenge an act of the insolvency practitioner performed in the exercise of its powers within the main insolvency proceedings. The actions governed by Articles 226 through 238 of the Spanish Insolvency Act are intended to challenge acts of the debtor.

In this case, the issue does not concern an act of the debtor, but rather an act of the insolvency practitioner, which, moreover, is authorised to carry it out under Article 21 EIR Recast. Furthermore, the conditions for an action to set aside are defined by the limits imposed by the aforementioned regulation on the exercise of the practitioner's powers to relocate assets, that is, it must not be carried out in an abusive manner, in particular with the purpose of frustrating the possibility that such interests can be effectively satisfied if secondary insolvency proceedings are opened subsequently.

Under these circumstances, the Provincial Court departs from the conclusion reached at the court of first instance and finds that the insolvency practitioner did not act with the intent to frustrate those interests. Along with other considerations, the Provincial Court finds that once the territorial insolvency proceedings were opened in Spain and a judgment was rendered in the dismissal proceeding, the preventive attachment could not become enforceable because Articles 142 through 144 of the Spanish Insolvency Act precluded it. That being the case, withholding the disputed amount in Spain did not guarantee the satisfaction of local creditors on the terms sought by the claimant, given the universal nature of the liabilities in both proceedings.