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# Supreme Court dismisses appeal over bank resolution claims

05 Jul 2018, 9:44 am

## Claims brought against Novo Banco, the bank set up by the Portuguese central bank following the collapse of Banco Espirito Santo (BES) in 2014, must be heard in Portugal, the UK's highest court has confirmed.

The Supreme Court, in a unanimous judgment, ruled that Novo Banco was not bound by an English jurisdiction clause in the original agreement between BES and lender Oak Finance, whose rights under the agreement have since been assigned to Goldman Sachs International and various investors. It found that, once the Portuguese central bank carried out 'reorganisation measures' under the EU's 2014 Bank Recovery and Resolution Directive (BRRD), any challenges to those measures had to be dealt with by the Portuguese courts.

Banking litigation expert Stuart McNeill of Pinsent Masons, the law firm behind Out-Law.com, who was part of the team that advised Novo Banco on the case, described the judgment as a "victory for common sense" which "avoids the potential chaos that would otherwise have arisen if courts in different jurisdictions were able to interpret the same decision by a European resolution authority in different ways".

"The BRRD was designed to give central resolution authorities wide tools and powers to rescue, resolve or otherwise restructure financial institutions that were failing or were likely to fail," he said. "These tools and powers would be exercised in less than ideal situations, in periods of stress, and the legislation provided that if there was to be any challenge to the decisions then it was to take place in the local courts."

"What the appellants in this case were seeking to do was to side step the rule that challenges to the actions of the Portuguese resolution authority, the Bank of Portugal, should be made in Portugal. They sought to do

this despite it being accepted that as a matter of Portuguese law, the debt had not been transferred to Novo Banco. The Supreme Court unanimously rejected the appellants' arguments, commenting on the inherent implausibility of them seeking to rely on one Bank of Portugal decision, but not another," he said.

Novo Banco was set up in August 2014 by the Bank of Portugal, using its BRRD powers. The BRRD sets out EU-wide rules on how to wind up or restructure failing financial institutions, particularly banks. It also ensures mutual recognition of measures taken for this purpose by the regulators in one EU member state in all other member states.

Goldman Sachs International and a group of investors attempted to bring around $850 million worth of claims against Novo Banco, relating to the obligations of BES under a facility agreement with Oak Finance. The investors argued that these obligations, which were governed by an English jurisdiction clause, had transferred to Novo Banco as a result of the actions of the Bank of Portugal. Novo Banco and the central bank both argued that these obligations had not transferred, and therefore remain with BES.

The High Court found in favour of Goldman Sachs and the investors in August 2015, although this was later overturned by the Court of Appeal. The Supreme Court has now backed the Court of Appeal's findings, agreeing that as Novo Banco is not a party to the Oak Finance facility agreement as a matter of Portuguese law. The Supreme Court has also confirmed that any challenge to this finding can only be brought in the Portuguese courts.

Lord Sumption, giving the judgment of the court, said that there was an "inherent implausibility" in the case presented by Goldman Sachs International and the investors. The parties accepted that some of the Bank of Portugal's actions should be treated as 'reorganisation measures' under the BRRD, but that others could not.

The judge went on to say that the BRRD could only operate effectively "by taking the process as a whole and applying the legal effects attaching to it under the law of the home state in every other member state".

"It is not consistent with either the language or the purpose of article 3 [of the directive] that an administrative act ... which affects the operation of a 'reorganisation measure' under the law of the home state should have legal consequences as regards a credit institution's debts which are recognised in the home state but not in other member states," he said.

In addition, none of the actions of the Portuguese central bank could be said to have occurred "in a legal vacuum", but rather "in the context of a broader framework of public law". It therefore "cannot make sense for the courts of another member state to give effect to a 'reorganisation measure' but not to other provisions of the law of the home state affecting the operation of a 'reorganisation measure', he said.

The Supreme Court went on to reject an alternative argument by Goldman Sachs and the investors, that the English courts were entitled to disregard as provisional the actions of the Portuguese central bank pending the outcome of a legal challenge in the Portuguese courts. It also ruled out a reference to the Court of Justice of the European Union, as "the relevant propositions of EU law are … beyond serious argument".

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