F-Tex SIA v Lietuvos Anglihos UAB 'Jadecloud-Vilma'
Case C-213/10 *F-Tex SIA v Lietuvos-Anglijos UAB "Jadecloud-Vilma"* 19th April 2012
Reference for a preliminary ruling under Article 267 from Lithuania
Court of Justice of the European Union

Key Words
Judicial cooperation in civil matters; closely connected actions; assignment; transaction avoidance; *actio pauliana*; judgments regulation; Brussels regulation; avoidance actions.

Summary of Facts of the Case

This was a reference for a preliminary ruling on the interpretation of differential applicability of the EIR and the Brussels Regulation by Lietuvos Auksciausiasis Teismas on the basis of a liquidator's *assignment* of the right to have a transaction set aside. This case is in a family of cases questioning whether an *actio pauliana* claim (or other connected action) can be heard outside of main insolvency proceeding even though such a claim is conceptually related to the insolvency.

Germany opened insolvency proceedings in respect of NPLC (a German company). NPLC had paid a large sum to Jadecloud-Vilma (a Lithuanian Company) after it became insolvent, giving rise to a potential application to set the transaction aside. The sole creditor of NPLC was F-Tex (Latvia). The liquidator of NPLC *assigned* to F-Tex, its sole creditor, all claims against third parties, giving F-Tex the power to demand the return of the funds paid (with interest) to Jadecloud-Vilma under an agreement with the liquidator to pay to them 33% of any proceeds collected (an avoidance action).

The court in Lithuania dismissed an action brought by F-Tex against Jadecloud-Vilma to reclaim the funds subsequent to the NPLC liquidator's assignment to F-Tex of the right to bring such an action, holding that such a claim should be heard in the German court, where insolvency proceedings had been opened. This decision was reversed by the Lithuanian Court of Appeal which held that Article 3(1) of the EIR did not have *exclusive jurisdiction* with regards to an action to set a transaction aside but should have regard to the circumstances of the case on the basis of the place where Jadecoud-Vilma (the defendant in this case) had its registered office (in Lithuania).

The German court then found that the action brought before it by F-Tex against Jadecloud-Vilma was also not within its jurisdiction on the ground that the registered office of Jadecloud-Vilma was not in Germany, coinciding it seems with the finding of the Lithuanian Court.

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Jadecloud-Vilma appealed to the Lithuanian Supreme Court which referred several questions to the CJEU:

(1) Should an *actio Pauliana* claim only be heard in the court where the insolvency proceedings have been opened (German)? And should the claim by the main credtor, F-Tex, having been assigned all third-party obligations by a liquidator, be considered a commercial and civil law matter under the Brussels Regulation does it qualify under the derogation in Article 1(2) and fall under the EIR?
(2) Can both courts decline jurisdiction for a claim of *actio pauliana* and does this implicate an applicant's right to a judicial remedy under EU Law guaranteed by Article 47 of the Charter of Fundamental Rights? And can the court of another Member State find its own motion for jurisdiction where the *actio pauliana* has been left unheard for want of jurisdiction?

Cooperation and/ or Coordination Issue

The cooperation issue in this case revolved around the complementary application of the EIR Recast and the Brussels Regulation in relation to which would cover an avoidance action assigned to a creditor by a liquidator. Should such an action be considered a commercial and civil law matter or closely connected (derived directly) from an insolvency proceeding. This falls within the line of cases that deals with actions that are closely connected to an insolvency proceeding, avoidance actions in this case, and whether such actions should fall within the scope of the EIR or the Brussels Regulation.

This is a question of jurisdiction in terms of closely connected proceedings and asks the question as to where an *actio pauliana* should be heard? In the court where insolvency proceedings have been opened or where the defendant to the claim has its domicile?

Bringing an action of this nature could be viewed as an attempt to avoid cooperation under the EIR and its Recast.

Resolution

Where should an actio Pauliana be heard?

In relation to the first question about jurisdiction for an *actio pauliana*, the CJEU looked to the scope of the EIR and the Brussels Regulation. Citing the case of *Gourdain*, the CJEU noted that 'it is necessary, if decisions relating to bankruptcy and winding-up are to be excluded from the scope of the Brussels Convention, that they must derive directly from the bankruptcy or winding-up and be closely connected with the proceedings for realising the assets or judicial supervision.' This was followed in subsequent cases in the interpretation of the Brussels Regulation (*SCT Industri)* making it decisive that the exception under the Brussels Regulation will apply only to those claims deriving directly from the insolvency proceeding – there must be a close link.

In relation to the applicability of the EIR, the court citing *Seagon* noted that the EIR itself in its preamble defines the criterion for application in identical terms to the decision in *Gourdain* in Recital 6: 'The regulation should be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings.'

Subsequent to the analysis of these prior cases, on this first question the CJEU found first that the Brussels Regulation excludes only actions derived directly from insolvency proceedings and are

closely connected with them. Thus, the EIR will only cover those actions directly derived from insolvency proceedings.

Should the actio pauliana *assigned to F-Tex be heard under Brussels or the EIR?*

The key difference to other *actio pauliana* brought by insolvency practitioners is the assignment by the liquidator of the right to pursue the *actio Pauliana* which appears to further distance the claim from the insolvency proceedings of NPLC. The claim is now between F-Tex and Jadecloud-Vilma rather than between NPLC and Jadecloud-Vilma. While the action is in essence the same as an action to set a transaction aside brought by a liquidator, the question remains whether a direct link remains once the right of action has been assigned. Of key importance in the finding was the fact that in German law under which the insolvency proceedings were brought, the closing of an insolvency proceeding has no effect on the exercise of an assignee of the right to have a transaction set aside, so can be pursued in addition to the insolvency proceeding. Thus, on the facts of F-Tex, the *actio Pauliana* brought by F-Tex against Jadecloud-Vilma subsequent to the assignment of the right of action by the liquidator of NPLC is not covered by the EIR, rather it is covered by the Brussels Regulation.

Does the right to a judicial remedy prohibit national courts from declining jurisdiction?

The CJEU declined to answer this question fully as it was determined that the Lithuanian court should have jurisdiction under the Brussels Regulation to hear the *actio pauliana* brought by F-Tex against Jadecloud-Vilma in this case.

Applicability to Preventive Restructuring

Actions in relation to the avoidance of transactions entered into prior to insolvency may not be as prevalent in preventive restructuring procedures given the nature of those proceedings occurring notionally *prior to functional insolvency.* That said, transactions entered into which are not *directly arising* from the restructuring itself, may also be covered by an alternative regulation if it cannot be covered by the EIR Recast (Article 6). This leaves a grey area, especially for preventive restructuring, as the possibilities are nearly endless in terms of what can be agreed under the circumstances of preventive restructuring.

However, where there is an *actio pauliana* in relation to a transaction connected to a restructuring, but not directly a part of a procedure falling within the scope of Annex A of the EIR Recast, this and other cases such as *Trachte, Feniks,* and *BNP Paribas* seem to indicate that courts will find such actions as falling outside of the insolvency procedure and being covered instead by the Brussels Regulation or other Conventions or Regulations where relevant.

Applicability of Existing Rules and Guidelines

The EIR Recast

One key change between the EIR and the EIR Recast in this area is the addition of Article 6, which deals with the 'jurisdiction for actions deriving directly from insolvency proceedings and closely linked with them'. Article 6 has incorporated a line of case law that has dealt with this sticky issue beginning with the case of *Seagon* in 2007 and including the developments in *F-Tex* and *Nickel & Goeldner* (among others). Article 6(1) states the following:

> The courts of the Member State within the territory of which insolvency proceedings have been opened in accordance with Article 3 shall have jurisdiction for any action which derives

directly from the insolvency proceedings and is closely linked with them, **such as avoidance actions.**

This appears to place actions taken to avoid transactions within the specific jurisdiction of the place where primary insolvency proceedings were opened. However, the second paragraph widens the scope of jurisdiction to civil and commercial actions against the same defendant, giving the IP the choice of bringing actions where the defendant is domiciled provided those courts will have jurisdiction under the Brussels Regulation. Perhaps key in this new provision in the EIR Recast is the final paragraph, which explains that 'actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.'

In addition, Article 12 of the EIR Recast deals with situations of transaction avoidance. Under 12(1) it places the effects of insolvency proceedings on the rights and obligations of parties to a payment or settlement system should be governed by the Member State law applicable to that system. Para (2) then goes on to specify that the provision of para (1) will not preclude action for voidness, voidability, or unenforceability taken to set aside payments or **transactions** under the law applicable to the relevant payment systems. Article 12 therefore seems to place jurisdiction for transactions taken around insolvency squarely within the remit of Member State law. This Article coincides with Recital 67, which notes that automatic recognition of insolvency proceedings could interfere with rules under which certain transactions are carried out in other Member States and that to therefore protect legitimate expectations and certainty, provision should be made for exceptions to the general rule of the primacy of the law of the Member State opening proceedings. This position seems to correlate with the findings in Nickel&Goeldner, placing transactions that are not directly connected with the insolvency within the remit of Member State law, where another convention or regulation applies, or within another Regulation where such a transaction cannot be interpreted as arising directly from the insolvency proceeding itself.

It seems that Articles 6 and 12 may contradict to some extent with Article 6 seemingly specifying jurisdiction for avoidance actions in the state of opening of proceedings, while 12 claws back Member State sovereignty in relation to some transactions by providing exceptions to the rule of the primacy of the opening of proceedings. Where avoidance actions are derived directly from the insolvency proceeding and brought an insolvency practitioner, the position seems clear under Article 6, however, where the exceptions to the rule might intervene, such as occurred in this case, the position is not so clear.

Recommendations and Guidelines

In terms of guidelines, as this case specifically deals with jurisdictional issues again, it is to the EIR Recast that one must look to determine the outcome. Although the CODIRE and ELI Reports do both discuss aspects of transaction avoidance, these discussions are in the context of making recommendations about the what approach to legislation and reform should be taken among the Member States and do not assist by way of guidelines or recommendations to courts or judges.

However, the decision also gives credence to the importance of the *principles* of cooperation that should permeate all levels of EU regulation wherever there is a cross-border element to consider.