Nickel & Goeldner Spedition GmbH
Case C-157/13 *Nickel & Goeldner Spedition GmbH v "Kintra" UAB* 4th September 2014
Reference by Lithuania under Article 267 TFEU
Court of Justice of the European Union

Key Words
Judicial co-operation in civil matters; action related to insolvency proceedings; closely connected proceedings; bankruptcy; action for payment of debt; Brussels regulation; judgements regulation; setting aside transactions; *actio pauliana;* avoidance actions.

Summary of Facts of the Case

This was a reference for a preliminary ruling on the request of Lithuania in relation to a German Company on the differential applicability of the Brussels Regulation and the EIR in relation to a debt claim made in connection with the Convention on the Contract for the International Carriage of Goods ('CMR'). Specifically, the request concerned the interpretation of EIR Article 3(1) in relation to international jurisdiction and Article 44(3), which allows the disapplication of the EIR when it conflicts with 'a convention concluded by that state with one or more third countries' (in this case the Convention on the Contract for the International Carriage of Goods. Were the exception under Article 44(3) of the EIR in play, then the Brussels/Judgments Regulation 44/2001 would apply instead of the EIR, essentially removing the specific claim from the insolvency exception under the Judgments Regulation.

The proceedings were between Nickel & Goeldner Spedition GmbH (German) and Kintra UAB (Lithuanian). The latter company had been placed in liquidation due to an outstanding payment in respect of services comprising the international carriage of goods, to which the Convention on the Contract for the International Carriage of Goods by Road 1978 would normally apply. The claim in question was essentially a debt claim 'based on the improper performance of its contractual obligations…for the international carriage of goods' which arose prior to the opening of insolvency proceedings.

The questions put to the CJEU were as follows:

(1) Where an action is brought by an insolvency administrator acting in the interests of all creditors and seeking to restore solvency and increase asset value, including actions to set transactions aside (*actio pauliana)* which have been recognised as actions closely

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connected to the insolvency proceedings covered by the CMR, will it be covered by the EIR or by the Brussels Regulation?

(2) If covered by the EIR, then where the debt obligation arose prior to opening insolvency proceedings and is covered by CMR, would the EIR not then be inapplicable because it is a specialised convention falling under the exception in Article 44(3)?

(3) If not covered by the EIR and falling within the scope of both the CMR and the Brussels Regulation, can a Member State apply the rules concerning jurisdiction provided for in the CMR and not those set by the Brussels regulation?

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 in relation to a debt claimed arising under the CMR. Should such an action be considered a commercial and civil law matter or closely connected (derived directly) from an insolvency proceeding or is it excepted under the circumstances. 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 also concerns the coordination of *closely related issues* such as transaction avoidance or *actio Pauliana* and their position in relation to the scope of an insolvency proceeding and its power to control proceedings related to them. Disputing the jurisdiction to hear cases like these could be viewed as an attempt to avoid cooperation under the EIR and its Recast.

Resolution

The court acknowledged the need to interpret the EIR so as to avoid any overlap or vacuum between it and the Brussels Regulation in the interests of legal certainty. As such, per Article 1(2)(b) of the Brussels Regulation, it will not apply to 'bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings' being covered instead exclusively by the EIR. Those falling outside of this definition and outside of the EIR will therefore be covered instead by the Brussels Regulation [para 21].

Further, the Brussels Regulation should be interpreted broadly when considering what should fall under civil and commercial matters whereas the scope of the EIR should *not* be broadly interpreted in order to ensure that there is neither an overlap between the two Regulations, nor a vacuum in order to ensure certainty. Previously, therefore, the court has found that *only* actions deriving directly from insolvency proceedings and are closely connected with them are excluded from the Brussels Regulation. Previous decisions have relied on the facts of each case as to whether an action at issue derived from insolvency law or from other rules. The decisive criterion adopted is not the procedural context of which an action is a part, but rather the legal basis upon which the action is based. *Therefore, it must be determined whether the right or obligation upon which the action is based is within the rules of civil and commercial law or if it derived directly from the insolvency proceeding, thereby falling within the derogation.*

The court held that the action in the instant proceedings is an action for the repayment of debt, which could have been brought by the creditor before the opening of insolvency proceedings and would then have been covered by civil and commercial matters. The action for payment was also taken by the insolvency administrator appointed in the course of the insolvency proceedings; however, this and the latter actions in the interest of creditors do not substantially amend the

nature of the debt relied upon and which continues to be subject to civil and commercial law rules and is therefore NOT directly linked with the insolvency proceedings. It was therefore covered under Brussels and did not fall within the insolvency exception placing it within the jurisdiction of the EIR.

The second question became a moot point following the answer to the first, but the third question as regards whether the rules concerning jurisdiction should be applied under the CMR Convention or the Brussels Regulation. The finding here made an important point about the principles underlying *judicial cooperation in civil and commercial matters*. Specifically:

> '…in relation to matters governed by specialised conventions, of the rules provided for by those conventions cannot compromise the principles which underlie judicial cooperation in civil and commercial matters in the EU…of the free movement of judgements in civil and commercial matters, predictability as to the courts having jurisdiction and therefore legal certainty for litigants, the sound administration of justice in the EU of the risk of concurrent proceedings, and mutual trust in the administration of justice in the EU.' [para 38]

Applying the finding under the first point, it was decided that where a dispute falls within the scope of the Brussels Regulation and the CMR, a Member State may apply the rules concerning jurisdiction as set out in Article 31(1) of the CMR.

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. 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 *F-Tex, Trachte, 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

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' 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 development in this case. 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 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 sent 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 ensure 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 this case, 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 by 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.

Guidelines and Recommendations

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.