Wiemar & Trachte GmbH v Zhan Oved Tadzher
Case C-296/17 *Wiemar & Trachte GmbH v Zhan Oved Tadzher* 14th November 2018
Reference for preliminary ruling under Article 267 TFEU from Bulgaria
Court of Justice of the European Union

Key Words
Judicial cooperation; insolvency proceedings; international jurisdiction; exclusive jurisdiction; main insolvency proceedings; *actio pauliana*.

Summary of Facts of the Case

Wiemer & Trachte GmbH was a company registered in Germany with a branch registered in Bulgaria. In the *context* of opening insolvency proceedings, a provisional liquidator was appointed on 3 April 2007 in Germany in respect of the whole company. Any asset disposal from that point required consent from the provisional liquidator. On 1st June 2007, insolvency proceedings were officially opened [para 13-14]. On 18 and 20th April 2007 (between the time that the provisional liquidator was appointed and the official opening of insolvency proceedings) funds were transferred from Wiemer & Trachte's account with the United Bulgaria Bank to the account of Mr Zhan Oved Tadzher in payment of travel expenses and an advance on business expenses [para 15]. An avoidance action was brought against the payment to Tadzher in a *Bulgarian* court on the basis that the transactions had taken place after the insolvency proceedings had been opened [para 16].

In one argument, the validity of the payment to Tadzher was justified on the basis of Article 24 of the EIR which exempts the discharge of obligations from avoidance actions after the opening of insolvency proceedings if the person honouring the obligation is unaware that insolvency proceedings had been opened in another Member State, ostensibly relying on the timing of the payment in the period between the appointment of a provisional liquidator and the official opening of proceedings. The Bulgarian courts proceeded to find that the request for repayment by the Bulgarian branch of Wiemer & Trachte was unfounded and unsubstantiated on the facts [para 19]. Wiemer & Trachte appealed against the applicability of Article 24 and that Tadzher should not be able to claim he had been unaware of the opening of insolvency proceedings [para 20] and thereby should be subject to the avoidance action.

A request for a preliminary reference was then filed with the CJEU by the Bulgarian court asking the following questions:

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Does Article 3(1) EIR mean that the court opening the insolvency proceedings has exclusive jurisdiction to hear and determine any action to set aside a transaction, even against a defendant whose registered office or habitual residence is in another Member State, or where transaction took place? [para 21] In other words, the question was whether under the Insolvency Regulation the court seised with primary proceedings has jurisdiction to set aside a transaction against a defendant registered in Bulgaria.

Three other questions surrounding the applicability of Article 24 were also presented, but the CJEU declined to answer these on the basis that their answer to the first question settled the issue in question (see below).

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 the repayment of a sum of money transferred from the Weimer & Trachte bank account without the consent of the provisional liquidator [para 2]. 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 Recast or the Brussels Regulation.

This is an important matter concerning cooperation because in finding that such actions are not covered by the EIR Recast, a party can effectively avoid coordinating with the main insolvency proceedings in relation to the action concerned. These grey areas continue to introduce uncertainty in the jurisdiction of such cases under the Brussels Regulation or the EIR Recast and it remains to be resolved under the EIR Recast as it was still the EIR 2000 that was applied in this case. Uncertainty is a classic impediment to mutual trust and effective cross-border co-operation, as noted in JCOERE Report 2, Chapter 4.

Resolution

The CJEU considered Art 3(1) and held that any actions deriving directly from and/or are closely connected to the insolvency proceedings are subject to exclusive jurisdiction of the court in which main proceedings are opened [para 22]. The court went on to acknowledge that it had previously held that actions to set aside a transaction, having the aim of adding to the assets of the undertaking subject to insolvency proceedings, falls within the category of actions derived directly and/or closely connected to a main insolvency proceedings. Following the line of cases including *F-Tex,* the court went on to confirm that Art 3(1) should therefore be interpreted as meaning that the court of main proceedings should also have exclusive jurisdiction to hear actions that aim to set aside transactions *by virtue of insolvency* that is brought against an entity in another Member State [para 26].

The court further recalled that by concentrating all actions that are directly related to insolvency within the main insolvency proceedings, it is acting consistently with the objectives of improving effectiveness and efficiency of cross-border insolvency proceedings (per Recitals 2 and 8 of the EIR) [para 33]. A strict interpretation also helps to avoid forum shopping in order to obtain a more favourable legal position [para 34]. Further, allowing more than one Member State to pursue such transaction avoidance actions in their domestic courts brought *by virtue of insolvency* would undermine the pursuit of the aforementioned objectives [para 35].

The court found unequivocally in this case that jurisdiction to hear and determine an action to set aside a transaction is exclusive to the jurisdiction in which main insolvency proceedings have been opened [para 42]. The avoidance action in this case should have been heard in Germany where main insolvency proceedings were opened.

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 a restructuring plan.

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, 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

EIR Recast

Although the judgement of this case was given in 2018, the law applied during the time that the case was being heard in the CJEU was the EIR 2000. As such, it is still worth considering how the finding might have changed had the case been heard a little later and under the EIR Recast. The following is drawn from the JCOERE case note on *FTex*, which also deals with a transactional claim specifically related to an avoidance action.

While the Recast Regulation may have clarified matters regarding exclusive jurisdiction in insolvency there is considerable lack of clarity regarding insolvency related actions which can be regarded as being in the nature of a tort claim (*BNP Paribas*) or a claim based in some other private law remedy that can be brought by parties other than just the insolvency practitioner or that could also be actioned outside of an insolvency proceeding (for example one that is restitutionary in nature). In these cases, such as *Fenik, BNP Paribas,* one can bring one's action elsewhere and indeed the court is entitled to open proceedings or accept jurisdiction.

In terms of the interface between the Recast Regulation and the Judgements Regulation there is a lack of certainty and clarity as to the borderline between insolvency matters and other causes of actions. In addition, there is quite a shadow cast by these decisions regarding the purported legal certainty and predictability created by the Recast Regulation with the consequence of a splintering off of some actions, depending on location.

One key change between the EIR and the EIR Recast is set out in Article 6, which deals with the 'jurisdiction for actions deriving directly from insolvency proceedings and closely linked with them'. In Article 6(1), it makes an example of avoidance actions as an action that would typically be closely linked with the insolvency proceeding. 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 the present case, it is therefore worth questioning whether, if main proceedings had been opened, the claw back action might be considered expedient to consider in connection with those proceedings in the jurisdiction in which they were opened. However, this line of cases seems to be trying to draw a solid line between the Brussels Regulation and the EIR Recast with the result of strictly limiting those actions that can be covered by the latter.

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.