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ARTICLE

The ECJ Judgement on German Court Competency Regarding an Action to Set a Transaction Aside by Virtue of Insolvency Brought Against a Company in Another Member State

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In the case of insolvency proceedings under German law, the insolvency administrator is entitled to challenge transactions entered into prior to the filing for insolvency if such transaction adversely affects the creditors. An example of such an adverse transaction is the transfer of funds to a third party shortly before the filing for insolvency.

This, in fact, was the basis of an action brought by an insolvency administrator against a Belgian company, which received EUR 50,000 from a German company one day before the filing to open insolvency proceedings. The interesting question, however, was whether the insolvency administrator was entitled to file the claim for repayment of the EUR 50,000 against the Belgium company in a German court. This question was the subject of a judgment by the European Court of Justice dated 12 February 2009 (C-339/07), which was the basis of a judgment by the Germany Federal Supreme Court from 19 May 2009.

Facts of the case

A German limited liability company ('Company'), which operated more than 200 home improvement stores in Germany, began having financial difficulties so that relief payments from the Company's shareholders were necessary in order to avoid insolvency. However, after the financial difficulties worsened, the Company's shareholders decided to stop further relief payments so that the Company's insolvency became unavoidable.

On 15 March 2002 the Company filed for insolvency. However, one day before the filing, the Company transferred EUR 50,000 to a company in Belgium. Once the insolvency administrator became aware of the payment transfer, he filed an action in Germany against the Belgian company for the repayment of the EUR 50,000.

Court decisions

Decisions of the German courts

The regional court (*Landgericht*) of Marburg, Germany, decided that the action was not admissible because the regional court does not have jurisdiction to hear the case.

The regional court stated that the Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Commercial Matter Regulation') applies to the case because the matter to be decided constitutes a civil and commercial matter in the meaning of Art. 1 (1) of the Regulation No. 44/2001. Pursuant to Art. 2 of the Regulation No. 44/2001, the general rule states that persons domiciled in a Member State shall be sued in the courts of that Member State. Taking into account that the defendant in the case at hand was a company with its registered seat in Belgium, the court argued that the insolvency administrator should have sued the Belgian company in Belgium and not in Germany even though the insolvency proceedings were handled by the district court in Marburg, Germany.

The higher regional court (*Oberlandesgericht*) confirmed the opinion of the regional court, i.e. the court held that Art. 2 of Regulation No. 44/2001 applies, so that the regional court did not have jurisdiction to hear the case. In its judgment, the higher regional court commented on two crucial questions:

First, it discussed the meaning of Art. 1 (2) lit. b of Regulation No. 44/2001, which states that the Regulation does not apply to bankruptcy, proceedings related to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings. However, the court stated that even though Art. 1 (2) lit. b of Regulation No. 44/2001 states that Regulation No. 44/2001 does not apply to bankruptcy proceedings, this does not mean that Regulation 44/2001 does not apply to actions of the insolvency administrator to set a transaction aside by virtue of insolvency ('action for annulment').

Therefore, the action of the insolvency administrator does not constitute a 'bankruptcy action' in the meaning of Art. 1 (2) lit. b of Regulation No. 44/2001 but rather a civil and commercial matter as set out in Art. 1 (1) of Regulation No. 44/2001.

Secondly, the court discussed the question of whether the German court competence to hear the case may be based on Art. 3 of Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings ('Regulation No. 1346/2000') instead of Regulation No. 44/2001. Art. 3 of Regulation No. 1346/2000 states that the courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. Due to the fact that the centre of the Belgian main interests was Germany, German courts would have jurisdiction if Regulation No. 1346/2000 applies to an action of the insolvency administrator to set a transaction aside by virtue of insolvency.

However, the higher regional court stated that Art. 3 of Regulation No. 1346/2000 does not apply. The court argued that Regulation No. 1346/2000 applies only to the *opening* of insolvency proceedings but not to actions that are only related to insolvency proceedings. Due to the fact that the action of the insolvency administrator against the Belgian company for the repayment of the EUR 50,000 constituted only an action related to insolvency proceedings, thus Regulation No. 1346/2000 does not apply. Therefore, Regulation No. 44/2001 applies only to the effect that not the German but the Belgian courts would have jurisdiction to hear the case.

The insolvency administrator filed for an appeal at the Federal Supreme Court (BGH). On 21 June 2007 the Federal Supreme Court made a reference to the European Court of Justice for a preliminary ruling under Article 234 EC with the following questions:

(1) Do the courts of the Member State within the territory of which insolvency proceedings regarding the debtor's assets have been opened have international jurisdiction under Regulation 1346/2000 in respect of an action in the context of the insolvency to set a transaction aside that is brought against a person whose registered office is in another Member State?

If the first question is to be answered in the negative:

(2) Does an action in the context of the insolvency to set a transaction aside fall within Article 1 (2) b of Regulation No. 44/2001?

Judgment of the European Court of Justice

The case was referred to the European Court of Justice (ECJ) for preliminary ruling under Article 234 (ex 177) EC. In its decision (C-339/07), the ECJ ruled that 'Article 3 (1) of Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted as meaning that the courts of the Member State within the territory of which insolvency proceedings have been opened have jurisdiction to decide an action to set a transaction aside by virtue of insolvency that is brought against a person whose registered office is in another Member State.'

In its reasoning, the Court referred to a judgment on the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Judgment of the ECJ of 22 February 1979, C-133/78). In this judgment, the ECJ has held that an action which relates to bankruptcy or winding-up, or which is closely related to bankruptcy or winding-up, does not constitute a civil or commercial matter. In its judgment, the ECJ referred to the judgment of 22 February 1979 and stated that the issue to be decided in the current case is comparable to a case that was decided in 1979.

Furthermore, the court argued that the above-mentioned principle is mirrored in Recital 6 of Regulation No. 1346/2000. Recital 6 states that 'In accordance with the principle of proportionality this 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 ...'

Thus, Art. 3 of Regulation No. 1346/2000 must be interpreted as meaning that it also attributes international jurisdiction to the Member State within the territory in which insolvency proceedings were opened in order to hear cases which derive directly from such proceedings.

The ECJ stated that the concentration of all actions directly related to insolvency proceedings being brought before one court of a Member State with jurisdiction to open the insolvency proceedings also appears to be consistent with the objective of improving the effectiveness and efficiency of insolvency proceedings.

Furthermore, the above-mentioned interpretation of Art. 3 of Regulation No. 1346/2000 can be based on Recital 4 of Regulation No. 1346/2000, whereupon forum shopping shall be avoided to ensure a proper functioning of the internal market in order to avoid incentives for a debtor to transfer assets from one Member State to another to delay and impede insolvency proceedings and obtain more favourable legal positions.

Conclusion

The judgment of the ECJ will not only improve the position of insolvency administrators due to the fact that they will no longer be forced to file actions in foreign courts but it will also result in a concentration of legal disputes related to insolvency proceedings at courts of

the same Member State. However, on the other hand, the judgment raises some questions in regard to which claims would be considered 'closely connected' to insolvency proceedings. Thus, it remains to be seen if – for example – liability claims against managing directors and administrators constitute claims closely connected to insolvency proceedings.

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