Avoidance actions: The Court of Luxembourg extends the scope of EIR

Jean-Luc Vallens reports on the ECJ judgment of 16 January 2014, C 328/12 (Schmidt)

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The German Supreme Court has filed a question with ECJ (European Court of Justice) for a preliminary ruling about issues of jurisdiction of Members States and limits of the scope of EIR.

A German liquidator had filed an avoidance action toward a third party located in Switzerland with a German Court. Do German courts have jurisdiction regarding such an action?

The Court of Luxembourg has answered "Yes" for grounds linked with predictability and effectiveness: the third party is deemed to expect application of the German insolvency Code and it could be necessary to gather all issues under a sole judge. It seems however in opposition with the natural scope of EIR (European Insolvency Regulation).

> "DOES THE EIR APPLY TO AN AVOIDANCE ACTION BROUGHT BY A GERMAN LIQUIDATOR AGAINST A THIRD PARTY LOCATED IN SWITZERLAND?"

About the judgment

The European Court of Justice (ECJ) has delivered a judgment giving a challenged interpretation of the EIR.

A question for a preliminary ruling was referred to the ECJ about the scope of EIR: does the EIR apply to an avoidance action brought by a German liquidator against a third party located in Switzerland? In particular, BGH (the Bundesgerichtshof) asked the ECJ whether such a lawsuit was, in application of the EIR, under the jurisdiction of German courts. The ECJ answered positively. This ruling seems to be in opposition with the EIR itself and it creates doubts regarding the real scope of the Regulation.

The grounds underlined in the judgment are related to

foreseeability and universality, and are based on a general and comprehensive approach of jurisdiction in favour to courts of the opening State, by reference to other previous cases. Nevertheless, each of these reasons seems very weak.

Foreseeability means that the Swiss third party which got a beneficial or preferential payment before insolvency could expect the German courts to have jurisdiction considering that main insolvency proceedings were opened in Germany (opening State under the EIR's definition). This is not true: no third party located outside the EU would expect the application of the EIR.

If the ECJ has adopted a similar rule in a previous case (ECJ, 12 February 2009, C-339/07, Seagon), it is important to note that it concerned a third party located within the EU.

Universality of insolvency proceedings, a principle mentioned in the Recitals of the EIR, only means that proceedings opened in any Member State should produce legal effects in any other Member State where assets are located. It does not grant jurisdiction to courts neither upon a part nor on all the assets located out of the EU borders.

The previous case invoked by the ECJ concerned the Regulation (EC) 44/2001 of 22 December

2000, for recognition and enforcement of civil and commercial judgments (ECJ, 1st March 2005, C-281/02, Owusu). But such an approach cannot easily be applied: the Recitals of the EIR promote the proper functioning of the internal market, as well as the efficiency of insolvency proceedings. The Recitals also express the general idea of proportionality in matters of rules and cooperation: i.e. nothing more than a better efficiency of insolvency proceedings among EU Member States.

Moreover, there are links between jurisdiction and recognition rules, Member States have to recognise foreign proceedings and judgments closely linked to insolvency by virtue of the application of mutual trust and direct effect of the EU principles. It cannot be imposed to the other States.

As far as the principle of efficiency is concerned, one can have some doubts about it: an order issued by the German court on the basis of this rule will have to be recognised and enforced in Switzerland, against the third party, by a Swiss court. Swiss judges will probably have to apply rules provided for by the Swiss International Private Law and its requirements for the recognition of foreign orders: namely local proceedings should be first opened, with specific rights for local creditors.

The reasons to approve the court's decision

Laurence-Caroline Henry, Professor at University of Nice has the opposite view.

LAURENCE-CAROLINE HENRY
Professor, University of Nice

"In my opinion, the judgment of the court must be approved because the regulation's words and objectives are respected.

There are three reasons to approve the judgment. The first one is the proper interpretation of the scope of the regulation on insolvency proceedings (EIR). The second one is the unjustified discrimination between similar situations. The third reason is the mandatory nature of the European regulation.

First, the scope of the EIR must be interpreted widely in order to improve the efficiency of the text. The EIR concerns necessarily cross-border insolvencies, but cross-border doesn't necessarily mean internal European insolvencies, it could mean international insolvencies involving a Member State and a third country. Nothing in the EIR forbids such interpretation because the text keeps silence on that point. In matters of international jurisdiction, the sole criterion laid down (EIR, art 3-1) is the centre of main interests (COMI). This one has to be located within the territory of one Member State. Actually, the only relevant criterion for determining the scope of the EIR is the localisation of the debtor' COMI in the European Union (EU). In that case, the insolvency proceedings are closely linked to the EU and the aims pursued by the regulation have to be respected (effectiveness and efficiency of insolvency proceedings).

Second, the fact that a creditor is settled or is not settled within the territory of one Member State is not a relevant criterion. Here, the question referred to the court for preliminary ruling concerns an action to set a transaction aside by virtue of insolvency. The court has already judged in the Seagon case that such an action derives directly from the proceedings and is closely connected with it. The fact that the involved creditor is settled in or out of the EU doesn't matter at all. In both cases, the court where the COMI of the debtor is located has jurisdiction. The interests at stake are the same; the liquidator has to protect the assets of the debtor for the other creditors to be paid. Same situations must involve same solutions.

Finally, the mandatory nature of the European regulation justifies the judgment. National courts have to apply the regulation as soon as the COMI is located within the territory of a Member State. Because of the words of the regulation, its application is necessarily universal in order to insure the efficiency of the text. The same rule of jurisdiction has to be enforced for all Member States even if the defender is settled in a third country, in order to insure the harmonisation of the rules governing jurisdiction. The difference between jurisdiction and recognition and enforcement must be done as usual in international private law. So the question to know if the Member State judgment will be recognised and enforced by a third country depends of the international private law of this non-European State. Even more, thanks to this consideration the defender is protected even if the EIR is applied. On the one hand, the foreign creditor knows where the debtor's COMI is located, so the application of the EIR is foreseeable. On the other hand, the European judgment must be recognised before being enforceable in the non-European State.

The judgment is an extensive interpretation of the scope of the EIR, but such an interpretation is the only way to insure the full application of this regulation. Of course the main consequence is the restriction of the scope of the international private law of the Member State and the effects of this wide approach have to be evaluated: it's a new and difficult question!" ■

> **"THE SCOPE OF THE EIR MUST BE INTERPRETED WIDELY IN ORDER TO IMPROVE THE EFFICIENCY OF THE TEXT"**