INS INSOLVENTIERECHT UPDATES

ANNOTATIE

Annotatie bij CJEU 15 October 2015, Case C-310/14 (Nike BV v Sportland Oy)

prof. mr. B. Wessels

Annotatie bij Hof van Justitie van de Europese Unie, 10-10-2015, ECLI:EU:C:2015:690 (INS-2015-0286)

1. The *Helsingin hovioikeus* (Court of Appeal, Helsinki, Finland) referred several questions to the Court of Justice of the European Union (CJEU) in a case between Nike European Operations Netherlands BV ('Nike', incorporated in the Netherlands) v Sportland Oy, in liquidation ('Sportland', incorporated in Finland), concerning an action to have certain transactions declared void by virtue of insolvency.

Sportland was a retailer of goods supplied by Nike under a franchising agreement, which by a choice of law clause was governed by the laws of the Netherlands. Sportland paid Nike outstanding debts arising from the purchase of stocks set out in the agreement in ten separate instalments made between 10 February 2009 and 20 May 2009, with a total of € 195,108.15. Two weeks prior to the last payment on 5 May 2009, the Helsinki District Court received a request to open insolvency proceedings in respect of Sportland, followed by the actual opening of insolvency proceedings on 26 May 2009. Sportland brought an action before the court seeking an order that the payments be annulled and that Nike be required to make restitution of the amounts paid plus interest in accordance with Paragraph 10 of the Finish Law on recovery of assets (*takaisinsaannista konkurssipesään annettu laki*). The provision says that the payment of a debt within three months of the prescribed date may be challenged if it is paid with an 'unusual' means of payment, is paid prematurely, or in an amount which, in view of the amount of the debtor's estate, may be regarded as significant. Nike, on the contrary, sought an order that the action be dismissed. It relied, inter alia, on Article 13 of EU Insolvency Regulation No 1346/2000 (EIR) and claimed that the payments at issue were

governed by Dutch law, and that Article 47 of the Bankruptcy Act (*Faillissementswet*) does not provide for avoidability of these payments. In short, Nike put forth that under Dutch law the payment of an outstanding debt which is due may be challenged only if it is proven that when the recipient received the payment he was aware that the application for insolvency proceedings had already been lodged or that the payment was agreed between the creditor and the debtor in order to give priority to that creditor to the detriment of the other creditors. So, according to Nike, those payments could not be annulled.

2. The legal context of the case is formed by the interplay between Articles 4 and 13 EIR. Article 4(1) EIR states that, save as otherwise provided, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened (*lex fori concursus*). It provides in Article 4(2) EIR that this law shall determine the conditions for the opening of those proceedings, their conduct and their closure: 'It shall determine in particular: (...)(m) the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors.' Article 13 EIR provides: 'Article 4(2)(m) shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that: (first indent) the said act is subject to the law of a Member State other than that of the State of the opening of proceedings, and (second indent) that law does not allow any means of challenging that act in the relevant case.' The key question posed by the Finish Court to the CJEU relate to the interpretation to be given to the expression 'does not allow any means of challenging that act in the relevant case'. Further questions relate to the scope of Nike's obligation to adduce evidence regarding the content of Dutch law and which party is to bear the burden of proof.

3. It should be recalled that Article 13 EIR is much debated. Generally, insolvency practitioners in Europe feel the article brings much more uncertainty than benefit. See Cherubini et al., in: 'Harmonisation of insolvency law at EU Level, IILR 2010, 87ff. However, in the Insolvency Regulation's Recast, the provision has survived and has not been amended (see http://bobwessels.nl/2015/09/2015-09-doc14-short-note-on-eir-recast/). It's now Article 16 EIR Recast. In a recent German study, comparing the laws of Austria, England, France and Germany, Stangl concludes that based on a conflict-of-laws perspective no solid argument exists to delete Article 13 (see Roland Stangl, *Die kollisionsrechtliche Umsetzung des Art. 13 EuInsVO*, Veröffentlichungen zum Verfahrensrecht 115, Tübingen: Mohr Siebeck 2015).

4. Now to the case. The first question of the Finnish court to the CJEU relates to the fact that the language of the EIR has over twenty authentic texts, and that Article 13 EIR must be interpreted as meaning that its application is subject to the condition that the act at issue cannot be challenged on the basis of the law governing the act (*lex causae*), after taking account of all the circumstances of the case. However, a tiny textual problem arises, as the text

of Article 13 in the Finnish language version differs slightly from the texts of the other language versions, in so far as in Finnish the words 'in the relevant case' (in Dutch: *in het gegeven geval*) or a similar expression do not appear. The CJEU brings into action settled case law of the Court, according to which the need for a uniform interpretation of a provision of EU law means that, where there is divergence between the various language versions of the provision, the latter must be interpreted by reference to the context and purpose of the rules of which it forms part. In this case Article 13 EIR forms an exception to the *lex fori concursus*. The CJEU reads this exception in the light of recital 24 in the preamble to the EIR. It holds that the exception in Article 13 EIR aims to protect legitimate expectations and the certainty of transactions in Member States other than that in which proceedings are opened. It therefore concludes that Article 13 EIR must be interpreted strictly, and that its scope cannot go beyond what is necessary to achieve that objective. The Court refers to a similar consideration in its judgment in *Lutz v Bauerle*, C-557/13, ECLI:EU:C:2015:227, paragraph 34, see http://bobwessels.nl/2015/04/2015-04-doc6-cjeu-16-april-2015-lutz-v-bauerle/.

5. The CJEU goes on to observe that Article 13 EIR aims to protect the legitimate expectations of a person who has benefited from an act detrimental to all the creditors by providing that the act will continue to be governed, even after insolvency proceedings have been opened, by the law that was applicable at the date on which it was concluded, namely the *lex causae*. This means that it is clear from that objective that the application of Article 13 EIR requires that all the circumstances of the case be taken into account. The Court applies its own logical reasoning: 'There cannot be legitimate expectations where, after insolvency proceedings have been opened, the validity of an act is to be assessed without regard being had to those circumstances whereas, where such proceedings are not opened, such circumstances would need to be taken into account.' In addition, the duty to interpret strictly the exception laid down in Article 13 EIR precludes a broad interpretation of the scope of that article which would allow a person who has benefited from an act detrimental to all the creditors to avoid the application of the *lex fori concursus* '... by relying solely, in a purely abstract manner, on the unchallengeable character of the act at issue on the basis of a provision of the *lex causae*'. Therefore, the CJEU concludes, Article 13 EIR must be interpreted as meaning that its application is subject to the condition that, after taking account of all the circumstances of the case, the act at issue cannot be challenged on the basis of the law governing the act, being the *lex causea*.

6. Then the CJEU switches from a pure substantial point to the area of proof and evidence. The system is that under Article 13 EIR, Article 4(2)(m) EIR can be disapplied only where the person who has benefited from an act detrimental to all the creditors provides proof that the act is governed by the law of a Member State other than that in which insolvency proceedings

were opened and (cumulative requirement) that that law does not allow any means of challenging the act. The question that arises is which party (for the purposes of the application of Article 13 EIR and in the event that the defendant in an action relating to the voidness, voidability or unenforceability of an act relies on a provision of the *lex causae* under which the act can be challenged only in the circumstances provided for in that provision) is required to plead that those circumstances do not exist and is to bear the burden of proof in that regard. Following the words of Article 13 EIR, the Court observes, it is for the defendant (here: Nike) in an action relating to the voidness etc. of an act to provide proof, on the basis of the *lex causae*, that the act cannot be challenged. He, as defendant, must provide proof that an act cannot be challenged by 'any means' and – after taking account of 'all the circumstances of the case' – Article 13 EIR also, according to the CJEU 'at least implicitly', places the burden on the defendant to prove both the facts from which the conclusion can be drawn that the act is unchallengeable and the absence of any evidence that would militate against that conclusion.

7. Providing proof that something has not happened? Isn't that draconian? The Court says that it cannot be required from the applicant (i.e. Sportland's insolvency practitioner) to claim, or even prove, that the conditions for the application of a provision of the *lex causae* which, in principle, would enable the act at issue to be challenged (such as in this case Article 47 of the Dutch Bankruptcy Act) in the main proceedings, are satisfied. Then follows the disenchanted statement that, although Article 13 EIR expressly governs where the burden of proof lies, '... it does not contain any provisions on more specific procedural aspects. For instance, that article does not set out, inter alia, the ways in which evidence is to be elicited, what evidence is to be admissible before the appropriate national court, or the principles governing that court's assessment of the probative value of the evidence adduced before it'. Again, settled EU case law provides an answer: '... in the absence of harmonisation of such rules under EU law, it is for the national legal order of each Member State to establish them in accordance with the principle of procedural autonomy provided, however, that those rules are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (principle of effectiveness)'. The CJEU refers to its judgment in *Kušionová*, C-34/13, ECLI:EU:C:2014:2189, paragraph 50 and the case law cited therein.

8. Fortunately, the CJEU does not fully limit itself in reasoning in the abstract. The Court does not say what the principle of equivalence means for the case at hand, but it adds that the principle of effectiveness precludes (1) the application of national rules of procedure that would make reliance on Article 13 EIR impossible or excessively difficult by providing for rules which are too onerous, especially in connection with proof of the negative, namely that certain circumstances did not exist, and also precludes (2) national rules of evidence that are not

sufficiently rigorous, the application of which would, in fact, have the effect of shifting the burden of proof laid down in Article 13 EIR. For the case this however means that the mere difficulty of proving that circumstances exist in which the *lex causae* prevents the act at issue from being challenged or, where relevant, that circumstances laid down in the *lex causae* do not exist in which the act can be challenged, does not in itself impinge upon the principle of effectiveness, 'but rather reflects the need to interpret that article strictly'. For the purposes of applying Article 13 EIR and in the event that the defendant in an action relating to the voidness etc. of an act relies on a provision of the *lex causae* under which that act can be challenged only in the circumstances provided for in that provision, it is for that defendant to plead that those circumstances do not exist and to bear the burden of proof in that regard.

9. Now, from the matter of providing proof, back to the words in the text of Article 13 EIR again. Does the expression (Article 31, second indent) '... does not allow any means of challenging that act ...' mean that in addition to the insolvency rules of the *lex causae*, the general provisions and principles of that law, taken as a whole, apply? Again, the CJEU falls back to the aim and context of Article 13 EIR. It aims to protect the legitimate expectations of a person who has benefited from an act detrimental to all the creditors, by providing that even after insolvency proceedings have been opened the act will continue to be governed by the *lex causae*, whilst the application of Article 13 EIR in favour of such a person benefiting from a detrimental act requires that all the circumstances of the case be taken into account. Summarizing: the aim of protecting legitimate expectations and the need for all the circumstances of the case to be taken into account require Article 13 EIR to be interpreted as meaning that a person benefiting from a detrimental act must prove that the act at issue cannot be challenged either on the basis of the insolvency provisions of the *lex causae* or on the basis of the *lex causae*, taken as a whole. The wording of Article 13 EIR clearly supports such an interpretation. It requires a person benefiting from a detrimental act to bear the burden of proving that the act cannot be challenged '[by] any means'. This means insolvency provisions and general law provisions, as Article 13 does not distinguish between the two. To give an example: if the *lex fori concursus* would allow for avoidability on the basis of transaction avoidance/*actio pauliana*, but if the *lex causae* would not provide for a remedy in its rules on transaction avoidance, the counterparty would not be protected if the national law would provide specific remedies under corporate law, such as invoking nullity under Article 2:7 Dutch Civil Code (*ultra vires* action) or rules on capital protection or its general law regarding liability for unlawful acts in the case at hand. Moreover, there cannot be legitimate expectations that an act, which may be challenged on the basis of a provision or general principle of the *lex causae*, is to be assessed, after insolvency proceedings have been opened, solely in the light of the insolvency provisions of the *lex causae*. In the Netherlands, this has been the prevailing view, see Bob Wessels, *International Insolvency Law*, 3rd ed., Deventer:

Kluwer 2012, par. 10716ff.

10. So, that is the 'which law' query. Now, the question: the status of the law on which date? It seems rather obvious to protect the legitimate expectations of a person who has benefited from an act detrimental to all the creditors by providing that that act will continue to be governed by the law that was applicable at the date on which it was concluded. At the date, the CJEU decides, the act was governed by the *lex causae*, taken as a whole, as applicable in the absence of insolvency proceedings since Article 13 EIR is not, in principle, applicable to acts which take place after the opening of insolvency proceedings. Again the Court refers to its judgment in *Lutz v Bauerle* case (C-557/13, ECLI:EU:C:2015:227).

11. Then, finally, how should a national court act? It is clear from the judgment that it is for the defendant to prove that the act cannot be challenged. The ways in which evidence is to be elicited, what evidence is admissible before the court, or the principles governing that court's assessment of the probative value of the evidence adduced before it, is a matter of the national legal order of each Member State. That court should establish such details in accordance with '... the principle of procedural autonomy provided, however, that the principles of equivalence and effectiveness are respected. National rules of evidence that are not sufficiently rigorous, the application of which would, in practice, shift the burden of proof, would not be consistent with the principle of effectiveness'. Although the burden of proof is on the defendant, the applicant is not fully discharged. Where the court finds that the defendant has first proven, in accordance with the rules generally applicable under national rules of procedure, that the act at issue cannot be challenged on the basis of the *lex causae*, the national court can rule that it is for the applicant in an action relating to the voidness etc. of an act to establish the existence of a provision or principle of the *lex causae* on the basis of which that act can be challenged. The issue of determining the criteria for ascertaining whether the applicant has in fact proven that the act can be challenged falls within the procedural autonomy of the relevant Member State, regard being had to the principles of effectiveness and equivalence, the CJEU concludes.

Bob Wessels

Prof. em. of international insolvency law, University of Leiden, the Netherlands; External Scientific Fellow Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law. He can be reached via info@bobwessels.nl.