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Case Note on BGH IX ZR 229/23

Prof. Dr. Reinhard Bork[1]

Abstract

In BGH IX ZR 229/23, the German Bundesgerichtshof referred a case concerning Art. 16 EIR 2015 to the Court of Justice of the European Union for a preliminary ruling. The case involves the partial repayment of an intercompany loan between an Austrian company and its German sister company, made four months before insolvency proceedings were initiated against the German borrower. The German insolvency practitioner sought to avoid the repayment under German transaction avoidance rules. However, the loan agreement was governed by Austrian law, which no longer permitted avoidance at the time of the challenge. This case note examines how Art. 16 EIR, by purporting to protect legitimate expectations where none exist, unnecessarily complicates the application of national avoidance provisions. It further questions whether a teleological reduction of Art. 16 EIR can resolve the inconsistencies raised in this case.

Keywords: Article 16 EIR; Transaction avoidance; Shareholder loans.

1. The German *Bundesgerichtshof* has referred a case on Art. 16 EIR 2015 (= Art. 13 EIR 2000) to the Court of Justice of the European Union.[2] Art. 16 EIR repeatedly causes major problems in practice. The norm leads to considerable legal uncertainty because an insolvency practitioner entitled to annul a transaction under his or her home law (*lex concursus*) is often unable to assess whether an opposing party domiciled in another Member State can defend itself on the grounds that the challenged transaction is governed by the law of another Member State (*lex causae*) and cannot be challenged in any way under that law.

1 Professor (Emeritus) for Civil Procedure Law and General Procedural Law, University of Hamburg; Senior Research Fellow at the Commercial Law Centre, Harris Manchester College, Oxford; Visiting Professor for International Insolvency Law at Radboud University, Nijmegen.

2 *BGH*, 16.01.2025 – IX ZR 229/23. The judgement is available – albeit in German only – at https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/list.py?Gericht=bgh&Art=en&Sort=12288&Datum=Aktuell (last accessed 05.02.2025).

The examination of these questions causes considerable costs and delays the insolvency proceedings considerably.

2. Sec. 135 of the German Insolvenzordnung (InsO)[3] poses particular problems from a German perspective. Under this rule, repayment or securitisation of a shareholder loan is challengeable under alleviated conditions. In the present case, an Austrian company had granted a loan to a German sister company (the joint Austrian parent company held a 78% stake in the former and a 33% stake in the latter) and this loan had been partially repaid four months before the insolvency application was filed for the borrower. The lender filed the remainder of its claim under the loan agreement in the German insolvency proceedings, but this claim was rejected by the German insolvency practitioner, who considered the claim to be subordinated pursuant to sec. 39 (1) no. 5 InsO. In the following court proceedings, the insolvency administrator filed a counterclaim for avoidance of the repayment of the loan. The counterclaim was unquestionably justified under German law (sec. 135 InsO), but under Austrian law, to which the parties had subjected the loan agreement, avoidance was no longer an option – probably due to the expiry of the one-year exclusion period for avoidance to be calculated from the opening of proceedings (sec. 43 (2) IO[4])[5] – so that the avoidance was precluded by the defence under Art. 16 EIR[6].

3. Cross-border avoidance in accordance with sec. 135 InsO is often at risk of failing due to Art. 16 EIR. Comparable rules that subject shareholder loans to a special avoidance regime can be found in some Member States (Italy, Croatia, Austria, Portugal, Slovenia).[7] In others, particularly in Poland, comparable objectives are achieved with avoidance provisions for payments to closely related parties. However, there are also a number of European legal systems in which only general avoidance law applies, and its requirements are not always met in cases of sec. 135 InsO. It is therefore no wonder that numerous efforts have been made in German case law and literature to exclude avoidance under

3 English text available at https://www.gesetze-im-internet.de/englisch_inso/index.html (last accessed 05.02.2025).

4 Austrian Insolvenzordnung; text available at https://www.jusline.at/gesetz/io (last accessed 05.02.2025).

5 CJEU, Case C-557/13 - *Hermann Lutz v. Elke Bäuerle*, ECLI:EU:C:2015:227 para. 43 et seq.

6 In the case in dispute, the identical wording of Art. 13 EIR 2000 was still applicable. This is not further taken account of here.

7 An overview can be found in *Bork/Veder*, Harmonisation of Transactions Avoidance Laws, Intersentia, Cambridge/Antwerp/Chicago 2022, para. 4.180.

sec. 135 InsO from the scope of application of Art. 16 EIR.[8] Four approaches have been discussed with regard to the corporate law context. Firstly, it has been disputed that sec. 135 InsO is a matter of insolvency law within the meaning of Art. 7 EIR. Secondly, it can be argued that the repayment of shareholder loans is subject to Art. 7 EIR, but not Art. 16 EIR. Thirdly, it can be discussed whether – when applying Art. 16 EIR – the *lex causae* is to be determined according to the law applicable to the company and not the law applicable to the contract. And fourthly, exceptions to the general rules of the Rome I Regulation can be considered when applying the law applicable to the contract.

4. Art. 16 EIR is an extremely dubious norm in terms of legal policy and is subject to strong criticism. It grants the opposing party protection of legitimate expectations where no protection of legitimate expectations is appropriate. This is because anyone who enters into an agreement with a foreign contractual partner must expect foreign insolvency law to apply in the event of the latter's insolvency, including foreign transactions avoidance laws.[9] This is shown by the fact that the shareholder lender, as the BGH correctly states in the present decision at para. 19[10], must accept the subordination pursuant to sec. 39 (1) no. 5 InsO for the unfulfilled residual claim, without there being any protection of legitimate expectations in this respect. It is therefore at least necessary to interpret this basically misguided norm as narrowly as possible.[11] In the present decision, the IXth Senate of the BGH proposes a teleological reduction[12]. However, it is uncertain whether this view will be shared by the CJEU. European law recognises both the restrictive construction of exceptions within their normative purpose[13] and the teleological reduction[14]. However, it is doubtful whether this will lead to the desired result in the present case.

8 Summarising, also on the following, *Bork*, Festschrift für Barbara Grunewald, 2021, p. 97 ff.

9 See only *Bork*, Principles of Cross-Border Insolvency Law, Intersentia, Cambridge/Antwerp/Portland 2017, para. 6.92 et seq. with further references; *KPB-Bork*, Commentary on the InsO, as of Dec. 2024, Art. 16 EuInsVO para. 3.

10 References to marginal numbers without further identification refer to the above-mentioned decision of the BGH.

11 *KPB-Bork* (fn. 8), Art. 16 para. 4.

12 Teleological reduction means that a case which is covered by the wording of a rule is excluded from the application of this rule according to its policy (telos).

13 Cf. only CJEU, Case C-86/23 - *E. N. I., Y. K. I. v. HUK-COBURG-Allgemeine Versicherung AG*, ECLI:EU:C:2024:689 para. 30.

14 *Mölllers*, Juristische Methodenlehre, 6th ed. 2025, § 6 para. 179; *Riesenhuber-Leible/Domröse*, Europäische Methodenlehre, 4th ed. 2021, ch. 8 para. 35; *Riesenhuber-Neuner*, ibid., ch. 12 para. 38 et seq.; *Vogenauer*, Die Auslegung von Gesetzen in England und auf dem Kontinent, vol. I, 2001, p. 374 et seq.

5. It is equally doubtful that the CJEU will follow the BGH's request to exclude sec. 135 InsO from the scope of application of Art. 16 EIR, which, although worthy of support, seems to be somewhat contrived. The arguments of the IX[th] Senate, some of which are direct, others somewhat hidden, are not convincing in every respect, not least because they are not examined to determine whether they apply only to sec. 135 InsO or also to other transactions avoidance provisions, such as sec. 133 InsO (transactions intentionally disadvantaging creditors) or sec. 134 InsO (transactions at an undervalue).

   a) The path occasionally suggested in literature[15] of classifying sec. 135 InsO not as insolvency law at all, but as company law and thus not assigning it to *the lex fori concursus* in accordance with Art. 7 EIR, but to the applicable company law, is one that the BGH does not take – and rightly so. This would have been difficult to do in a judgment in which it is expressly pointed out in para. 11 that sec. 39 (1) no. 5 and sec. 135 InsO have no significance outside of insolvency. The IX[th] Senate thus follows the previous line of case law in which these provisions were understood purely in terms of insolvency law.[16]

   b) The idea that avoidance rules that serve to enforce subordination provisions are not covered by Art. 16 EIR (para. 29) is interesting, but ultimately does not hold water. Sec. 134 InsO also serves to enforce a subordination provision, namely that of sec. 39 (1) no. 4 InsO. Art. 16 EIR does not attach any weight to the purpose of the avoidance provision. If one also considers that Art. 16 EIR covers not only grounds of invalidity under insolvency law, but also all grounds of invalidity under general private law of the *lex causae*,[17] it becomes difficult not to apply Art. 16 EIR at all in certain cases of the *lex fori concursus*. This is because if a provision of insolvency law even covers all grounds of ineffectiveness under substantive law, then it will hardly be possible to exclude individual grounds of ineffectiveness under insolvency law.

15 E.g. by *Schall* ZIP 2011, 2177, 2179 et seq.; also *Wöhlert*, GWS 2011, 72 for crisis financing.
16 Fundamentally BGH, 21.07.2011 – IX ZR 185/10, BGHZ 190, 364 para. 30.
17 CJEU, Case C-310/14 - *Nike European Operations Netherlands BV v. Sportland Oy*, ECLI:EU:C:2015:690 para. 32 et seq.

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c) Surprisingly argued is the proposal presented in para. 27 et seq. to determine the *lex causae* under Art. 16 EIR not under contract law but under company law. The thesis that sec. 135 InsO serves to "largely equate shareholder loans with liable equity capital in the run-up to insolvency" (para. 30; cf. also para. 25) can certainly be described as bold, because the topos of "equity substitution" has been abolished in Germany in 2008 by the *Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen* (MoMiG)[18]. The explanatory memorandum to the government draft of what is now sec. 135 InsO expressly states[19] that capital-replacing loans will no longer exist in future, i.e. after the Act comes into force. The equal treatment of debt and equity would therefore require special justification. Until now, the protection provided by sec. 39 (1) no. 5 and sec. 135 InsO has always been understood, at least in the case law of the Federal Court of Justice, as being in contrast to capital protection under company law (e.g. pursuant to sec. 30, 31 GmbHG[20]).[21] The mere assertion in the present judgment that sec. 135 InsO is about capital protection is intended to push the discussion "atmospherically" in the direction of company law. It remains to be seen whether the CJEU will adopt this extremely controversial classification in its decision.

d) The argument that the creditor of a shareholder loan cannot claim the same protection of legitimate expectations as another loan creditor (para. 32), which amounts to a teleological reduction of Art. 16 EIR, is also unconvincing. After all, Art. 16 EIR certainly and indisputably also covers sec. 134 InsO and, for transactions at an undervalue, there is no protection of legitimate expectations at all in this provision. Consequently, this cannot be the decisive aspect.

e) Finally, recourse to Art. 9 Rome I Regulation (para. 37) does not lead us any further. One can consider qualifying avoidance rules as overriding mandatory provisions, although this would require that such a law or provision necessarily envisages the protection of public interests of particular

18 *Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen* (Act to Modernise the Law on Private Limited Companies and to Combat Abuses), Bundesgesetzblatt (German Federal Gazette) 2008 I, 2026.

19 Bundestagsdrucksache (publication of the German parliament) 16/6140, p. 56.

20 Act on Limited Liability Companies, English text available at https://www.gesetze-im-internet.de/englisch_gmbhg/index.html (last accessed 05.02.2025).

21 See for example BGH, 17.10.2020 – IX ZR 122/19, ZRI 2021, 85 para. 9.

importance, such as those relating to the political, social or economic organisation of the Member State of the forum.[22] This is hardly plausible in the case of avoidance provisions that exist in the interests of creditors. However, it is difficult to argue that this only holds true for sec. 135 InsO. If this provision is an intervention rule, should anything else apply to sec. 133 InsO, the German version of the *actio pauliana*, which is available throughout Europe, or to the provision of sec. 134 InsO, which covers transactions at an undervalue and is also comparably available in all Member States? If this were correct, there would ultimately be nothing left of Art. 16 EIR, because then the *lex causae* would never be decisive, but always the *lex fori concursus*. Furthermore, according to the case law of the CJEU, overriding mandatory provisions may only be used if the objective of protecting the interest at issue pursued by the relevant provision of the law of the forum cannot be achieved by applying the law designated pursuant to the conflict-of-law rules of the Rome I Regulation.[23] However, Austrian law pursues the same objectives as sec. 135 InsO with its avoidance provisions (sec. 27 et seq. IO) on the one hand and the Equity Substitution Act[24] on the other. The fact that a different (namely one-year) exclusion period for avoidance applies in Austria pursuant to sec. 43 (2) IO should hardly call this into question.

6. In Germany, the arguments in the legal question discussed here have been exchanged. Despite all doubts about the effectiveness of its arguments, the IXth Senate is to be wished success with its request. It is extremely commendable that this issue, which is associated with great legal uncertainty in practice, has finally been presented in Luxembourg. In any case, the Harmonisation Directive currently under discussion will not solve the problem, as it does not regulate the avoidance of shareholder loan repayments. *De lege lata*, only a teleological reduction or a restrictive interpretation of Art. 16 EIR will help; both are not impossible, but difficult to justify. *De lege ferenda*, the norm should be abolished.

22 ECJ, Case C-86/23 - *E. N. I., Y. K. I. v. HUK-COBURG-Allgemeine Versicherung AG*, ECLI:EU:C:2024:689 para. 44.

23 ECJ, Case C-86/23 - *E. N. I., Y. K. I. v. HUK-COBURG-Allgemeine Versicherung AG*, ECLI:EU:C:2024:689 para. 43.

24 Eigenkapitalersatz-Gesetz (EKEG, Federal Act on Equity-Replacing Contributions by Shareholders, Equity Substitution Act), Bundesgesetzblatt (Austrian Federal Gazette) I, No. 92/2003.