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Case note on CJEU 14 November 2024, ECLI:EUC:2024:952, C-394/22 (*Oilchart*)

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Abstract

In *Skarb v Riel* (C-47/18), the Court of Justice of the European Union (CJEU) held that actions aimed at verifying the existence of a creditor's claim in insolvency proceedings are excluded from Brussels I-bis and fall within the scope of the European Insolvency Regulation, so that jurisdiction lies exclusively with the courts of the Member State where the proceedings were opened. By contrast, in Oilchart (C-394/22), the CJEU emphasized that the legal basis of a claim is decisive, ruling that a contractual claim does not derive directly from insolvency proceedings even if it is also submitted in such proceedings. This case note examines the divergent approaches of the CJEU – contrasting its decisions with an earlier stance of the Dutch Supreme Court regarding forum selection clauses in bankruptcy – and considers the implications for the potential of conflicting decisions on claim verification.

Keywords: Insolvency related actions; Skarb Pánstwa/Riel; Art. 6 EIR; Oilchart

1. In its judgment of 18 September 2019, ECLI:EU:C:2019:754, Case C-47/18 (*Skarb v Riel*), the Court of Justice of the European Union ruled that an action to establish the existence of a claim for the purpose of its verification and admission in insolvency proceedings, is excluded from the scope of Brussels I-bis and falls within the scope of the EIR. This means that the courts of the Member State in which the relevant insolvency proceedings were opened, have exclusive jurisdiction to decide whether a claim that has been submitted by a creditor, when disputed, exists. In that case, claims of the Polish authorities against the Austrian company Alpine Bau were contested by both the insolvency administrator in Alpine Bau's Austrian main insolvency proceeding

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and the insolvency administrator in Alpine Bau's Polish secondary insolvency proceeding. As a result, claim validation proceedings were initiated in both Poland and Austria. The CJEU thus adopted a different approach to the division of jurisdiction in claim verification disputes than, for example, the Supreme Court of the Netherlands follows in cases to which the Insolvency Regulation does not apply. In 1999, the Dutch Supreme Court ruled that, even in the case of a referral to claim validation proceedings after the liquidator had disputed a claim submitted for verification, an exclusive forum selection clause remains effective (see HR 16 April 1999, *JOR* 1999/156, case note Veder (*Ultrafin*)). While the provisions of the Dutch Bankruptcy Act ("**DBA**") regarding verification and admission of claims are aimed at an efficient settlement of disputes regarding the existence, extent and possible priority of claims against the bankrupt debtor, the Dutch Supreme Court held that the interests of international legal certainty take precedence. Accordingly, claim verification proceedings should be stayed pending the outcome of the proceedings before the elected forum on the existence of a claim submitted for verification. If the creditor's claim is upheld, in whole or in part, by the chosen court, the Dutch courts must then determine – within the claim validation proceedings and on the basis of Article 431 of the Dutch Code of Civil Procedure – whether to recognise and enforce that judgment in the Dutch bankruptcy proceeding.The CJEU's judgment in *Skarb v Riel* entails that divergent decisions may be reached on questions pertaining to insolvency law that may arise in verification proceedings, such as the admissibility or ranking of a claim. Such differences in outcome are acceptable and indeed explicable within the system of main and secondary insolvency proceedings established by the EIR, since the treatment of claims in insolvency proceedings depends on the applicable insolvency law (see Article 4(2)(g) and (h), EIR 2000 and (now) Article 7(g) and (h), EIR). That the courts of the Member State in which the relevant insolvency proceedings were opened have exclusive jurisdiction to decide these questions, which are clearly issues of insolvency law, is obvious. However, the CJEU's judgment also means that the question whether a claim *exists* and, if so, for what amount – which is not a matter of insolvency law – may be answered differently by the courts in the Member States where verification proceedings concerning that same claim are pending. The risk of irreconcilable decisions on this point is not inconceivable. However, the CJEU in its judgment in *Skarb v Riel* decided that, in cases falling within the scope of the EIR, the lis pendens rules of Brussels I-bis – which aim to prevent such irreconcilable judgments – do not apply, not even by analogy.

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2. In its recent judgment in the Oilchart case (CJEU 14 November 2024, ECLI:EUC:2024:952, Case C-394/22), following preliminary questions referred by the Antwerp Court of Appeal, the CJEU reached a different conclusion. In my view, the outcome in this case is difficult to reconcile with its earlier judgment in *Skarb v Riel*, though nonetheless correct.

3. The questions referred to the CJEU for a preliminary ruling arose in proceedings brought before the court in Antwerp (Belgium) by Oilchart International NV against O.W. Bunker (Netherlands) BV, which had (previously) been declared bankrupt in the Netherlands. Oilchart sought an order requiring O.W. Bunker to pay an amount exceeding EUR 110.000 in connection with the supply of bunker oil to the ocean-going vessel ms Evita K. Oilchart had also filed its claim in O.W. Bunker's Dutch bankruptcy proceedings, but made no mention of this in the Belgian proceedings.

4. The background to the case, as summarised by the CJEU in para 17 of its judgment, suggests that Oilchart commenced these proceedings to obtain a judgment from the Belgian court that would allow it to draw under bank guarantees. These guarantees were issued to it in the context of the lifting of prejudgment attachments that Oilchart – after the opening of bankruptcy proceedings in respect of O.W. Bunker in the Netherlands – had levied on some seagoing vessels of third parties, to which it had delivered oil on O.W. Bunker's instructions.

5. At first instance, the Antwerp court found that it had jurisdiction to hear Oilchart's claim against O.W. Bunker, but declared Oilchart's claim inadmissible on the basis of Dutch insolvency law. On appeal, the Belgian court questioned whether it should assess its jurisdiction pursuant to Brussels I-bis or the EIR and referred preliminary questions to the CJEU in that regard. These questions were prompted by Oilchart's contention on appeal that the legal basis of its claim was Article 25(2) DBA.

6. According to the CJEU's established case law, now codified in Article 6(1) EIR, a claim falls within the scope of the EIR – and thus outside the scope of Brussels I-bis – if it (*i*) derives directly from insolvency proceedings and (*ii*) is closely connected with them. This is a double test (judgment, para 35). As Advocate General Medina points out in her opinion of 18 April 2024 (ECLI:EU:2024:330), it is not easy to determine the exact scope and content of these criteria (see also, in this regard, the opinion of Advocate General Bobek in the matter of *NK*, ECLI:EU:C:2018:850, Case C-535/17)). The case law of the CJEU does not excel

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in clarity on this point and, according to Advocate General Medina, does not always lead to coherent rules (Opinion, para 43).

7. Advocate General Medina concludes that Oilchart's claim falls within the scope of the EIR. The CJEU, however, does not follow her. It holds that, when assessing whether a claim derives directly from insolvency proceedings, the legal basis of the claim is decisive (judgment, para 37). According to this approach, it must be determined whether the right or the obligation underlying the action originates in the ordinary rules of civil and commercial law, or in derogating rules specific to insolvency proceedings. And on that issue, the CJEU concludes – correctly – that the legal basis of Oilchart's claim is contract law and not insolvency law. Moreover, the CJEU notes at paragraph 45, "neither the opening of insolvency proceedings nor the appointment of a liquidator have the effect of altering the legal basis of an action which is covered by the ordinary rules of civil and commercial law with a view to bringing it within the scope of rules specific to insolvency proceedings." This raises the question of whether the same reasoning should not also apply where the *existence* of a claim is the subject of claim validation proceedings. Yet, the CJEU apparently thinks otherwise, as shown in the case of Skarb v Riel. For the second element of the double test, the "closeness of the link between a court action and the insolvency proceedings" is decisive (judgment, para 47). As regards this second element, the CJEU notes that the mere fact that a claim has also been submitted for verification to the insolvency practitioner is not sufficient to exclude that claim from the scope of Brussels I-bis.

8. The foregoing does not mean that, should the Belgian court indeed consider itself to have jurisdiction under Brussels I-bis, Oilchart's claim is admissable. As the CJEU notes in paragraphs 50 et seq, the consequences of the insolvency proceeding opened in the Netherlands – both for the manner in which claims against the debtor can be enforced and for the question whether a creditor may still litigate against the bankrupt debtor in that context – are governed by Dutch bankruptcy law.

9. The Antwerp Commercial Court declared Oilchart's claim inadmissible at first instance. There is much to be said for that conclusion. After all, under Article 26 DBA, legal actions aimed at the satisfaction of an obligation from the estate – whether or not brought directly against the bankrupt debtor – may only be lodged in the manner provided in Article 110 DBA, i.e. by submitting a claim for verification with the insolvency practitioner. But it could perhaps be argued, as Oilchart did, that Article 25(2) DBA allows creditors to litigate against the

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bankrupt debtor (as was allowed in Court of Appeal of Amsterdam 24 March 2009, *JOR* 2009/153), e.g. to be able to draw under a bank guarantee or to take recourse against assets belonging to third parties. Article 25(2) DBA provides: "If proceedings initiated or pursued by or against the bankrupt result in a judgment against the bankrupt, such judgment will have no force in law as against the bankrupt estate" (translation taken from H. Warendorf a.o (eds.), *Warendorf Dutch Civil and Commercial Law Legislation*, Deventer: Wolters Kluwer). In my view, it is highly questionable whether this provision permits the lodging of actions against the bankrupt debtor. Article 25 (2) DBA does not, in my opinion, confer on creditors the power to litigate against the bankrupt debtor, but merely regulates the effect of a judgment if this should have happened anyway. By contrast, under Article 25(1) DBA, a creditor might be able to litigate against the insolvency practitioner (*curator*), as the claim concerns rights and obligations belonging to the estate. This interpretation is supported, for instance, by Van Hees in his case note to the Court of Appeal of The Hague, 24 March 1998, *JOR* 1998/113.

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