Reports of Cases

OPINION OF ADVOCATE GENERAL
MAZÁK
delivered on 26 January 2012 [1]

Case C-527/10

ERSTE Bank Hungary Nyrtv
Republic of Hungary,
BCL Trading GmbH, ERSTE Befektetési Zrt.

(Reference for a preliminary ruling made by the Legfelsőbb Bíróság (Hungary))

(Judicial cooperation in civil matters — Insolvency proceedings — Application in time of Regulation (EC) No 1346/2000 — International jurisdiction — Actions deriving directly from insolvency proceedings and closely connected to them — Applicable law — Third parties' rights in rem — Inadmissibility of the reference for a preliminary ruling)

1. The present reference for a preliminary ruling, made by the Legfelsőbb Bíróság (Supreme Court) (Hungary), concerns the interpretation of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings ('the Regulation'). [2] In essence, the question to be determined is whether Article 5(1) of the Regulation, concerning third parties' rights *in rem* over the assets of a debtor located in a Member State other than that in which the insolvency proceedings were opened, is also applicable in the case where the debtor's relevant asset is situated within the territory of a State which became a Member State of the European Union only after the insolvency proceedings had been opened.

Legal context

The Act concerning the Conditions of Accession

2. Article 2 of the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded [3] ('the Act concerning the Conditions of Accession') states:

'From the date of accession, the provisions of the original Treaties and the acts adopted by the institutions and the European Central Bank before accession shall be binding on the new Member States and shall apply in those States under the conditions laid down in those Treaties and in this Act.'

1 — Original language: French.
2 — OJ 2000 L 160, p. 1.
3 — OJ 2003 L 236, p. 33.

The Regulation

3. In order to determine which court has jurisdiction to open insolvency proceedings, Article 3(1) and (2) of the Regulation provides:

'1. 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. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.

2. Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.'

4. As regards determination of the law applicable to the insolvency proceedings, Article 4(1) of the Regulation provides:

'Save as otherwise provided in this Regulation, 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, hereafter referred to as the "State of the opening of proceedings".'

5. With regard to third parties' rights *in rem*, Article 5(1) of the Regulation states:

'The opening of insolvency proceedings shall not affect the rights *in rem* of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets — both specific assets and collections of indefinite assets as a whole which change from time to time — belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.'

6. Article 16(1) of the Regulation, which forms part of Chapter II thereof, entitled 'Recognition of Insolvency Proceedings', provides:

'Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings.

…'

7. Article 43 of the Regulation contains provisions regarding its application in time and is worded as follows:

'The provisions of this Regulation shall apply only to insolvency proceedings opened after its entry into force. Acts done by a debtor before the entry into force of this Regulation shall continue to be governed by the law which was applicable to them at the time they were done.'

8. Under the terms of Article 47, the Regulation entered into force on 31 May 2002.

Background to the dispute, proceedings and question referred for a preliminary hearing

9. On 8 May 1998, Postabank és Takarékpénztár Rt. ('Postabank') issued two irrevocable letters of credit, on deferred payment terms, for the amounts of USD 6 000 000 and USD 6 120 000, respectively, in favour of BCL Trading GmbH, a company established in Vienna ('BCL Trading').

10. BCL Trading assigned to various banks the right to claim the money that could be drawn down by means of the letters of credit. Postabank subsequently refused to pay the amounts claimed from it under the letters of credit, contending that the certificates of deposit submitted were not genuine.

11. On 9 July 2003, BCL Trading gave, as a guarantee, shares in Postabank which it held, in the event that Postabank might be required to pay the amounts covered by the letters of credit, up to a maximum amount of USD 12 120 000. Those shares constituted the security deposit.

12. Subsequently, the legal successor of Postabank, namely ERSTE Bank Hungary Nyrt. ('ERSTE Bank'), entered into a settlement with the assignee banks pursuant to which it undertook to pay them USD 7 850 000.

13. Insolvency proceedings were opened against BCL Trading in Austria on 5 December 2003 and published on 4 February 2004.

14. With regard to the shares in Postabank held by BCL Trading, replaced by shares in ERSTE Bank, as the legal successor to Postabank, and provided as a guarantee, the Legfelsőbb Bíróság, by partial decision of 6 December 2005, ordered the Hungarian State to purchase them at a price of HUF 1 516 450 200 on the ground that the State exercised a determining influence over Postabank which, under Hungarian law, created an obligation on it to acquire the Postabank shares offered for sale by small shareholders. The Hungarian State fulfilled its obligation by purchasing the shares in question and paid into court the amount set by the Legfelsőbb Bíróság.

15. On 27 January 2006, ERSTE Bank brought an action before the Fővárosi Bíróság (Budapest Municipal Court) against the Hungarian State, as first defendant, BCL Trading, as second defendant, and the company ERSTE Befektetési Zrt., as third defendant, in which it sought a declaratory judgment to the effect that it had a right over the security deposit paid into court.

16. The Fővárosi Bíróság delivered an order removing the case from the register, after having found that insolvency proceedings had already been opened in Austria against BCL Trading and that the Austrian law on insolvencies did not permit an action to be brought against an economic operator in liquidation in respect of the assets relating to the insolvency, which implied a total prohibition on bringing an action.

17. At second instance, following the appeal lodged by ERSTE Bank, the Ítélőtábla (Regional Court of Appeal) confirmed the order made at first instance, pointing out that, pursuant to Article 4(1) of the Regulation, it was Austrian law which had to be applied in the present case, which had the effect of excluding all possibility of bringing such court proceedings.

18. ERSTE Bank appealed in cassation to the Legfelsőbb Bíróság. That court took the view that it required an interpretation of Article 5(1) of the Regulation in order to be able to rule in this case. Consequently, it decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does Article 5(1) of … [the Regulation] govern civil proceedings relating to the existence of rights *in rem* (security deposits) where the country in which the bond, and subsequently the money it represented, was deposited as a security was not a Member State of the European Union at the time when insolvency proceedings were instituted in another Member State, but was a Member State of the European Union by the time the application initiating the proceedings was submitted?'

19. As a supplementary point, it should be added that ERSTE Bank, in addition to the action seeking a declaratory judgment to the effect that it had a right over the security deposit paid into court, filed an application for the opening of a second set of insolvency proceedings in respect of the assets of BCL Trading located in Hungary. The Legfelsőbb Bíróság dismissed the claim on the ground that ERSTE Bank had been unable to show that BCL Trading had an establishment in Hungary, after having accepted that the Regulation was applicable in this case.

Assessment

20. The information provided in the decision for reference allows the inference to be drawn that the Hungarian courts ruling at first and second instance dismissed an action by ERSTE Bank on the basis of Austrian law, which they applied by virtue of Article 4 of the Regulation, which lays down a general principle that the law of the Member State in which the insolvency proceedings were opened (*lex concursus*) is to be applicable to the insolvency proceedings and their effects.

21. The referring court, ruling on an appeal in cassation, envisages the possible application of Article 5(1) of the Regulation, which represents, within the meaning of recitals 24 and 25 in the preamble to the Regulation, an exception to that general principle. It is an exception in favour of rights *in rem* over goods belonging to the debtor which are located in a Member State other than that in which the insolvency proceedings have been opened.

22. In that regard, the referring court expresses doubts as to whether the fact that the debtor's asset (in the present case, the shares in ERSTE Bank held by BCL Trading and the monetary sums which replaced them) over which the third parties have a right *in rem* (namely the financial security provided in favour of ERSTE Bank) is situated within the territory of a Member State (here, the Republic of Hungary) other than that in which the insolvency proceedings were opened (here, the Republic of Austria), in the case where the State in which the asset concerned is located became a Member State of the European Union only after the insolvency proceedings had been opened against the debtor, did not preclude application of Article 5(1) of the Regulation.

23. That fact calls into question not only the applicability of that provision of the Regulation, but also the applicability *ratione temporis* of the Regulation itself to the present case. Consequently, before even dealing with the issue of the applicability of Article 5(1) of the Regulation, it is necessary to clarify the effects in time of the Regulation in the States which became Members of the European Union after its entry into force.

24. The application of the Regulation in time is governed by Article 43 thereof, which states that its provisions are to apply only to insolvency proceedings opened after its entry into force. It is a straightforward matter to identify the date on which the Regulation entered into force, since that date is expressly laid down in the Regulation itself: Article 47 fixes it as 31 May 2002.

25. In the present case, insolvency proceedings were opened against BCL Trading in Austria on 5 December 2003 and published on 4 February 2004. It is thus common ground that those proceedings were opened after 31 May 2002 and that, consequently, the Regulation is fully applicable to them.

26. Although it is not expressly apparent from the information in the decision for reference, since BCL Trading had its head office in Vienna, it seems possible to assume, on the basis of Article 3(1) of the Regulation, that the insolvency proceedings opened in Austria were main proceedings which, within the meaning of recital 12 in the preamble to the Regulation, have universal scope and aim at encompassing all the debtor's assets. In that regard, it is nevertheless appropriate to bear in mind that the expression 'all the debtor's assets' must of necessity be limited exclusively to those of the debtor's

assets that are located in all the Member States in which the Regulation is applicable. [4]

27. This means that the assets of BCL Trading located in Hungary at the time when that State was not yet a Member of the European Union were not affected by the opening of the insolvency proceedings in Austria on the basis of the Regulation.

28. However, did that situation change following the accession of the Republic of Hungary to the European Union, that is to say, after 1 May 2004? I believe that the answer to such a question must be in the affirmative, regard being had to the combined provisions of Articles 16(1) and 17(1) of the Regulation, which became applicable in Hungary pursuant to Article 2 of the Act concerning the Conditions of Accession. It is precisely those provisions of the Regulation which imply a continuous integration of the debtor's assets located in an acceding State with the assets covered by the main insolvency proceedings.

29. Article 16(1) of the Regulation requires all Member States to recognise a judgment opening insolvency proceedings from the time at which it becomes effective in the State of the opening of proceedings, on condition that it was handed down by a court of a Member State which has jurisdiction pursuant to Article 3 of the Regulation. It is clear that, so far as concerns the States which acceded to the European Union after the Regulation had entered into force, that obligation can come into being, by application of Article 2 of the Act concerning the Conditions of Accession, only as from the accession of the State in question to the European Union.

30. With regard to the condition that the decision to open proceedings be taken by a court of a Member State which has jurisdiction pursuant to Article 3 of the Regulation, it must be noted that it matters little whether, in that respect, the State in which a decision opening insolvency proceedings must be recognised was or was not already a Member of the European Union at the time when the decision opening the proceedings was taken.

31. It follows from a combined reading of Article 16(1) of the Regulation and Article 2 of the Act concerning the Conditions of Accession that a Member State which acceded to the European Union after the date of entry into force of the Regulation was required, upon its accession to the European Union, to recognise any decision opening insolvency proceedings if it had been handed down by a court having jurisdiction pursuant to Article 3 of the Regulation. Consequently, with effect from the date of accession of a State to the European Union, a decision opening insolvency proceedings adopted by a court of a Member State which has jurisdiction pursuant to Article 3 of the Regulation produces in the new Member State concerned, in accordance with Article 17(1) of the Regulation, the effects given to it by the law of the State in which those proceedings were opened.

32. On that point, it must be noted that, in accordance with recital 22 in the preamble to the Regulation, recognition of decisions opening insolvency proceedings is automatic. As the Court has already stated, it is the principle of mutual trust which has enabled the Member States to waive the right to apply their internal rules on recognition and enforcement in favour of a simplified mechanism for the recognition and enforcement of judgments handed down in the context of insolvency proceedings. [5]

33. To return to the present case, it is worth repeating that an action by ERSTE Bank seeking a declaratory judgment to the effect that it had a right over the security deposit paid into court was brought before a Hungarian court on 27 January 2006, that is to say, after the Republic of Hungary had acceded to the European Union. It follows that, at that date, it was not possible to ignore the existence of the insolvency proceedings opened against BCL Trading in Austria, by virtue of the

4 — See, to that effect, Case C-341/04 *Eurofood IFSC* [2006] ECR I-3813, paragraph 28; Case C-444/07 *MG Probud Gdynia* [2010] ECR I-417, paragraph 22; and Case C-112/10 *Zaza Retail* [2011] ECR I-11525, paragraph 17.

5 — *MG Probud Gdynia*, cited in footnote 4 above, paragraph 28 and the case-law cited.

automatic recognition of the decision opening insolvency proceedings provided for in Article 16(1) of the Regulation, which became applicable in Hungary upon the latter's accession to the European Union. Consequently, in accordance with Article 17(1) of the Regulation, the decision opening insolvency proceedings adopted by an Austrian court produced its effects under Austrian law in Hungary.

34. Given that an action brought by ERSTE Bank related to the assets of the legal person against which insolvency proceedings had already been opened in another Member State and that the decision of the Austrian court opening insolvency proceedings had to be recognised in Hungary, it was for the Hungarian courts to apply the procedural rules contained in the Regulation. That means that the court hearing the action brought by ERSTE Bank was required, first, to ascertain whether it had international jurisdiction and, second, to determine the applicable law on the basis of the Regulation.

35. The referring court has stated in its decision for reference, with regard to ascertainment of its international jurisdiction, that it required the interpretation of Article 5(1) of the Regulation in order to determine whether the Hungarian courts had jurisdiction to rule on ERSTE Bank's action.

36. Article 5(1) of the Regulation, however, does not relate to the court's jurisdiction. That provision does not deal with the conflict between courts which is liable to arise as a result of the insolvency proceedings. The rule set out in Article 5(1) constitutes a conflict-of-laws rule in the form of an exception to the general principle, laid down in Article 4(1) of the Regulation, that the law of the Member State in which the insolvency proceedings were opened is to apply.

37. It is thus manifestly clear that Article 5(1) of the Regulation is of no use for the purpose of determining whether the Hungarian courts called to rule on ERSTE Bank's action have international jurisdiction.

38. However, it must be stated in that regard that the referring court did not refer the question for a preliminary ruling with a view to determining whether the Hungarian courts had international jurisdiction. It appears, rather, that that court is proceeding on the assumption that it must determine the applicable law in order to be able to establish whether it itself has jurisdiction to examine the action brought by ERSTE Bank.

39. As I have already pointed out, the court seised of such an action must, above all, determine whether it has international jurisdiction. In order to do so, that court must take as its basis Article 3(1) of the Regulation, even though that provision refers expressly only to jurisdiction to open insolvency proceedings.

40. In this regard, it is appropriate to refer to the judgment in *Seagon*, in which the Court held that Article 3(1) of the Regulation must be interpreted as meaning that it also confers international jurisdiction on the Member State within the territory of which insolvency proceedings were opened in order to hear and determine actions which derive directly from those proceedings and which are closely connected to them.[6]

41. I am of the view that that is precisely the nature of the action brought by ERSTE Bank, since it relates to a portion of the assets of BCL Trading affected by the decision opening the insolvency proceedings. For that reason, that action follows directly from the insolvency proceedings opened against BCL Trading and is closely connected to those proceedings.

6 — Case C-339/07 *Seagon* [2009] ECR I-767, paragraph 21. The Court has repeated that interpretation even more recently in its judgment in Case C-191/10 *Rastelli Davide e C.* [2011] ECR I-13209, paragraph 20.

42. Since the action in question is of such a nature, international jurisdiction must be assessed on the basis of Article 3(1) of the Regulation, which leads us to the Austrian courts, on the assumption that the centre of BCL Trading's main interests is in Austrian territory. Of course, that does not mean that the court concerned must necessarily be the same court as that which opened the insolvency proceedings. [7]

43. In summary, if it is accepted, firstly, that the decision opening the insolvency proceedings adopted by an Austrian court had, at the date of accession of the Republic of Hungary to the European Union, to be automatically recognised in Hungary with effect from that date of accession and, secondly, that the action brought by ERSTE Bank followed directly from those insolvency proceedings and was closely connected to them, the Hungarian courts would not have had international jurisdiction to rule on that action. It follows that the Court's answer to the question referred for a preliminary ruling is of no use to the referring court for the purpose of ruling on the action, given that that court has no international jurisdiction for that purpose and that the question referred for a preliminary ruling is therefore hypothetical.

44. It is, admittedly, true that, according to established case-law, in the context of the procedure instituted in Article 267 TFEU, it is for the national court seised of the dispute, which alone has direct knowledge of the facts giving rise to the dispute and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of European Union law, the Court is in principle bound to give a ruling. [8]

45. However, the Court has also stated that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to enable it to give an answer. [9]

46. In the light of the case-law referred to above, and in view of the hypothetical nature of the question referred, I consider that the Court lacks jurisdiction to answer the question referred.

47. If, however, the Court were to consider that it does have jurisdiction to answer the question referred, my view is that it would be appropriate to answer that question in the negative, given that one of the conditions for application of Article 5(1) of the Regulation, namely the condition that an asset of the debtor be located within the territory of another Member State at the time of the opening of the insolvency proceedings, is not satisfied. That condition could not be regarded as having been satisfied if the asset in question was located at the relevant time within the territory of a State which acceded to the European Union only at a later date.

Conclusion

48. In view of the foregoing considerations, I propose that the Court should declare that it lacks jurisdiction to answer the question referred by the Legfelsőbb Bíróság for a preliminary ruling.

7 — See, to that effect, *Seagon*, cited in footnote 6, paragraph 27.

8 — Order of 15 April 2011 in Case C-613/10 *Debiasi*, paragraph 20 and the case-law cited.

9 — Case C-310/10 *Agafiței and Others* [2011] ECR I-5989, paragraph 27 and the case-law cited.