Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

11 April 2013 *

(Regulation (EC) No 44/2001 — Articles 1(1) and 6.1 — Concept of 'civil and commercial matters' — Undue payment made by a State entity — Claim for recovery of that payment in legal proceedings — Determination of the court having jurisdiction in the case where claims are connected — Close connection between the claims — Defendant domiciled in a non-member State)

In Case C-645/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Germany), by decision of 18 November 2011, received at the Court on 16 December 2011, in the proceedings

***Land* Berlin**

v

Ellen Mirjam Sapir,

Michael J. Busse,

Mirjam M. Birgansky,

Gideon Rumney,

Benjamin Ben-Zadok,

Hedda Brown,

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, E. Jarašiūnas, A. Ó Caoimh, C. Toader (Rapporteur) and C.G. Fernlund, Judges,

Advocate General: V. Trstenjak,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the German Government, by K. Petersen, acting as Agent,

* Language of the case: German.

— the Portuguese Government, by L. Inez Fernandes and S. Nunes de Almeida, acting as Agents,

— the European Commission, by M. Wilderspin and W. Bogensberger, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 November 2012,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 1(1) and 6.1 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

2 The request has been made in proceedings between, on the one hand, *Land* Berlin and, on the other, Ms Sapir, Mr Busse, Ms Birgansky, Mr Rumney, Mr Ben-Zadok, Ms Brown and five other persons, concerning the repayment of an amount overpaid in error following an administrative procedure designed to provide compensation in respect of the loss of real property during persecution under the Nazi regime.

Legal context

European Union law

Regulation No 44/2001

3 Recitals 7 to 9 and 11 in the preamble to Regulation No 44/2001 are worded as follows:

‘(7) The scope of this Regulation must cover all the main civil and commercial matters apart from certain well-defined matters.

(8) There must be a link between proceedings to which this Regulation applies and the territory of the Member States bound by this Regulation. Accordingly, common rules on jurisdiction should, in principle, apply when the defendant is domiciled in one of those Member States.

(9) A defendant not domiciled in a Member State is in general subject to national rules of jurisdiction applicable in the territory of the Member State of the court seised, and a defendant domiciled in a Member State not bound by this Regulation must remain subject to [the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1978 L 304, p. 36; “the Brussels Convention”)].

…

(11) The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant’s domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.’

4 Article 1(1) of Regulation No 44/2001 defines the material scope of the regulation as follows:

'This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.'

5 The general rules of jurisdiction concerning actions brought against persons domiciled within the European Union are laid down in Articles 2 and 3 of that regulation, which feature in Section 1 (entitled 'General provisions') of Chapter II thereof.

6 Thus, under Article 2(1) of that regulation:

'Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.'

7 Article 3(1) of that regulation provides:

'Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.'

8 So far as concerns legal proceedings brought against a person domiciled in a non-member State, Article 4(1) of Regulation No 44/2001, which also features in Section 1 of Chapter II thereof, provides:

'If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State.'

9 Article 5 and Article 6.1 of Regulation No 44/2001, which feature in Section 2 (entitled 'Special jurisdiction') of Chapter II thereof, are worded as follows:

'A person domiciled in a Member State may, in another Member State, be sued:

…'

'A person domiciled in a Member State may also be sued:

1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings'.

German law

10 The provisions of the Law on the settlement of open property issues (Gesetz zur Regelung offener Vermögensfragen) ('the Vermögensgesetz') and of the Law on priority for investments in the case of claims for return under the Vermögensgesetz (Gesetz über den Vorrang für Investitionen bei Rückübertragungsansprüchen nach dem Vermögensgesetz) ('the Investitionsvorranggesetz') are applicable to the case in the main proceedings.

11 The scope of the Vermögensgesetz is defined by Paragraph 1(1) and (6) thereof, which provides:

'The present Law shall regulate claims under property law to property assets which were … expropriated and transferred into public ownership without compensation …

…

The present Law shall be applicable *mutatis mutandis* to claims under property law made by citizens and associations who were persecuted on racial, political, religious or ideological grounds in the period from 30 January 1933 to 8 May 1945 and therefore forfeited their property as a result of compulsory sales, expropriations or otherwise …'

12 Paragraph 3(1) of the Vermögensgesetz, which deals with the return of property assets, provides:

'Property assets which were subject to measures such as those referred to in Paragraph 1 and which were transferred into public ownership or sold to third parties shall be returned upon request to the entitled persons, unless this is precluded …'

13 In order to avoid a situation in which these rights can no longer be relied on by reason of acquisition in good faith and free from the relevant property charges, Paragraph 3(3) of the Vermögensgesetz introduced a prohibition on the sale of buildings which are the subject of a claim for return pursuant to that law.

14 The Investitionsvorranggesetz provides an exception to those principles, with a view to ensuring that the necessary investments in the new *Länder* are not made impossible by reason of the prohibition on the sale to an investor of buildings in respect of which claims for return have been registered pursuant to the Vermögensgesetz.

15 Thus, Paragraph 1 of the Investitionsvorranggesetz provides:

'Properties … which are or may be the subject of claims for return under the Vermögensgesetz may be used, wholly or in part, for special investment purposes in accordance with the following provisions. In such cases, the entitled person shall receive compensation under the present Law.'

16 According to Paragraph 16(1) of the Investitionsvorranggesetz, '[i]f … the return of the property asset is not possible, any entitled person may, after establishing or proving his entitlement, … claim payment of a sum of money equivalent to all the monetary benefits accruing to the property asset to be claimed by him under the contract. That claim shall be decided … by a decision of the Office or the Regional Office for the Settlement of Open Property Issues. If proceeds are not realised … [or] if they are below the market value of the property asset at the time when the investment priority decision becomes enforceable, … the entitled person may make a judicial claim for payment of the market value within one year …'.

The dispute in the main proceedings and the questions referred for a preliminary ruling

17 Mr Julius Busse was the owner of a plot of land in what was formerly East Berlin. During the Third Reich he was persecuted under the Nazi regime and, in 1938, he was forced to sell his plot of land to a third party. That plot was later expropriated by the German Democratic Republic and incorporated into a larger plot together with other publicly owned properties. Following German reunification, the ownership of that parcel of land passed partly to the *Land* Berlin and partly to the Federal Republic of Germany.

18 On 5 September 1990, the first 10 defendants in the main proceedings, of whom Ms Sapir, Ms Birgansky, Mr Rumney and Mr Ben-Zadok are domiciled in Israel, Mr Busse in the United Kingdom and Ms Brown in Spain, who are the successors in title of the original owner, made an application for return of the part of that plot of land which had formerly belonged to the original owner on the basis of the Vermögensgesetz.

19 In 1997, the *Land* Berlin and the Federal Republic of Germany invoked the provisions of Paragraph 1 of the Investitionsvorranggesetz and sold to an investor the entire parcel of land obtained from the consolidation of the plots of land mentioned above.

20 Following the sale, the competent authority held that, under national law, the first 10 defendants in the main proceedings were not entitled to the return of the land but that they were entitled to receive the corresponding share of the proceeds of the sale of the entire parcel of land, or the market value of the property. That authority ordered the *Land* Berlin, which is the applicant in the main proceedings, to pay the first 10 defendants in the main proceedings the share of the proceeds of sale corresponding to the plot of land which had belonged to Mr Julius Busse.

21 However, when making the payment in question, the *Land* Berlin, which also acted on behalf of the Federal Republic of Germany, committed an error. It unintentionally paid the entire amount of the sale price to the lawyer representing the first 10 defendants in the main proceedings, who then distributed that amount amongst those defendants.

22 In the main proceedings, the *Land* Berlin seeks to recover from the defendants the overpayment, which it estimates to be EUR 2.5 million. It brought an action before the Landgericht Berlin against the first 10 defendants, as the successors in title of Mr Julius Busse, on the basis of unjust enrichment and against the lawyer representing them, who is the 11th defendant in the main proceedings, on the basis of a tortious act.

23 Those defendants in the main proceedings opposed that action, arguing that the Landgericht Berlin did not have international jurisdiction to decide the case with respect to the defendants in the main proceedings who were domiciled in the United Kingdom, Spain and Israel, namely Ms Sapir, Mr Busse, Ms Birgansky, Mr Rumney, Mr Ben-Zadok and Ms Brown.

24 They also contend that they may claim an amount greater than the share of the proceeds of the sale due to them because those proceeds amount to less than the market value of the property which had belonged to Mr Julius Busse. They take the view that the action is therefore unfounded.

25 By an interim decision, the Landgericht Berlin (Regional Court, Berlin) dismissed the action of the *Land* Berlin as inadmissible with respect to the defendants in the main proceedings domiciled in the United Kingdom, Spain and Israel. The *Land* Berlin was also unsuccessful in its appeal against that decision.

26 In that connection, the appeal court took the view that the German courts did not have international jurisdiction to determine the case brought against Ms Sapir, Mr Busse, Ms Birgansky, Mr Rumney, Mr Ben-Zadok and Ms Brown. According to that court, that dispute did not concern a civil matter within the meaning of Article 1(1) of Regulation No 44/2001, but was a matter of public law to which that regulation does not apply.

27 On appeal on a point of law ('Revision'), the applicant in the main proceedings seeks to obtain a ruling from the Landgericht Berlin on the substance of its claims, also with respect to those defendants in the main proceedings.

28 In those circumstances, the Bundesgerichtshof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Does a claim for the repayment of an amount unduly paid constitute a civil matter within the meaning of Article 1(1) of Regulation No 44/2001 in the circumstances where a *Land* ordered by a public authority to pay to victims by way of compensation part of the proceeds from a sale of land instead, erroneously, pays to those parties the entire purchase price?

2. Can claims be regarded as so closely connected as required pursuant to Article 6.1 of Regulation No 44/2001 where the defendants rely on additional compensation claims which must be determined on a uniform basis?

3. Does Article 6.1 of Regulation No 44/2001 also apply to defendants not domiciled in the European Union? If that question is answered in the affirmative, does this also apply where, in the defendant's State of domicile, pursuant to a bilateral convention with the State determining the claim, recognition of the judgment might be refused for lack of jurisdiction?'

Consideration of the questions referred

The first question

29 By its first question, the referring court asks essentially whether Article 1(1) of Regulation No 44/2001 must be interpreted as meaning that the concept of 'civil and commercial matters' includes an action for recovery of an amount unduly paid in the case where a public body which is required, by an authority established by legislation designed to provide compensation for acts of persecution carried out by a totalitarian regime, to pay to victims, by way of compensation, part of the proceeds of the sale of land, has paid to those persons the total sale price, as a result of an unintentional error, and subsequently brings legal proceedings seeking to recover the amount unduly paid.

30 The Bundesgerichtshof indicates, in the order for reference, that, the doubts which it entertains in that connection arise from a number of factors. First, according to that court, the proceedings concern the repayment of an amount of money that the *Land* Berlin paid in error to the defendants in the main proceedings, which is to be repaid pursuant to the provision concerning restitution based on unjust enrichment in Paragraph 812(1) of the German Civil Code, according to which anyone who has received an undue payment is required to repay that sum. Second, the payment resulted, not from a legal act by the *Land* Berlin, acting as a legal person subject to private law, but from administrative proceedings.

31 As a preliminary point, it must be recalled that, in so far as Regulation No 44/2001 now replaces the Brussels Convention in relations between the Member States, an interpretation given by the Court concerning that convention also applies to the regulation, where its provisions and those of the Brussels Convention may be treated as equivalent (see, inter alia, Case C-406/09 *Realchemie Nederland* [2011] ECR I-9773, paragraph 38 and the case-law cited).

32 In that connection, it must be stated that the scope of Regulation No 44/2001 is, like that of the Brussels Convention, limited to the concept of 'civil and commercial matters'. It follows from settled case-law of the Court that that scope is defined essentially by the elements which characterise the nature of the legal relationships between the parties to the dispute or the subject-matter thereof (see, inter alia, Case C-292/05 *Lechouritou and Others* [2007] ECR I-1519, paragraph 30 and the case-law cited).

33 The Court has thus held that, although certain actions between a public authority and a person governed by private law may come within the scope of Regulation No 44/2001, it is otherwise where the public authority is acting in the exercise of its public powers (see, inter alia, to that effect Case C-420/07 *Apostolides* [2009] ECR I-3571, paragraph 43 and the case-law cited, and Case C-154/11 *Mahamdia* [2012] ECR, paragraph 56).

34 In order to determine whether that is the case in a dispute such as that at issue in the main proceedings, it is therefore necessary to examine the basis and the detailed rules governing the bringing of the action (see, to that effect, Case C-271/00 *Baten* [2002] ECR I-10489, paragraph 31, and Case C-266/01 *Préservatrice foncière TIARD* [2003] ECR I-4867, paragraph 23).

35 In that connection, it must be held, as the referring court points out, that the right to compensation which gives rise to the action brought in the main proceedings is based on provisions of national law, in this case the Vermögensgesetz and the Investitionsvorranggesetz, concerning compensation for victims of the Nazi regime, which are identical for all owners of property subject to restitutionary rights. They impose the same obligation to pay compensation without distinguishing between the status of the owner of the property subject to such rights as a private person or as a State entity.

36 Likewise, as is clear from the order for reference, the administrative procedure which relates to the rights of victims to compensation is identical whatever the status of the owner concerned. Furthermore, in those proceedings, that owner, whether a private person or a public body, does not have any prior right to a decision as regards the determination of the victim's rights to restitution.

37 Furthermore, it must be observed that the action in the main proceedings concerns recovery of an overpayment erroneously made when the *Land* Berlin gave effect to the victims' payment rights. First, the restitution of that overpayment is not part of the administrative procedure laid down by the Vermögensgesetz and the Investitionsvorranggesetz. Second, for the purposes of the recovery of that overpayment, the owner, whether a public or a private person, must bring an action against the victims before the civil courts. Likewise, the legal basis for that recovery consists of the rules laid down in Paragraph 812(1) of the German Civil Code concerning restitution based on unjust enrichment.

38 In the light of all the foregoing, the answer to the first question is that Article 1(1) of Regulation No 44/2001 must be interpreted as meaning that the concept of 'civil and commercial matters' includes an action for recovery of an amount unduly paid in the case where a public body is required, by an authority established by a law providing compensation in respect of acts of persecution carried out by a totalitarian regime, to pay to a victim, by way of compensation, part of the proceeds of the sale of land, has, as the result of an unintentional error, paid to that person the entire sale price, and subsequently brings legal proceedings seeking to recover the amount unduly paid.

The second question

39 By its second question, the referring court asks essentially whether Article 6.1 of Regulation No 44/2001 must be interpreted as meaning that there is a close connection, within the meaning of that provision, between the claims brought against several defendants domiciled in other Member states in the case where the latter, in circumstances such as those in the main proceedings, rely on additional compensation claims which must be determined on a uniform basis.

40 The rule of jurisdiction laid down in Article 6.1 of Regulation No 44/2001 provides that a person may, where he is one of a number of defendants, be sued in the courts for the place where any one of them is domiciled, provided that the claims are so closely connected that it is expedient to hear and determine them together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings (see Case C-145/10 *Painer* [2011] ECR I-12533, paragraph 73).

41 That special rule, because it derogates from the principle stated in Article 2 of Regulation No 44/2001 that jurisdiction be based on the defendant's domicile, must be strictly interpreted and cannot be given an interpretation going beyond the cases expressly envisaged by that regulation (see *Painer*, paragraph 74 and the case-law cited).

42 In order for Article 6.1 of Regulation No 44/2001 to apply, it is necessary to ascertain whether, between various claims brought by the same plaintiff against different defendants, there is a connection of such a kind that it is expedient to determine those actions together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings (see Case C-98/06 *Freeport* [2007] ECR I-8319, paragraph 39 and the case-law cited).

43 With regard to that close connection, the Court has stated that, in order for judgments to be regarded as contradictory, it is not sufficient that there be a divergence in the outcome of the dispute, but that divergence must also arise in the context of the same situation of fact and law (see *Freeport*, paragraph 40, and *Painer*, paragraph 79).

44 In that regard, it is not apparent from the wording of Article 6.1 of Regulation No 44/2001 that the conditions laid down for application of that provision include a requirement that the actions brought against different defendants should have identical legal bases. Such an identity is only one relevant factor among others (see *Painer*, paragraphs 76 and 80).

45 In the present case, both the claims in the main proceedings, which are based on recovery of an amount unduly paid and, as regards the 11th defendant, on a tortious act, and the defence pleas of additional compensation claims raised against them by the first 10 defendants, have their origin in a single situation of law and fact, namely the right to compensation which the first 10 defendants in the main proceedings are recognised as having pursuant to the Vermögensgesetz and the Investitionsvorranggesetz and the transfer of the disputed sum erroneously made by the *Land* Berlin in favour of those defendants.

46 Furthermore, as the German Government has stressed, only the Vermögensgesetz and the Investitionsvorranggesetz can provide the defendants in the main proceedings with the legal basis to justify the excess amount they received, which also requires an assessment, for all of the defendants, in relation to the same factual and legal situation. Account must also be taken of the fact that the assessment of the legal basis of the defendants' pleas relating to additional compensation claims is a matter which precedes the claims in the main proceedings in that the soundness of those claims depends on whether or not those rights to compensation exist.

47 This identical nature exists even though the legal basis relied on in support of the claim against the eleventh defendant in the main proceedings is different from that on which the action brought against the first 10 defendants is based. As the Advocate General stated, in point 99 of her Opinion, all of the claims relied on in the various actions in the main proceedings are directed at the same interest, namely the repayment of the erroneously transferred surplus amount.

48 Having regard to the foregoing considerations, the answer to the second question is that Article 6.1 of Regulation No 44/2001 must be interpreted as meaning that there is a close connection, within the meaning of that provision, between the claims lodged against several defendants domiciled in other Member States in the case where those defendants, in circumstances such as those at issue in the main proceedings, rely on rights to additional compensation which it is necessary to determine on a uniform basis.

The third question

49 By the first part of the third question, the referring court asks essentially whether Article 6.1 of Regulation No 44/2001 must be interpreted as meaning that it is intended to apply to defendants who are not domiciled in a Member State in the case where they are sued in proceedings brought against several defendants, some of whom are also persons domiciled in the European Union.

50 As a preliminary point, it must be stated that this third question concerns Ms Sapir, Ms Birgansky, Mr Rumney and Mr Ben-Zadok, who are domiciled in Israel.

51 In order to answer that question, it is therefore necessary to determine whether the existence of the domicile of a co-defendant in another Member State is a condition for the application of Article 6.1 of Regulation No 44/2001.

52 In that connection, it must be stated, first of all, that, as far as concerns the persons to whom it applies, it is clear from the introductory part of Article 6.1 of Regulation No 44/2001 that it refers expressly to defendants domiciled in the European Union.

53 Second, it must be recalled that it is settled case-law that Article 6.1 of Regulation No 44/2001 lays down a special rule which must be strictly interpreted and cannot be given an interpretation going beyond the cases expressly envisaged by that regulation (see, to that effect, *Freeport*, paragraph 35 and the case-law cited).

54 Third, it must be observed that Article 4(1) of Regulation No 44/2001 contains an express provision which governs exhaustively the matter of persons domiciled outside the European Union, by providing for them, in accordance with recital 9 in the preamble to that regulation, that the jurisdiction of the courts of each Member State is, subject to Articles 22 and 23, to be determined by the law of that Member State. It is common ground that neither of those two provisions, which relate respectively to exclusive jurisdiction in certain matters set out in an exhaustive list and to the prorogation of jurisdiction on the basis of an agreement concluded between the parties, is applicable in the main proceedings.

55 It follows that, in order to sue a co-defendant before the courts of a Member State on the basis of Article 6.1 of Regulation No 44/2001, it is necessary that that person should be domiciled in another Member State.

56 In those circumstances, the answer to the third question is that Article 6.1 of Regulation No 44/2001 must be interpreted as meaning that it is not intended to apply to defendants who are not domiciled in another Member State, in the case where they are sued in proceedings brought against several defendants, some of whom are also persons domiciled in the European Union.

57 In view of the fact that the first part of the third question has been answered in the negative, there is no need to answer the second part of that question, since it is clear from the order for reference that it was raised solely on the assumption that the question concerning the applicability of Article 6.1 of Regulation No 44/2001 to defendants who are not domiciled in the European Union would be answered in the affirmative.

Costs

58 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **Article 1(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that the concept of 'civil and commercial matters' includes an action for recovery of an amount unduly paid in the case where a public body is required, by an authority established by a law providing compensation in respect of acts of**

persecution carried out by a totalitarian regime, to pay to a victim, by way of compensation, part of the proceeds of the sale of land, has, as the result of an unintentional error, paid to that person the entire sale price, and subsequently brings legal proceedings seeking to recover the amount unduly paid.

2. **Article 6.1 of Regulation No 44/2001 must be interpreted as meaning that there is a close connection, within the meaning of that provision, between claims lodged against several defendants domiciled in other Member States in the case where the latter, in circumstances such as those at issue in the main proceedings, rely on rights to additional compensation which it is necessary to determine on a uniform basis.**

3. **Article 6.1 of Regulation No 44/2001 must be interpreted as meaning that it is not intended to apply to defendants who are not domiciled in another Member State, in the case where they are sued in proceedings brought against several defendants, some of who are also persons domiciled in the European Union.**

[Signatures]