Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

19 April 2012 *

(Judicial cooperation in civil matters — Regulation (EC) No 1346/2000 — Article 3(1) — Concept of an action related to insolvency proceedings and closely connected with those proceedings — Regulation (EC) No 44/2001 — Article 1(1) and (2)(b) — Concepts of civil and commercial matters and of bankruptcy or winding-up — Action brought on the basis of an assignment, by a liquidator, of his right to have a transaction set aside)

In Case C-213/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Lietuvos Aukščiausiasis Teismas (Lithuania), made by decision of 27 April 2010, received at the Court on 4 May 2010, in the proceedings

F-Tex SIA

v

Lietuvos-Anglijos UAB "Jadecloud-Vilma",

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, M. Safjan, M. Ilešič, E. Levits and M. Berger (Rapporteur), Judges,

Advocate General: V. Trstenjak,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— F-Tex SIA, by M. Nosevič, advokatas,

— Lietuvos-Anglijos UAB "Jadecloud-Vilma", by R. Bukauskas, advokatas,

— the Lithuanian Government, by D. Kriaučiūnas and L. Liubertaitė, acting as Agents,

— the German Government, by T. Henze and J. Kemper, acting as Agents,

— the Greek Government, by M. Michelogiannaki, K. Georgiadis and D. Kalogiros, acting as Agents,

* Language of the case: Lithuanian.

— the European Commission, by A. Steiblytė and M. Wilderspin, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1) and Articles 1(2)(b) and 2(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 reference has been made in proceedings between F-Tex SIA ('F-Tex') and Lietuvos-Anglijos UAB "Jadecloud-Vilma" ('Jadecloud-Vilma'), concerning the return, with interest, of a sum of LTL 523 700.20 which was paid to Jadecloud-Vilma by Neo Personal Light Clothing GmbH ('NPLC') when NPLC was insolvent.

Legal context

Regulation No 1346/2000

3 In accordance with recital 6 in the preamble to Regulation No 1346/2000, that regulation is confined to 'provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings'.

4 Article 3(1) of Regulation No 1346/2000, which deals with international jurisdiction, sets out the following basic rule of jurisdiction:

'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.'

5 Article 25 of Regulation No 1346/2000, which relates to the recognition and enforceability of other judgments, provides in paragraphs 1 and 2:

'1. Judgments handed down by a court whose judgment concerning the opening of proceedings is recognised in accordance with Article 16 and which concern the course and closure of insolvency proceedings, and compositions approved by that court shall also be recognised with no further formalities. Such judgments shall be enforced in accordance with Articles 31 to 51, with the exception of Article 34(2), of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Conventions of Accession to this Convention.

The first subparagraph shall also apply to judgments deriving directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court.

…

2. The recognition and enforcement of judgments other than those referred to in paragraph 1 shall be governed by the Convention referred to in paragraph 1, provided that that Convention is applicable.'

Regulation No 44/2001

6 Regulation No 44/2001 replaces, in relations between the Member States, 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').

7 According to recital 7 in the preamble to Regulation No 44/2001, '[t]he scope of this Regulation must cover all the main civil and commercial matters apart from certain well-defined matters'.

8 Article 1 of Regulation No 44/2001 defines the scope of that regulation in these terms:

'1. 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.

2. The Regulation shall not apply to:

…

(b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;

…'

9 Article 2(1) of Regulation No 44/2001 sets out the following basic rule of jurisdiction:

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

10 Article 60(1) of Regulation No 44/2001 provides:

'For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:

(a) statutory seat, or

(b) central administration, or

(c) principal place of business.'

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

11 Between February and June 2001, NPLC, the registered office of which is in Germany, paid, when insolvent, the sum of LTL 523 700,20 to Jadecloud-Vilma, the registered office of which is in Lithuania.

12 On 24 January 2005, the Landgericht Duisburg (Regional Court, Duisburg) (Germany) opened insolvency proceedings in respect of NPLC. According to the findings of the referring court, the sole creditor was F-Tex, the registered office of which is in Latvia.

13 By contract of 28 August 2007, the liquidator appointed in the proceedings opened in respect of NPLC assigned to F-Tex all NPLC's claims against third parties, including the right to demand from Jadecloud-Vilma the return of the sums acquired by the latter in February to June 2001. That assignment was granted without any guarantee on the part of the liquidator regarding the content of

the claims or their amount, or as to whether they could, in fact and in law, be enforced. F-Tex was not legally obliged to enforce the claims thus taken over. If it decided to do so, it was agreed that it would pay the liquidator 33% of the proceeds obtained from its action.

14 By order of 19 August 2009, the Vilniaus apygardos teismas (Regional Court, Vilnius) (Lithuania) dismissed the action brought before it by F-Tex claiming that Jadecloud-Vilma should be ordered to pay to it the sum of LTL 523 700,20 which that company had received from NPLC, together with interest. The Vilniaus apygardos teismas held that that action came within the jurisdiction of the German courts since the insolvency proceedings brought in respect of NPLC had been opened in Germany.

15 On 5 November 2009, following an appeal by F-Tex, the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania) reversed the decision of the Vilniaus apygardos teismas and referred the case back to that court. The Lietuvos apeliacinis teismas held that the jurisdiction provided for in Article 3(1) of Regulation No 1346/2000 in respect of an action to set a transaction aside was not an exclusive jurisdiction and that, having regard to the circumstances of the case, that action had to be examined on the basis of the place where the defendant had its registered office.

16 By decision of 25 November 2009, the Landgericht Duisburg found that the action brought before it by F-Tex against Jadecloud-Vilma did not come within its jurisdiction, on the ground, inter alia, that the registered office of the defendant was not in Germany, and informed F-Tex that its action would probably be dismissed as inadmissible. F-Tex discontinued that action.

17 Jadecloud-Vilma appealed against the decision of the Lietuvos apeliacinis teismas of 5 November 2009 to the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania), which decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1. Having regard to the judgments of the Court of Justice in [Case 133/78] *Gourdain* [[1979] ECR 733] and in [Case C-339/07] *Seagon* [[2009] ECR I-767], do Article 3(1) of Regulation No 1346/2000 and Article 1(2)(b) of Regulation No 44/2001 have to be interpreted in such a way that:

(a) a national court hearing insolvency proceedings has exclusive jurisdiction to hear an *actio Pauliana* which derives directly from the insolvency proceedings or is closely connected with them, and exceptions to such jurisdiction can be founded only on other provisions of Regulation No 1346/2000;

(b) an *actio Pauliana* by the sole creditor of an undertaking in respect of which insolvency proceedings have been initiated in one Member State, that:

— is brought in another Member State,

— arises from a right of claim against third parties assigned to him by the liquidator on the basis of an agreement for consideration, restricting in that way the extent of the liquidator’s claims in the first Member State, and

— does not give rise to a danger for other possible creditors,

is to be classified as a civil and commercial matter under Article 1(1) of Regulation No 44/2001?

2. Does an applicant’s right to a judicial remedy, which is recognised by the Court of Justice as a general principle of European Union law and which is guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union, have to be understood and interpreted in such a way that:

(a) the national courts having jurisdiction to hear an *actio Pauliana* (depending upon its connection with the insolvency proceedings) either under Article 3(1) of Regulation No 1346/2000 or under Article 2(1) of Regulation No 44/2001 cannot both decline jurisdiction;

(b) where a court of one Member State has decided to leave an *actio Pauliana* unheard for want of jurisdiction, a court of another Member State, seeking to safeguard the applicant's right to a court, has the right to find of its own motion that it itself has jurisdiction, regardless of the fact that according to the provisions of European Union law concerning the determination of international jurisdiction it cannot so decide?'

Consideration of the questions referred

The second part of the first question

18 In the second part of the first question, which it is appropriate to examine first, the referring court asks, in essence, whether an action brought against a third party by the creditor of a debtor who is the subject of insolvency proceedings, in circumstances where that creditor is acting on the basis of an assignment of claims which has been granted by the liquidator appointed in those proceedings, is covered by Regulation No 1346/2000, inasmuch as such an action derives directly from those proceedings and is closely connected with them, or is covered by Regulation No 44/2001, inasmuch as that action falls within the concept of a civil or commercial matter.

Initial observations

19 First of all, it is necessary to define the respective scopes of Regulation No 44/2001 and Regulation No 1346/2000.

– Regulation No 44/2001

20 The first paragraph of Article 1 of the Brussels Convention, which was replaced by Regulation No 44/2001, provided that that Convention applied in civil and commercial matters whatever the nature of the court or tribunal. The second paragraph of Article 1 of that Convention excluded certain specific matters including, in point 2 thereof, 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings'.

21 Both the Report on the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, drawn up by Mr Jenard (OJ 1979 C 59, p. 1), and the Report on the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to that Convention and to the Protocol on its interpretation by the Court of Justice, drawn up by Mr Schlosser (OJ 1979 C 59, p. 71), stated that the matters referred to by that exclusion were to be covered by a separate Convention. Mr Schlosser's report stated, in paragraph 53, that the two Conventions were intended to dovetail completely with each other, avoiding any problems of interpretation.

22 In *Gourdain*, delivered in connection with the Brussels Convention, the Court defined the scope of the exclusion in question. In paragraph 4 of that judgment, it held that it is necessary, if decisions relating to bankruptcy and winding-up are to be excluded from the scope of the Brussels Convention, that they must derive directly from the bankruptcy or winding-up and be closely connected with the proceedings for realising the assets or judicial supervision.

23 In the judgment in Case C-111/08 *SCT Industri* [2009] ECR I-5655, which was delivered after the entry into force of Regulation No 44/2001, the Court held that, in so far as that regulation replaces the Brussels Convention, an interpretation given concerning that Convention also applies to the regulation where the provisions in question may be treated as equivalent, which is true of

Article 1(2)(b) of the regulation and point 2 of the second paragraph of Article 1 of the Brussels Convention, the wording of which is identical. Using again the criterion that an action is related to bankruptcy or winding-up if it derives directly from the bankruptcy or winding-up and is closely connected with proceedings for realising the assets or for judicial supervision, the Court stated that it is the closeness of the link, in the sense of the case-law deriving from *Gourdain*, between a court action and the insolvency proceedings that is decisive for the purposes of deciding whether that exclusion is applicable (see, to that effect, *SCT Industri*, paragraphs 22 to 25).

– Regulation No 1346/2000

24 Regulation No 1346/2000 reproduces, in identical terms, the provisions of the Convention on Insolvency Proceedings, opened for signature by the Member States at Brussels on 23 November 1995.

25 In *Seagon*, the Court, as the referring court observes, examined the criteria for establishing whether an action comes within the scope of Article 3(1) of Regulation No 1346/2000.

26 In paragraph 20 of that judgment, the Court pointed out that it is exactly the criterion defined in *Gourdain* that is used by recital 6 in the preamble to Regulation No 1346/2000 in order to delimit the purpose of the regulation. According to that recital, the regulation should be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings.

27 The Court deduced that, taking into account that intention of the legislature and the effectiveness of the regulation, Article 3(1) thereof must be interpreted as meaning that it also confers on the courts of the Member State which has jurisdiction to open insolvency proceedings international jurisdiction to hear and determine actions which derive directly from those proceedings and which are closely connected with them (*Seagon*, paragraph 21).

28 It must be added that that dual criterion is also used in the first subparagraph of Article 25(1) of Regulation No 1346/2000, which governs the recognition and enforcement of judgments concerning the course and closure of insolvency proceedings. The second subparagraph of Article 25(1) provides that the first subparagraph also applies to judgments deriving directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court. According to Article 25(2) of Regulation No 1346/2000, judgments other than those referred to in Article 25(1) are governed by Regulation No 44/2001, provided that that regulation is applicable.

– The relationship between Regulation No 1346/2000 and Regulation No 44/2001

29 It follows from all of the above considerations, first, that Article 1(2)(b) of Regulation No 44/2001 excludes from the scope of that regulation, which, in accordance with recital 7 in its preamble, is intended to apply to all civil and commercial matters apart from certain well-defined matters, only actions which derive directly from insolvency proceedings and are closely connected with them. It follows from the same considerations, second, that only actions which derive directly from insolvency proceedings and are closely connected with them are covered by Regulation No 1346/2000.

30 In order to answer the second part of the first question it is therefore necessary to establish whether the action in the main proceedings, in view of the findings of the referring court, must be regarded as satisfying that dual criterion.

The links between the action in the main proceedings, on the one hand, and the insolvency of the debtor and the insolvency proceedings, on the other hand

31 The action in the main proceedings seeks the return by the defendant of sums which it received from a debtor before insolvency proceedings were opened in respect of the latter. The applicant bases its action on the assignment of claims which was granted to it by the liquidator appointed in those proceedings. The subject-matter of that assignment was the right to have a transaction set aside which the German Insolvency Code confers upon the liquidator with regard to acts undertaken before the insolvency proceedings have been opened which are detrimental to the creditors participating in those proceedings.

32 It is apparent from the case-file that an action to set a transaction aside, governed under German law by Paragraph 129 et seq. of the Insolvency Code, may be brought only by the liquidator, with the sole purpose of protecting the interests of the general body of creditors. According to the German Government, the right to have a transaction set aside may, however, be assigned provided that that assignment takes place for consideration which is regarded as equivalent, for the benefit of the general body of creditors.

33 In that regard, it must be pointed out that the Court has held, in connection with an action by which the applicant, in his capacity as liquidator, requested, by way of an action to set a transaction aside by virtue of the debtor's insolvency, the repayment of a sum paid by the latter, that such an action is covered by Article 3(1) of Regulation No 1346/2000 (see, to that effect, *Seagon*, paragraph 28).

34 Furthermore, in *SCT Industri*, the Court held, in connection with the recognition of a judgment which held that a transfer granted by the liquidator appointed in insolvency proceedings was invalid on the ground that the liquidator had no power to dispose of the assets transferred, that such a matter is covered by the concept of bankruptcy or winding-up for the purposes of Article 1(2)(b) of Regulation No 44/2001 (see, to that effect, *SCT Industri*, paragraph 33).

35 However, the present main proceedings can be distinguished from the situations which gave rise to those judgments.

36 Unlike the applicant in the case which gave rise to the judgment in *Seagon*, the applicant in the main proceedings is not acting as a liquidator, that is to say as a body responsible for insolvency proceedings, but as the assignee of a right.

37 Furthermore, unlike the case which gave rise to the judgment in *SCT Industri*, the present main proceedings do not relate to the validity of the assignment granted by the liquidator and the liquidator's power to assign his right to have a transaction set aside is not disputed.

38 It must therefore be examined whether, in view of the specific characteristics of the action brought by the applicant in the main proceedings, that action has a direct link with the insolvency of the debtor and is closely connected with the insolvency proceedings.

39 In their observations submitted to the Court, Jadecloud-Vilma and the European Commission maintain that the origin and content of the action brought by the assignee are, in essence, the same as those of an action to set a transaction aside brought by the liquidator.

40 It is true that it cannot be denied that the right on which the applicant in the main proceedings bases its action is linked with the insolvency of the debtor as it has its origin in the right to have a transaction set aside conferred on the liquidator by the national law applicable to insolvency proceedings. Nevertheless, the question arises whether the right acquired, once it becomes owned by the assignee, retains a direct link with the debtor's insolvency.

41 That question may, however, remain open if it is evident that, in any event, the exercise by the assignee of the right acquired is not closely connected with the insolvency proceedings.

42 It must be stated that, as observed by F-Tex and the Lithuanian and German Governments, the exercise of the right acquired by an assignee is subject to rules other than those applicable in insolvency proceedings.

43 First, unlike the liquidator, who is, as a rule, required to act in the interest of the creditors, the assignee can freely decide whether to exercise the right of claim he has acquired. As the referring court has stated, F-Tex was not legally obliged to enforce the claims taken over.

44 Second, the assignee, when he decides to exercise his right of claim, acts in his own interest and for his personal benefit. Like the right of claim which serves as the basis for his application, the proceeds of the action which he brings become owned by him personally. The consequences of his action are therefore different from those of an action to set a transaction aside brought by a liquidator, which is intended to increase the assets of the undertaking which is the subject of insolvency proceedings (*Seagon*, paragraph 17).

45 The fact that, in the main proceedings, the benefit granted by F-Tex in consideration for the assignment by the liquidator of his right to have a transaction set aside took the form of an obligation to pay the liquidator a percentage of the proceeds obtained from the claim assigned does not alter that analysis, since it is merely a method of payment. Such a contractual stipulation is within the power of the parties as it is not disputed that the liquidator and the assignee could freely choose to express the consideration paid by the assignee in the form of a fixed sum or a percentage of any sums recovered.

46 Furthermore, under German law, which is, in the main proceedings, the law applicable to the insolvency proceedings, the closure of the insolvency proceedings has no effect on the exercise by the assignee of the right to have a transaction set aside which he has acquired. According to the German Government, that right may be exercised by the assignee after the closure of the insolvency proceedings.

47 Having regard to its characteristics, the action in the main proceedings is not therefore closely connected with the insolvency proceedings.

48 Consequently, and without the need to rule on the existence of any direct link between that action and the insolvency of the debtor, it must be held that that action is not covered by Article 3(1) of Regulation No 1346/2000 and, symmetrically, that it does not concern bankruptcy or winding-up for the purposes of Article 1(2)(b) of Regulation No 44/2001.

49 Accordingly, the answer to the second part of the first question is that Article 1(1) of Regulation No 44/2001 must be interpreted as meaning that an action brought against a third party by an applicant acting on the basis of an assignment of claims which has been granted by a liquidator appointed in insolvency proceedings and the subject-matter of which is the right to have a transaction set aside that the liquidator derives from the national law applicable to those proceedings is covered by the concept of civil and commercial matters within the meaning of that provision.

The first part of the first question

50 In the first part of the first question, the referring court asks, in essence, whether the jurisdiction conferred by Regulation No 1346/2000, as interpreted by the Court, on the courts of the Member State in which insolvency proceedings have been opened to hear and determine actions which derive directly from those proceedings and are closely connected with them constitutes exclusive jurisdiction.

51 In view of the answer given to the second part of the first question, it is unnecessary to answer the first part of that question.

The second question

52 By the second question, the referring court asks, in essence, whether the right to a judicial remedy, which is guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union, prohibits the national courts of a Member State, before which an action has been brought in respect of which they do not have jurisdiction under Article 2(1) of Regulation No 44/2001, from declining jurisdiction if the national courts of another Member State have already declared that they do not have jurisdiction under Article 3(1) of Regulation No 1346/2000.

53 That question is relevant in the context of the main proceedings only if the Lithuanian courts cannot base their jurisdiction on a provision of European Union law.

54 Since it is apparent from the answer to the first question that the main proceedings are covered by Regulation No 44/2001, the jurisdiction of the Lithuanian courts is established under Article 2(1) and 60(1) of that regulation, as courts of the Member State in which the defendant company has its domicile.

55 It follows that there is no need to answer the second question.

Costs

56 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 (First Chamber) hereby rules:

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 an action brought against a third party by an applicant acting on the basis of an assignment of claims which has been granted by a liquidator appointed in insolvency proceedings and the subject-matter of which is the right to have a transaction set aside that the liquidator derives from the national law applicable to those proceedings is covered by the concept of civil and commercial matters within the meaning of that provision.

[Signatures]