Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

14 November 2018*

(Reference for a preliminary ruling — Judicial cooperation in civil matters — Insolvency proceedings — Regulation (EC) No 1346/2000 — Article 3(1) — International jurisdiction — Action to set a transaction aside — Exclusive jurisdiction of the courts of the Member State within the territory of which insolvency proceedings have been opened)

In Case C-296/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Varhoven kasatsionen sad (Supreme Court of Cassation, Bulgaria), made by decision of 12 May 2017, received at the Court on 22 May 2017, in the proceedings

Wiemer & Trachte GmbH, in liquidation,

v

Zhan Oved Tadzher,

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Seventh Chamber, acting as President of the Fourth Chamber, K. Jürimäe (Rapporteur), C. Lycourgos, E. Juhász and C. Vajda, Judges,

Advocate General: N. Wahl,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 3 May 2018,

after considering the observations submitted on behalf of:

– Wiemer & Trachte GmbH, by A. Ganev, S. Simeonov and V. Bozhilov, advokati,

– the European Commission, by M. Wilderspin, G. Koleva and M. Heller, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 June 2018,

gives the following

* Language of the case: Bulgarian.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 3(1), Article 18(2) and Articles 21 and 24 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1).

2 The request has been made in proceedings between Wiemer & Trachte GmbH, a company in liquidation, and Mr Zhan Oved Tadzher concerning the repayment by that person of a sum of money which was transferred to him from Wiemer & Trachte's bank account without the provisional liquidator's consent.

Legal context

European Union law

Regulation No 1346/2000

3 Recitals 2 and 6 to 8 of Regulation No 1346/2000 state:

'(2) The proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively and this Regulation needs to be adopted in order to achieve this objective which comes within the scope of judicial cooperation in civil matters within the meaning of Article 65 [EC].

…

(6) In accordance with the principle of proportionality this 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. In addition, this Regulation should contain provisions regarding the recognition of those judgments and the applicable law which also satisfy that principle.

(7) Insolvency proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings are excluded from the scope of the [convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1978 L 304, p. 36)].

(8) In order to achieve the aim of improving the efficiency and effectiveness of insolvency proceedings having cross-border effects, it is necessary, and appropriate, that the provisions on jurisdiction, recognition and applicable law in this area should be contained in [an EU] law measure which is binding and directly applicable in Member States.'

4 Under Article 3(1) and (2) of that regulation:

'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.'

5 Article 16(1) of that regulation 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.

…'

6 Under Article 18 of that regulation:

'1. The liquidator appointed by a court which has jurisdiction pursuant to Article 3(1) may exercise all the powers conferred on him by the law of the State of the opening of proceedings in another Member State, as long as no other insolvency proceedings have been opened there nor any preservation measure to the contrary has been taken there further to a request for the opening of insolvency proceedings in that State. He may in particular remove the debtor's assets from the territory of the Member State in which they are situated, subject to Articles 5 and 7.

2. The liquidator appointed by a court which has jurisdiction pursuant to Article 3(2) may in any other Member State claim through the courts or out of court that moveable property was removed from the territory of the State of the opening of proceedings to the territory of that other Member State after the opening of the insolvency proceedings. He may also bring any action to set aside which is in the interests of the creditors.

…'

7 Under Article 21 of Regulation No 1346/2000:

'1. The liquidator may request that notice of the judgment opening insolvency proceedings and, where appropriate, the decision appointing him, be published in any other Member State in accordance with the publication procedures provided for in that State. Such publication shall also specify the liquidator appointed and whether the jurisdiction rule applied is that pursuant to Article 3(1) or Article 3(2).

2. However, any Member State within the territory of which the debtor has an establishment may require mandatory publication. In such cases, the liquidator or any authority empowered to that effect in the Member State where the proceedings referred to in Article 3(1) are opened shall take all necessary measures to ensure such publication.'

8 Article 24 of that regulation provides:

'1. Where an obligation has been honoured in a Member State for the benefit of a debtor who is subject to insolvency proceedings opened in another Member State, when it should have been honoured for the benefit of the liquidator in those proceedings, the person honouring the obligation shall be deemed to have discharged it if he was unaware of the opening of proceedings.

2. Where such an obligation is honoured before the publication provided for in Article 21 has been effected, the person honouring the obligation shall be presumed, in the absence of proof to the contrary, to have been unaware of the opening of insolvency proceedings; where the obligation is honoured after such publication has been effected, the person honouring the obligation shall be presumed, in the absence of proof to the contrary, to have been aware of the opening of proceedings.'

9 Under Article 25(1) of that regulation:

'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. …

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.

The first subparagraph shall also apply to judgments relating to preservation measures taken after the request for the opening of insolvency proceedings.'

Regulation (EC) No 44/2001

10 Under Article 1(1) and (2)(b) 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):

'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;

…'

Bulgarian law

11 Article 17a of the Targovski zakon (Law on Commerce) provides:

'1. Any branch of a non-resident person, registered with a right to engage in commercial activity in accordance with its national law, shall be entered in the Commercial Register.

…

3. The following information shall be entered in the register:

…

(3) the information derived from all acts of the competent insolvency court which are entered in the register in which the non-resident person has been entered, together with, where appropriate, the information derived from the decisions referred to in Article 759(1) and Article 760(3);

…

5. The information referred to in paragraph 3(2), (3) and (4) may also be entered *ex officio* on the basis of a notification from the register of another Member State of the European Union in which the non-resident person is entered, received via the system of interconnection of the registers of the Member States.'

12 Under Article 15 of the Zakon za targovskia register (Law on the Commercial Register):

'1. Entry, expungement and disclosure may be applied for by:

(1) … the merchant or non-profit legal person;

(2) … the proxy;

(3) … another person in the cases provided for by law;

(4) … a lawyer with an express mandate, established in accordance with the conditions laid down by the Law on the Legal Profession with a view to the representation of the merchant or non-profit legal person before the Agency.

…'

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

13 Wiemer & Trachte is a limited liability company whose registered office is in Dortmund (Germany). By decision of 10 May 2004, the Sofiyski gradski sad (Sofia City Court, Bulgaria) ordered that a branch of Wiemer & Trachte in Bulgaria be entered in the Bulgarian Commercial Register.

14 By order of 3 April 2007, the Amtsgericht Dortmund (Local Court, Dortmund, Germany), in the context of opening insolvency proceedings concerning Wiemer & Trachte, designated a provisional liquidator and decided that no disposals of assets by that company could take effect without the consent of that liquidator. That first order was entered in the German Commercial Register on 4 April 2007. By a second order made on 21 May 2007 and entered in that register on 24 May 2007, that court placed a general prohibition on Wiemer & Trachte disposing of its assets. By a third order made by that court on 1 June 2007, that company's assets were made the subject of insolvency proceedings. That third order was entered in the register on 5 June 2007.

15 On 18 and 20 April 2007, respectively, amounts of EUR 2 149.30 and EUR 40 000 were transferred from Wiemer & Trachte's account at Obedinena Balgarska banka AD (United Bulgarian Bank), via the managing director of the Bulgarian branch of Wiemer & Trachte, to an account in the name of Mr Tadzher by way of a 'declaration of travel expenses' and an 'advance on business expenses', respectively.

16 Wiemer & Trachte therefore brought an action against Mr Tadzher before the Sofiyski gradski sad (Sofia City Court), claiming that those banking transactions were invalid because they had taken place after the insolvency proceedings were opened. It sought repayment of the amounts referred to in paragraph 15 above, together with statutory interest, to the insolvency estate.

17 Mr Tadzher contended that the Sofiyski gradski sad (Sofia City Court) lacked jurisdiction to hear the case in the main proceedings and that the amount corresponding to the advance on business expenses had not been used and had been repaid to Wiemer & Trachte on 25 April 2007.

18 The objection of a lack of jurisdiction was rejected by the Sofiyski gradski sad (Sofia City Court) and on appeal by the Apelativen sad (Court of Appeal, Bulgaria). By order of 28 January 2013 the Varhoven kasatsionen sad (Supreme Court of Cassation, Bulgaria) considered that the appeal brought on a point of law against the order made by the Apelativen sad (Court of Appeal) was inadmissible and that that order, which recognised the jurisdiction of the Sofiyski gradski sad (Sofia City Court) to decide the case on the merits had acquired the force of *res judicata*.

19 The Sofiyski gradski sad (Sofia City Court) upheld the action brought by Wiemer & Trachte on the merits. Mr Tadzher lodged an appeal against that judgment. On 26 July 2016 the Apelativen sad (Court of Appeal) set aside that judgment and dismissed the request for repayment of the amounts referred to in paragraph 15 above as unfounded and unsubstantiated.

20 Wiemer & Trachte therefore brought an appeal on a point of law before the Varhoven kasatsionen sad (Supreme Court of Cassation) against the judgment of the Apelativen sad (Court of Appeal), claiming that Article 24 of Regulation No 1346/2000 was not applicable to the dispute in the main proceedings and that, accordingly, Mr Tadzher could not claim to have been unaware of the opening of the insolvency proceedings concerning Wiemer & Trachte.

21 In those circumstances, the Varhoven kasatsionen sad (Supreme Court of Cassation) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is Article 3(1) of [Regulation No 1346/2000] to be interpreted as meaning that the jurisdiction of the courts of the Member State within the territory of which insolvency proceedings have been opened to hear and determine an action to set a transaction aside by virtue of the debtor’s insolvency which has been brought against a defendant whose registered office or habitual residence is in another Member State is exclusive, or, in the case of Article 18(2) of that regulation, is the liquidator empowered to bring an action to set aside before a court in the Member State within the territory of which the defendant has his registered office or habitual residence, where the action to set aside brought by the liquidator is based on a disposal of moveable assets carried out in the other Member State?

(2) Is an obligation which was honoured for the benefit of the debtor in one Member State, via the managing director of an establishment of the debtor company registered in that Member State, deemed to have been discharged, in accordance with Article 24(2) in conjunction with Article 24(1) of Regulation No 1346/2000, where, at the time when that obligation was honoured, a request for the opening of insolvency proceedings in respect of the debtor’s assets had been made and a provisional liquidator had been appointed in another Member State, but no judgment opening insolvency proceedings had been delivered?

(3) Does Article 24(1) of Regulation No 1346/2000, on the honouring of an obligation, apply to the payment of a sum of money to the debtor, where the original transfer of that sum from the debtor to the person honouring the obligation is regarded as being invalid under the national law of the insolvency court and that invalidity follows from the opening of the insolvency proceedings?

(4) Does the presumption of a lack of awareness provided for in Article 24(2) of Regulation No 1346/2000 apply where the authorities referred to in the second sentence of Article 21(2) have not taken all necessary measures to ensure that the decisions by which the insolvency court appointed a provisional liquidator and ordered that disposals of assets effected by the company are to be valid only with the consent of the provisional liquidator are published in the register of the Member State within the territory of which the debtor has an establishment, where the

Member State in which the establishment has its registered office provides for the mandatory publication of those decisions, even though it recognises them in accordance with Article 25 in conjunction with Article 16 of that regulation?'

Consideration of the questions referred

Question 1

22 By its first question, the referring court asks, in essence, whether Article 3(1) of Regulation No 1346/2000 is to be interpreted as meaning that the jurisdiction of the courts of the Member State within the territory of which insolvency proceedings have been opened to hear and determine an action to set a transaction aside by virtue of the debtor's insolvency which has been brought against a defendant whose registered office or habitual residence is in another Member State is exclusive, or whether the liquidator may also bring such an action to set aside before a court of the Member State in which the defendant has his registered office or habitual residence.

23 Article 3(1) of Regulation No 1346/2000 confers exclusive jurisdiction to open the main insolvency proceedings on the courts of the Member State within the territory of which the centre of the debtor's interests is situated (judgment of 15 December 2011, *Rastelli Davide e C.*, C-191/10, EU:C:2011:838, paragraph 27).

24 For the purpose of determining whether or not an action falls within the scope of that provision, the Court stated that it was necessary to take into account recital 6 of Regulation No 1346/2000, according to which that 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 (see, to that effect, judgments of 12 February 2009, *Seagon*, C-339/07, EU:C:2009:83, paragraph 20, and of 19 April 2012, *F-Tex*, C-213/10, EU:C:2012:215, paragraph 26).

25 The Court deduced that, taking into account the objective of the legislature as set out in that recital and the effectiveness of Regulation No 1346/2000, 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 (see, to that effect, judgments of 12 February 2009, *Seagon*, C-339/07, EU:C:2009:83, paragraph 21, and of 19 April 2012, *F-Tex*, C-213/10, EU:C:2012:215, paragraph 27).

26 Having regard to, inter alia, those considerations, the Court has previously held that actions to set a transaction aside, the aim of which is to add to the assets of the undertaking subject to insolvency proceedings, fall within that category. Article 3(1) of Regulation No 1346/2000 must therefore be interpreted as meaning that the courts of the Member State within the territory of which insolvency proceedings have been opened have jurisdiction to decide an action to set a transaction aside by virtue of insolvency that is brought against a person whose registered office is in another Member State (judgment of 12 February 2009, *Seagon*, C-339/07, EU:C:2009:83, paragraph 28).

27 The referring court questions whether that international jurisdiction is exclusive or whether, instead, it is optional, enabling the liquidator to bring such an action to set aside before a court of the Member State in which the defendant has his registered office or habitual residence.

28 In that regard, it should be noted, first, that recital 7 of Regulation No 1346/2000 states that insolvency proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings are excluded from the scope of the

convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters which has been replaced, in relations between Member States (with the exception of the Kingdom of Denmark), by Regulation No 44/2001. Second, under Article 1(2)(b) of Regulation No 44/2001, that regulation is not to apply to 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings'.

29 That regulation and Regulation No 1346/2000 must be interpreted in such a way as to avoid any overlap between the rules of law laid down by those texts or any legal vacuum. Accordingly, actions excluded, under Article 1(2)(b) of Regulation No 44/2001, from the scope of that regulation fall within the scope of Regulation No 1346/2000. Correspondingly, actions which fall outside the scope of Article 3(1) of Regulation No 1346/2000 fall within the scope of Regulation No 44/2001 (see, to that effect, judgment of 9 November 2017, *Tünkers France and Tünkers Maschinenbau*, C-641/16, EU:C:2017:847, paragraph 17 and the case-law cited).

30 In that regard, the Court has stated that Regulation No 44/2001 is intended to apply to all civil and commercial matters apart from certain well-defined matters, and that Article 1(2)(b) of that regulation excludes from its scope only actions which derive directly from the insolvency proceedings and are closely connected with them, which are covered by Regulation No 1346/2000 (see, to that effect, judgment of 19 April 2012, *F-Tex*, C-213/10, EU:C:2012:215, paragraph 29).

31 It follows that the scope of each of those two regulations relating to the international jurisdiction of the courts of the Member States is clearly defined and that an action to set a transaction aside, where it derives directly from the insolvency proceedings and is closely connected with them, falls within the scope of Regulation No 1346/2000 and not that of Regulation No 44/2001.

32 It should be noted that Regulation No 1346/2000 does not lay down any rules regarding the allocation of international jurisdiction which would entail allocating jurisdiction to hear actions to set a transaction aside which derive directly from the insolvency proceedings and are closely connected with them to the courts of the Member State in which the defendant has his registered office or habitual residence.

33 Moreover, the Court has previously held that concentrating all the actions directly related to insolvency before the courts of the Member State with jurisdiction to open insolvency proceedings is consistent with the objective of improving the effectiveness and efficiency of insolvency proceedings having cross-border effects, referred to in recitals 2 and 8 of Regulation No 1346/2000 (judgment of 12 February 2009, *Seagon*, C-339/07, EU:C:2009:83, paragraph 22).

34 In addition, it should be noted that, according to recital 4 of that regulation, it is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping) (judgment of 12 February 2009, *Seagon*, C-339/07, EU:C:2009:83, paragraph 23).

35 The possibility for more than one court to exercise jurisdiction as regards actions to set a transaction aside by virtue of insolvency brought in various Member States would undermine the pursuit of such an objective (judgment of 12 February 2009, *Seagon*, C-339/07, EU:C:2009:83, paragraph 24).

36 It follows from the foregoing that the courts of the Member State within the territory of which insolvency proceedings have been opened, as referred to in Article 3(1) of Regulation No 1346/2000, enjoy exclusive jurisdiction to hear actions which derive directly from those proceedings and are closely connected with them, and thus to hear actions to set a transaction aside based on insolvency.

37 That conclusion cannot be called in question by the context of Article 3(1) of Regulation No 1346/2000.

38 In the first place, Article 18(2) of that regulation cannot be used to call in question the exclusive nature of the international jurisdiction of the courts referred to in Article 3(1) thereof to hear actions to set a transaction aside.

39 Indeed, Article 18(2) of Regulation No 1346/2000 concerns only the specific situation where the liquidator was appointed in the context of proceedings covered by Article 3(2) of that regulation and cannot apply in a situation, such as that at issue in the main proceedings, where the liquidator was appointed in the context of the main insolvency proceedings.

40 As is emphasised by the Advocate General in point 64 of his Opinion, that distinction can be explained by the fact that the powers of the liquidator are, in the context of proceedings covered by Article 3(2) of Regulation No 1346/2000, territorially limited in so far as, by virtue of that provision, the effects of those proceedings are confined to the assets of the debtor situated in the territory of the Member State on the date those proceedings are opened. In such a situation, the liquidator must therefore be able to bring an action to set a transaction aside in connection with those proceedings before a court of a Member State other than the one which opened the secondary proceedings if the assets that are the subject of those proceedings were transferred, after those proceedings were opened, to another Member State.

41 In the second place, it is also not possible to use Article 25(1) of Regulation No 1346/2000 to support an interpretation of Article 3(1) thereof which favours optional international jurisdiction in respect of actions to set a transaction aside.

42 As the Advocate General notes in point 65 of his Opinion, that provision covers only the recognition and enforceability of judgments deriving directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court. That provision merely allows for the possibility that the courts of a Member State within the territory of which insolvency proceedings have been opened pursuant to Article 3(1) of Regulation No 1346/2000 may also hear and determine an action deriving directly from those proceedings, whether that be the court which opened the insolvency proceedings under that provision, or another court of that same Member State having territorial and substantive jurisdiction (see, to that effect, judgment of 12 February 2009, *Seagon*, C-339/07, EU:C:2009:83, paragraphs 26 and 27).

43 Having regard to all of the foregoing, the answer to the first question is that Article 3(1) of Regulation No 1346/2000 must be interpreted as meaning that the jurisdiction of the courts of the Member State within the territory of which insolvency proceedings have been opened to hear and determine an action to set a transaction aside by virtue of the debtor's insolvency which has been brought against a defendant whose registered office or habitual residence is in another Member State is exclusive.

Questions 2 to 4

44 Given that the second, third and fourth questions assume, contrary to the implications of the answer given to the first question, that an action to set a transaction aside may be brought before a court of the Member State in which the defendant has his registered office or habitual residence, there is no need to answer those questions.

Costs

45 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 (Fourth Chamber) hereby rules:

Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted as meaning that the jurisdiction of the courts of the Member State within the territory of which insolvency proceedings have been opened to hear and determine an action to set a transaction aside by virtue of the debtor's insolvency which has been brought against a defendant whose registered office or habitual residence is in another Member State is exclusive.

[Signatures]