Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

5 July 2012*

(Judicial cooperation in civil matters — Insolvency proceedings –Regulation (EC) No 1346/2000 — Article 5(1) — Temporal application — Action in rem brought in a State not a member of the European Union — Insolvency proceedings opened against the debtor in another Member State — First State became a member of the European Union — Applicability)

In Case C-527/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Legfelsőbb Bíróság (Hungary), made by decision of 26 October 2010, received at the Court on 15 November 2010, in the proceedings

ERSTE Bank Hungary Nyrt

v

Magyar Állam,

BCL Trading GmbH,

ERSTE Befektetési Zrt,

THE COURT (First Chamber),

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

Advocate General: J. Mazák,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 27 October 2011,

after considering the observations submitted on behalf of:

— ERSTE Bank Hungary Nyrt, by T. Éless and L. Molnár, ügyvédek,

— Mr Bárándy és Társai Ügyvédi Iroda, by D. Bojkó, ügyvéd,

— Komerční Banka, as, by P. Lakatos, I. Sólyom, A. Ungár, P. Köves and B. Fazakas, ügyvédek,

— the Hungarian Government, by M.Z. Fehér, K. Szíjjártó and K. Veres, acting as Agents,

* Language of the case: Hungarian.

— the Spanish Government, by S. Centeno Huerta, acting as Agent,

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

after hearing the Opinion of the Advocate General at the sitting on 26 January 2012,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 5(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1) ('the Regulation').

2 The reference has been made in insolvency proceedings against the Austrian company BCL Trading GmbH ('BCL Trading').

Legal context

European Union law

3 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 (OJ 2003 L 236, p. 33), ('the Act 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.'

4 Recitals 6, 11 and 23 to 25 in the preamble to the Regulation provide:

'(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.

…

(11) This Regulation acknowledges the fact that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope in the entire Community. The application without exception of the law of the State of opening of proceedings would, against this background, frequently lead to difficulties. This applies, for example, to the widely differing laws on security interests to be found in the Community. … This Regulation should take account of this in two different ways. On the one hand, provision should be made for special rules on applicable law in the case of particularly significant rights and legal relationships (e.g. rights in rem and contracts of employment). On the other hand, national proceedings covering only assets situated in the State of opening should also be allowed alongside main insolvency proceedings with universal scope.

…

(23) This Regulation should set out, for the matters covered by it, uniform rules on conflict of laws which replace, within their scope of application, national rules of private international law. Unless otherwise stated, the law of the Member State of the opening of the proceedings should be applicable (*lex concursus*). This rule on conflict of laws should be valid both for the main proceedings and for local proceedings; the *lex concursus* determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned. It governs all the conditions for the opening, conduct and closure of the insolvency proceedings.

(24) Automatic recognition of insolvency proceedings to which the law of the opening State normally applies may interfere with the rules under which transactions are carried out in other Member States. To protect legitimate expectations and the certainty of transactions in Member States other than that in which proceedings are opened, provisions should be made for a number of exceptions to the general rule.

(25) There is a particular need for a special reference diverging from the law of the opening State in the case of rights in rem, since these are of considerable importance for the granting of credit. The basis, validity and extent of such a right in rem should therefore normally be determined according to the lex situs and not be affected by the opening of insolvency proceedings. The proprietor of the right in rem should therefore be able to continue to assert his right to segregation or separate settlement of the collateral security. Where assets are subject to rights in rem under the lex situs in one Member State but the main proceedings are being carried out in another Member State, the liquidator in the main proceedings should be able to request the opening of secondary proceedings in the jurisdiction where the rights in rem arise if the debtor has an establishment there. If a secondary proceeding is not opened, the surplus on sale of the asset covered by rights in rem must be paid to the liquidator in the main proceedings.'

5 Article 3 of the Regulation, which deals with international jurisdiction, states:

'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.

3. Where insolvency proceedings have been opened under paragraph 1, any proceedings opened subsequently under paragraph 2 shall be secondary proceedings. These latter proceedings must be winding-up proceedings.

…'

6 Article 4 of the Regulation, relating to the law applicable, provides:

'1. 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".

2. The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. It shall determine in particular:

…

(b) the assets which form part of the estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings;

…

(f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending;

(g) the claims which are to be lodged against the debtor's estate and the treatment of claims arising after the opening of insolvency proceedings;

(h) the rules governing the lodging, verification and admission of claims;

(i) the rules governing the distribution of proceeds from the realisation of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right in rem or through a set-off;

…'

7 As regards the rights in rem of third parties, 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.

8 Concerning the recognition of insolvency proceedings, Article 16 of the Regulation states:

'1. 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.

This rule shall also apply where, on account of his capacity, insolvency proceedings cannot be brought against the debtor in other Member States.

2. Recognition of the proceedings referred to in Article 3(1) shall not preclude the opening of the proceedings referred to in Article 3(2) by a court in another Member State. The latter proceedings shall be secondary insolvency proceedings within the meaning of Chapter III.'

9 Article 17(1) of the Regulation, which deals with the effects of the recognition of insolvency proceedings, is worded as follows:

'The judgment opening the proceedings referred to in Article 3(1) shall, with no further formalities, produce the same effects in any other Member State as under this law of the State of the opening of proceedings, unless this Regulation provides otherwise and as long as no proceedings referred to in Article 3(2) are opened in that other Member State.'

10 Article 43 of the Regulation, which governs the applicability in time of that act, provides:

'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.'

11 Article 47 of the basic regulation provides:

'This Regulation shall enter into force on 31 May 2002.'

Hungarian law

12 The rules relating to securities, in force at the material time, are set out in Paragraphs 270 and 271 of Law No IV of 1959 on the Civil Code (Polgári törvénykönyvről szóló 1959. évi IV. törvény).

13 Paragraph 270 of that law provides:

'1. If a security deposit is provided to secure a claim, the obligee shall be entitled to satisfy his claim directly from the security deposit in the case of deficient performance or non-performance of the contract.

2. Cash, savings accounts, or securities can be used as security deposits. If the object of the security deposit is some other thing, the regulations on liens shall apply.

3. Security deposits used to secure claims that cannot be enforced in court shall be null and void. This provision shall not be applied to security deposits that are used to secure expired claims.

4. The expiration of a claim shall not impede satisfaction from the security deposit provided for that purpose.'

14 Paragraph 271 provides:

'1. Security deposits can only be used for satisfaction; agreements to the contrary shall be null and void.

2. Security deposits shall be returned if the contract providing the basis therefor terminates or the period of guarantee or warranty lapses without providing any legal grounds for satisfaction from the security deposit.'

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

15 The present case arises from the dispute between ERSTE Bank Hungary Nyrt ('ERSTE Bank') and Magyar Állam (Hungarian State), BCL Trading and ERSTE Befektetési Zrt.

16 On 8 May 1998, Postabank és Takarékpénztár Rt (Postabank') issued a letter of credit in favour of BCL Trading.

17 BCL Trading subsequently assigned that letter of credit to several banks. Since Postabank refused to pay the amount corresponding to that credit to the banks, the latter brought a claim for payment of the credit assigned.

18 On 9 July 2003, BCL Trading gave shares in Postabank as a guarantee which it held in the event that the letter of credit was drawn upon and the latter would therefore be required to pay the corresponding amounts. The shares constituted a security deposit.

19 Insolvency proceedings against BCL Trading, whose registered office in Vienna (Austria), were opened on 5 December 2003 and published on 4 February 2004.

20 As regards the shares in Postabank held by BCL Trading which constituted a security deposit, on 6 December 2005, the Legfelsőbb Bíróság ordered the Magyar Állam to purchase them on the ground that the latter exercised a determining influence over Postabank, which, under Hungarian law, created an obligation to acquire the Postabank shares offered for sale by small shareholders. Pursuant to that judgment, the Magyar Állam purchased those shares at an amount fixed by the Legfelsőbb Bíróság and paid into court the amount representing the value of those shares which were previously dematerialised.

21 On 27 January 2006, ERSTE Bank, whose registered office is in Budapest (Hungary), who became the legal successor of Postabank, brought an action before the Fővárosi Bíróság (Budapest Municipal Court) against the defendants in the main proceedings seeking a declaratory judgment to the effect that it had a right over the security deposit paid into court.

22 Pending the outcome of those proceedings, on 8 January 2007, ERSTE Bank also requested the opening in Hungary of secondary insolvency proceedings against BCL Trading, arguing that it possessed an establishment there and that insolvency proceedings had already been opened against it in Austria. While acknowledging the applicability of the Regulation, the Legfelsőbb Bíróság dismissed that application on the ground that the applicant had not established that the debtor possessed an establishment in Hungary as required by Article 3(2) of the Regulation.

23 On 7 January 2009, the Fővárosi Bíróság ruled that since insolvency proceedings against BCL Trading had already been opened in Austria, Austrian insolvency law was the law applicable to the insolvency proceedings and its effects. As Austrian law excludes the possibility of bringing an action against an economic operator in liquidation in respect of the assets relating to the insolvency, no action could be brought against BCL Trading, since the latter was in liquidation. In those circumstances, the Fővárosi Bíróság delivered an order removing the case from the register.

24 Following an appeal by ERSTE Bank against that decision, on 4 February 2010 the Fővárosi Ítélőtábla (Court of Appeal, Budapest), basing its decision on Article 4(1) of the Regulation, confirmed the order given at first instance by the Fővárosi Bíróság. It also pointed out that it is Austrian law that determines whether ERSTE Bank may obtain a declaratory judgment that it has a right over the security deposit paid into court.

25 ERSTE Bank then appealed in cassation to the Legfelsőbb Bíróság seeking, principally, the annulment of the order removing the case from the register and an order to remit the case back to the court of first instance so that that court could reconsider the application for the opening of secondary insolvency proceedings against BCL Trading. Furthermore, it argued that the Regulation was not applicable in this case because the judgment opening insolvency proceedings against BCL Trading in Austria had been handed down before the Republic of Hungary's accession to the European Union, which therefore made it impossible, pursuant to the Regulation, to regard that company as being in liquidation in Hungary.

26 Taking the view that the decision in this case depends on the interpretation of the provisions of the Regulation, the Legfelsőbb Bíróság decided to stay proceedings and 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 (in this case security deposits (óvadék)) 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 opened in another Member State, but was a Member State of the European Union by the time the application initiating the proceedings was submitted?'

Consideration of the question referred for a preliminary ruling

27 By its question, the Legfelsőbb Bíróság asks the Court essentially whether Article 5(1) of the Regulation is applicable in the context of civil proceedings concerning the existence of a right in rem, in this case a security, in circumstances in which the property to which that right refers, such as a sum of money paid into court, is situated in a State which was not yet a Member State of the European Union when the insolvency proceedings were opened in a Member State, but which had become one when the action which gave rise to the judicial proceedings was brought.

28 Before answering that question it is necessary to dispel the doubts expressed by certain parties to the present proceedings regarding the possibility that the Regulation itself applies *ratione temporis* in circumstances such as those at issue in the main proceedings.

29 In that regard, it must be recalled, as a preliminary point, that under Article 1(1), the Regulation applies to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.

30 In accordance with Article 43 of the Regulation, which governs its applicability in time, the Regulation applies only to insolvency proceedings opened after its entry into force which, as stated in Article 47 thereof, is fixed for 31 May 2002.

31 It is apparent from the order for reference that the insolvency proceedings against BCL Trading were opened in Austria on 5 December 2003.

32 In those circumstances, there is no doubt that those proceedings were opened in a Member State after 31 May 2002 and that, therefore, they fall within the scope of the Regulation.

33 It should also be observed that it follows from Articles 16(1) and 17(1) of the Regulation that the judgment opening insolvency proceedings in a Member State is to be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings and that it is, with no further formalities, to produce the same effects in any other Member State as under the law of the State of the opening of proceedings (Case C-444/07 *MG Probud Gdynia* [2010] ECR I-417, paragraph 26).

34 As is shown by recital 22 in the preamble to the Regulation, the rule of priority laid down in Article 16(1) thereof is based on the principle of mutual trust. It is indeed that mutual trust which has enabled not only the establishment of a compulsory system of jurisdiction which all the courts within the purview of the Regulation are required to respect, but also as a corollary the waiver by the Member States of 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 (Case C-341/04 *Eurofood IFSC* [2006] ECR I-3813, paragraphs 39 and 40, and *MG Probud Gdynia*, paragraphs 27 and 28).

35 As regards the case in the main proceedings, it must be stated that, under Article 2 of the Act of Accession, the provisions of the Regulation are applicable in Hungary from the date of accession of that State to the European Union that is from 1 May 2004.

36 Thus, from that date, the Hungarian courts are required, in accordance with Article 16(1) of the Regulation, to recognise any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 thereof. Furthermore, pursuant to Article 17(1), any judgment opening insolvency proceedings handed down by a Member State produces in principle in Hungary, from 1 May 2004 and without any other formality, the effects attributed to it by the law of the State of the opening of proceedings.

37 Taking account of the foregoing, it must be held that the Regulation is applicable in circumstances such as those in the main proceedings given that the insolvency proceedings at issue, as is clear from paragraphs 31 and 32 of this judgment, fall within its scope and that, from 1 May 2004, the Hungarian courts were therefore required to recognise the judgment opening those proceedings handed down by the Austrian courts.

38 Article 4(1) of the Regulation then lays down the rule that the determination of the court with jurisdiction entails determination of the law which is to apply. According to that provision, as regards both the main insolvency proceedings and secondary insolvency proceedings, the law of the Member State within the territory of which proceedings are opened (*lex concursus*) is applicable to the insolvency proceedings and their effects (see, to that effect, *Eurofood IFSC*, paragraph 33; *MG Probud Gdynia*, paragraph 25; and Case C-191/10 *Rastrelli Davide e C.* [2011] ECR I-13209, paragraph 16). As stated in Recital 23 in the preamble to the Regulation, that law governs all the conditions for the opening, conduct and closure of the insolvency proceedings.

39 However, in order to protect legitimate expectations and the legal certainty of transactions in Member States other than the State of the opening of the insolvency proceedings, the Regulation lays down, in Articles 5 to 15, a certain number of exceptions to that rule of the applicable law for certain rights and legal situations which are considered, according to recital 11 thereto, as particularly important.

40 Thus, as regards rights in rem, Article 5(1) of the Regulation states that the opening of insolvency proceedings does not affect the rights in rem of creditors or third parties in respect of assets belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.

41 The scope of that provision is clarified by recitals 11 and 25 in the preamble to the Regulation, according to which there is a need for a special reference 'diverging from the law of the opening State' in the case of rights in rem, since these are of considerable importance for the granting of credit. Thus, according to recital 25, the basis, validity and extent of such a right in rem should therefore normally be determined according to the *lex situs* and not be affected by the opening of insolvency proceedings.

42 Therefore, Article 5(1) of the Regulation must be understood as a provision which, derogating from the rule of the law of the State of the opening of the proceedings, allows the law of the Member State on whose territory the asset concerned is situated to be applied to the right in rem of a creditor or a third party over certain assets belonging to the debtor.

43 As regards the case in the main proceedings, it is true that, at the time the insolvency proceedings were opened in Austria, on 5 December 2003, the debtor's assets on which the right in rem concerned was based were in Hungary, that is in a State which, at the time, was not yet a Member State of the Union.

44 However, the fact remains, as set out in paragraphs 35 and 37 of this judgment, that the provisions of the Regulation are applicable in Hungary from the date of accession of that State to the European Union, that is 1 May 2004, and therefore, from that date, the Hungarian courts were required to recognise the decision to open insolvency proceedings handed down by the Austrian courts.

45 In those circumstances, in order to maintain the cohesion of the system established by the Regulation and the effectiveness of insolvency proceedings, Article 5(1) thereof must be interpreted as meaning that that provision is applicable even to insolvency proceedings opened before the accession of the Republic of Hungary to the European Union in a case, such as that in the main proceedings, when, on 1 May 2004, the debtor's assets on which the right in rem concerned was based were situated in that State, which is for the referring court to ascertain.

46 Taking account of those findings, the answer to the question referred is that Article 5(1) of the Regulation must be interpreted as meaning that that provision is applicable, in circumstances such as those in the main proceedings, even to insolvency proceedings opened before the accession of the Republic of Hungary to the European Union where on 1 May 2004 the debtor's assets on which the right in rem concerned was based were situated in that State, which is for the referring court to ascertain.

Costs

47 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 5(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted as meaning that that provision is applicable, in circumstances such as those in the main proceedings, even to insolvency proceedings opened before the accession of the Republic of Hungary to the European Union where, on 1 May 2004, the debtor's assets on which the right in rem concerned was based were situated in that State, which is for the referring court to ascertain.

[Signatures]