Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

18 April 2024*

(Reference for a preliminary ruling – Judicial cooperation in civil matters – Regulation (EU) 2015/848 – Insolvency proceedings – Main insolvency proceedings in Germany and secondary insolvency proceedings in Spain – Challenge to the inventory of assets and the list of creditors submitted by the insolvency practitioner in the secondary insolvency proceedings – Classification of employees' claims – Date to be taken into account – Transfer of assets situated in Spain to Germany – Composition of the estate in secondary insolvency proceedings – Time parameters to be taken into consideration)

In Joined Cases C-765/22 and C-772/22,

TWO REQUESTS for a preliminary ruling under Article 267 TFEU from the Juzgado de lo Mercantil No 1 de Palma de Mallorca (Commercial Court No 1, Palma de Mallorca, Spain), made by decisions of 24 November 2022 (C-765/22) and 25 November 2022 (C-772/22), received at the Court on 16 December 2022 and 19 December 2022, respectively, in the proceedings

Luis Carlos,

Severino,

Isidora,

Angélica,

Paula,

Luis Francisco,

Delfina

v

Air Berlin Luftverkehrs KG, Sucursal en España (C-765/22),

and

Victoriano,

Bernabé,

* Language of the case: Spanish.

Jacinta,

Sandra,

Patricia,

Juan Antonio,

Verónica

v

Air Berlin Luftverkehrs KG, Sucursal en España,

Air Berlin PLC & Co. Luftverkehrs KG (C-772/22),

THE COURT (Third Chamber),

composed of K. Jürimäe (Rapporteur), President of the Chamber, K. Lenaerts, President of the Court, acting as Judge of the Third Chamber, N. Piçarra, N. Jääskinen and M. Gavalec, Judges,

Advocate General: J. Richard de la Tour,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Luis Carlos, Severino, Isidora, Angélica, Paula, Luis Francisco, Delfina, Victoriano, Bernabé, Jacinta, Sandra, Patricia, Juan Antonio and Verónica by A. Martínez Domingo, abogado, and M.I. Muñoz García, procuradora,

– Air Berlin Luftverkehrs KG, Sucursal en España, by L.A. Martín Bernardo, administrador concursal,

– the Spanish Government, by A. Ballesteros Panizo, acting as Agent,

– the European Commission, by S. Pardo Quintillán and W. Wils, acting as Agents,

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

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation, first, of Article 7(1) and (2)(g) and (h) and Article 35 of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (OJ 2015 L 141, p. 19), read in conjunction with recital 72 of that regulation, and, second, of Article 3(2), Article 21(1) and (2) and Article 34 of that regulation.

2 The requests have been made in two sets of proceedings between, first, Luis Carlos, Severino, Isidora, Angélica, Paula, Luis Francisco and Delfina, on the one hand, and Air Berlin Luftverkehrs KG, Sucursal en España ('Air Berlin Spain'), on the other, concerning a challenge to the inventory of assets and the list of creditors established by the insolvency practitioner in secondary insolvency proceedings opened in Spain in respect of Air Berlin Spain (Case C-765/22) and, second, Victoriano, Bernabé, Jacinta, Sandra, Patricia, Juan Antonio and Verónica, on the one hand, and Air Berlin Spain and Air Berlin PLC & Co. Luftverkehrs KG ('Air Berlin'), on the other, concerning a challenge to an act by which assets were removed from the territory of Spain (Case C-772/22).

Legal context

European Union law

3 Recitals 3, 22, 23, 40, 46, 48, 66 to 68 and 72 of Regulation 2015/848 are worded as follows:

'(3) The proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively. This Regulation needs to be adopted in order to achieve that objective, which falls within the scope of judicial cooperation in civil matters within the meaning of Article 81 of the Treaty.

…

(22) 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 throughout the [European] Union. The application without exception of the law of the State of the opening of proceedings would, against this background, frequently lead to difficulties. This applies, for example, to the widely differing national laws on security interests to be found in the Member States. Furthermore, the preferential rights enjoyed by some creditors in insolvency proceedings are, in some cases, completely different. At the next review of this Regulation, it will be necessary to identify further measures in order to improve the preferential rights of employees at European level. This Regulation should take account of such differing national laws in two different ways. On the one hand, provision should be made for special rules on the 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 the opening of proceedings should also be allowed alongside main insolvency proceedings with universal scope.

(23) This Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of its main interests. Those proceedings have universal scope and are aimed at encompassing all the debtor's assets. To protect the diversity of interests, this Regulation permits secondary insolvency proceedings to be opened to run in parallel with the main insolvency proceedings. Secondary insolvency proceedings may be opened in the Member State where the debtor has an establishment. The effects of secondary insolvency proceedings are limited to the assets located in that State. Mandatory rules of coordination with the main insolvency proceedings satisfy the need for unity in the Union.

…

(40) Secondary insolvency proceedings can serve different purposes, besides the protection of local interests. Cases may arise in which the insolvency estate of the debtor is too complex to administer as a unit, or the differences in the legal systems concerned are so great that difficulties may arise from the extension of effects deriving from the law of the State of the opening of proceedings to the other Member States where the assets are located. For that reason, the insolvency practitioner in the main insolvency proceedings may request the opening of secondary insolvency proceedings where the efficient administration of the insolvency estate so requires.

…

(46) In order to ensure effective protection of local interests, the insolvency practitioner in the main insolvency proceedings should not be able to realise or re-locate, in an abusive manner, assets situated in the Member State where an establishment is located, in particular, with the purpose of frustrating the possibility that such interests can be effectively satisfied if secondary insolvency proceedings are opened subsequently.

…

(48) … In order to ensure the dominant role of the main insolvency proceedings, the insolvency practitioner in such proceedings should be given several possibilities for intervening in secondary insolvency proceedings which are pending at the same time. …

…

(66) 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 insolvency 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.

(67) Automatic recognition of insolvency proceedings to which the law of the State of the opening of proceedings 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, provision should be made for a number of exceptions to the general rule.

(68) 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 such rights are of considerable importance for the granting of credit. The basis, validity and extent of rights *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 a right *in rem* should therefore be able to continue to assert its 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 insolvency proceedings are being carried out in another Member State, the insolvency practitioner in the main insolvency proceedings should be able to request the opening of secondary insolvency proceedings in the jurisdiction where the rights *in rem* arise if the debtor has an establishment there. If secondary insolvency proceedings are not opened, any surplus on the sale of an asset covered by rights *in rem* should be paid to the insolvency practitioner in the main insolvency proceedings.

…

(72) In order to protect employees and jobs, the effects of insolvency proceedings on the continuation or termination of employment and on the rights and obligations of all parties to such employment should be determined by the law applicable to the relevant employment agreement, in accordance with the general rules on conflict of laws. Moreover, in cases where the termination of employment contracts requires approval by a court or administrative authority, the Member State in which an establishment of the debtor is located should retain jurisdiction to grant such approval even if no insolvency proceedings have been opened in that Member State. Any other questions relating to the law of insolvency, such as whether the employees' claims are protected by preferential rights and the status such preferential rights may have, should be determined by the law of the Member State in which the insolvency proceedings (main or secondary) have been opened, except in cases where an undertaking to avoid secondary insolvency proceedings has been given in accordance with this Regulation.'

4 Article 2 of that regulation, entitled 'Definitions', provides:

'For the purposes of this Regulation:

…

(5) "insolvency practitioner" means any person or body whose function, including on an interim basis, is to:
   (i) verify and admit claims submitted in insolvency proceedings;
   (ii) represent the collective interest of the creditors;
   (iii) administer, either in full or in part, assets of which the debtor has been divested;
   (iv) liquidate the assets referred to in point (iii); or
   (v) supervise the administration of the debtor's affairs.

…

(7) "judgment opening insolvency proceedings" includes:
(i) the decision of any court to open insolvency proceedings or to confirm the opening of such proceedings; and
(ii) the decision of a court to appoint an insolvency practitioner;

(8) "the time of the opening of proceedings" means the time at which the judgment opening insolvency proceedings becomes effective, regardless of whether the judgment is final or not;

…

(11) "local creditor" means a creditor whose claims against a debtor arose from or in connection with the operation of an establishment situated in a Member State other than the Member State in which the centre of the debtor's main interests is located;

…'

5 Article 3 of that regulation, entitled 'International jurisdiction', provides, in paragraphs 1 to 3 thereof:

'1. The courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings ("main insolvency proceedings"). The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.

…

2. Where the centre of the 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 it 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 in accordance with paragraph 1, any proceedings opened subsequently in accordance with paragraph 2 shall be secondary insolvency proceedings.'

6 Article 6 of that regulation, entitled 'Jurisdiction for actions deriving directly from insolvency proceedings and closely linked with them', provides, in paragraph 1 thereof:

'The courts of the Member State within the territory of which insolvency proceedings have been opened in accordance with Article 3 shall have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them, such as avoidance actions.'

7 Under Article 7 of Regulation 2015/848, entitled 'Applicable law':

'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 (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. In particular, it shall determine the following:

…

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

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

…

(m) the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors.'

8 Article 8 of that regulation, entitled 'Third parties' rights *in rem*', provides:

'1. 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.

…

4. Paragraph 1 shall not preclude actions for voidness, voidability or unenforceability as referred to in point (m) of Article 7(2).'

9 Article 10 of that regulation, entitled 'Reservation of title', states:

'1. The opening of insolvency proceedings against the purchaser of an asset shall not affect sellers' rights that are based on a reservation of title where at the time of the opening of proceedings the asset is situated within the territory of a Member State other than the State of the opening of proceedings.

2. The opening of insolvency proceedings against the seller of an asset, after delivery of the asset, shall not constitute grounds for rescinding or terminating the sale and shall not prevent the purchaser from acquiring title where at the time of the opening of proceedings the asset sold is situated within the territory of a Member State other than the State of the opening of proceedings.

3. Paragraphs 1 and 2 shall not preclude actions for voidness, voidability or unenforceability as referred to in point (m) of Article 7(2).'

10 Article 13 of that regulation, entitled 'Contracts of employment', provides:

'1. The effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment.

2. The courts of the Member State in which secondary insolvency proceedings may be opened shall retain jurisdiction to approve the termination or modification of the contracts referred to in this Article even if no insolvency proceedings have been opened in that Member State.

The first subparagraph shall also apply to an authority competent under national law to approve the termination or modification of the contracts referred to in this Article.'

11 Article 21 of Regulation 2015/848, entitled 'Powers of the insolvency practitioner', provides, in paragraphs 1 and 2 thereof:

'1. The insolvency practitioner appointed by a court which has jurisdiction pursuant to Article 3(1) may exercise all the powers conferred on it, 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 and no preservation measure to the contrary has been taken there further to a request for the opening of insolvency proceedings in that State. Subject to Articles 8 and 10, the insolvency practitioner may, in particular, remove the debtor's assets from the territory of the Member State in which they are situated.

2. The insolvency practitioner 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. The insolvency practitioner may also bring any action to set aside which is in the interests of the creditors.'

12 Chapter III of that regulation, entitled 'Secondary insolvency proceedings', includes, inter alia, Articles 34 to 36 thereof.

13 Article 34 of that regulation, entitled 'Opening of proceedings', provides:

'Where main insolvency proceedings have been opened by a court of a Member State and recognised in another Member State, a court of that other Member State which has jurisdiction pursuant to Article 3(2) may open secondary insolvency proceedings in accordance with the provisions set out in this Chapter. Where the main insolvency proceedings required that the debtor be insolvent, the debtor's insolvency shall not be re-examined in the Member State in which secondary insolvency proceedings may be opened. The effects of secondary insolvency proceedings shall be restricted to the assets of the debtor situated within the territory of the Member State in which those proceedings have been opened.'

14 Under Article 35 of that regulation, entitled 'Applicable law':

'Save as otherwise provided for in this Regulation, the law applicable to secondary insolvency proceedings shall be that of the Member State within the territory of which the secondary insolvency proceedings are opened.'

15 Article 36 of Regulation 2015/848, entitled 'Right to give an undertaking in order to avoid secondary insolvency proceedings', states:

'1. In order to avoid the opening of secondary insolvency proceedings, the insolvency practitioner in the main insolvency proceedings may give a unilateral undertaking (the "undertaking") in respect of the assets located in the Member State in which secondary insolvency proceedings

could be opened, that when distributing those assets or the proceeds received as a result of their realisation, it will comply with the distribution and priority rights under national law that creditors would have if secondary insolvency proceedings were opened in that Member State. The undertaking shall specify the factual assumptions on which it is based, in particular in respect of the value of the assets located in the Member State concerned and the options available to realise such assets.

2. Where an undertaking has been given in accordance with this Article, the law applicable to the distribution of proceeds from the realisation of assets referred to in paragraph 1, to the ranking of creditors' claims, and to the rights of creditors in relation to the assets referred to in paragraph 1 shall be the law of the Member State in which secondary insolvency proceedings could have been opened. The relevant point in time for determining the assets referred to in paragraph 1 shall be the moment at which the undertaking is given.

…

5. The undertaking shall be approved by the known local creditors. … The insolvency practitioner shall inform the known local creditors of the undertaking, of the rules and procedures for its approval, and of the approval or rejection of the undertaking.

6. An undertaking given and approved in accordance with this Article shall be binding on the estate. If secondary insolvency proceedings are opened in accordance with Articles 37 and 38, the insolvency practitioner in the main insolvency proceedings shall transfer any assets which it removed from the territory of that Member State after the undertaking was given or, where those assets have already been realised, their proceeds, to the insolvency practitioner in the secondary insolvency proceedings.

…'

16 Article 45 of that regulation, entitled 'Exercise of creditors' rights', provides, in paragraph 1 thereof, that 'any creditor may lodge its claim in the main insolvency proceedings and in any secondary insolvency proceedings'.

Spanish law

17 According to Articles 231, 232 and 238 of the Ley Concursal (Law on insolvency), in the version resulting from Real Decreto Legislativo 1/2020 por el que se aprueba el texto refundido de la Ley Concursal (Royal Legislative Decree 1/2020 approving the recast text of the Law on insolvency) of 5 May 2020 (BOE No 127 of 7 May 2020), primary standing to bring proceedings lies with the insolvency practitioner. However, on a subsidiary basis, that standing lies with the creditors where they have requested the insolvency practitioner in writing to bring the action and the insolvency practitioner has not brought the action within two months of being given notice to act.

18 Article 242 of the Law on insolvency is worded as follows:

'The following shall be claims against the assets of the insolvent debtor:

…

8.° claims generated by the exercise of the debtor's professional or business activity after the opening of insolvency proceedings. This paragraph shall include claims arising from employment contracts corresponding to that period, including compensation for dismissal or termination of an employment contract occurring after the opening of insolvency proceedings …

…'

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

19 By decision of 1 November 2017, the Amtsgericht Charlottenburg (Local Court, Charlottenburg, Germany) opened main insolvency proceedings in respect of Air Berlin. That company ceased trading after those proceedings were opened. Subsequently, pursuant to an order of 6 November 2020, secondary insolvency proceedings were opened in Spain in respect of that company, which had a commercial establishment in Spain through Air Berlin Spain.

20 The applicants in the main proceedings, who were employees of Air Berlin Spain, were dismissed following the cessation of Air Berlin's activity.

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21 The applicants in the main proceedings brought an action before the Spanish courts challenging the legality of their dismissals.

22 By judgment of 30 April 2018, the Sala de lo Social de la Audiencia Nacional (Social Division of the National High Court, Spain) found the dismissals to be void with effect from 24 November 2017, on the ground that there was no record that the insolvency practitioner in the main insolvency proceedings had opened insolvency proceedings in Spain in order to obtain judicial authorisation from the court hearing the insolvency and that that practitioner had not provided the employees' legal representatives with the mandatory documents.

23 Since Air Berlin was unable to reinstate the applicants in the main proceedings to their posts, it was ordered to pay them certain sums by way of compensation and outstanding remuneration that had fallen due during the proceedings challenging the dismissals.

24 The applicants in the main proceedings, who were then local creditors within the meaning of point 11 of Article 2 of Regulation 2015/848, lodged their claims in the main insolvency proceedings opened in Germany and in the secondary insolvency proceedings opened in Spain, on the basis of Article 45(1) of Regulation 2015/848.

25 In the main insolvency proceedings, those claims were recognised as preferential claims because they were regarded as claims against the assets of the insolvent debtor under the German legislation. By contrast, in the secondary insolvency proceedings, the appointed insolvency practitioner took the view that the claims of the applicants in the main proceedings were 'insolvency claims' and consequently ranked them as general privileged claims and non-privileged claims. According to that practitioner, the reference in point 8 of Article 242 of the Law on insolvency to claims arising from employment contracts that come in being or are upheld by a court decision following the opening of the insolvency proceedings relates to claims

that come in being or are upheld following the opening of the secondary insolvency proceedings, not to claims that come in being or are upheld following the opening of the main insolvency proceedings.

26 The applicants in the main proceedings filed an interlocutory application before the Juzgado de lo Mercantil No 1 de Palma de Mallorca (Commercial Court No 1, Palma de Mallorca, Spain), which is the referring court, challenging the list of creditors thus drawn up with regard to the admission and ranking of their claims. They argued that the 'insolvency proceedings' referred to in point 8 of Article 242 of the Law on insolvency necessarily refer to the main insolvency proceedings, with the result that, under that provision, their salary claims, generated after the opening of those proceedings, should be ranked as claims against the assets of the insolvent debtor.

27 The referring court considers, first of all, that the Law on insolvency appears, as emerges from the combined provisions of Article 7(1) and (2)(g) and (h) and Article 35 of Regulation 2015/848, to be the law applicable when determining which claims are to be lodged against the debtor's insolvency estate and the treatment of claims arising after the opening of insolvency proceedings.

28 In addition, it has doubts as to which date of the opening of insolvency proceedings is to be taken into account in order to rank the claims in the main proceedings. Since the decisions of the Spanish employment courts were delivered after the date on which the main insolvency proceedings were opened but before the date on which the secondary insolvency proceedings were opened, the claims in the main proceedings are either 'claims against the assets of the insolvent debtor' or 'insolvency claims' depending on which insolvency proceedings are to be used under point 8 of Article 242 of the Law on insolvency.

29 The referring court finds that the interpretation put forward by the insolvency practitioner in the secondary insolvency proceedings is compatible with a literal interpretation of point 8 of Article 242 of the Law on insolvency. That court considers, however, that that interpretation might conflict with a systematic interpretation of Article 7(1) and (2)(g) and (h) and Article 35 of Regulation 2015/848, read in conjunction with recital 72 of that regulation, as part of the qualified universal proceedings outlined by that regulation.

30 That could especially be so since, according to recitals 23 and 40 of that regulation, one of the reasons for allowing secondary insolvency proceedings to be opened is precisely the protection of local interests. In that context, it would be inconsistent for Regulation 2015/848 to provide that the priority of claims or the ranking of employees' claims must be determined, in order to protect local interests, in accordance with the law on insolvency proceedings of the State of the opening of proceedings, only for the application of that law to lead to an outcome that is detrimental to the interests the protection of which is sought.

31 In those circumstances, the Juzgado de lo Mercantil No 1 de Palma de Mallorca (Commercial Court No 1, Palma de Mallorca) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'In the qualified universal proceedings outlined by Regulation [2015/848], in which it is permissible to open secondary proceedings that apply exclusively to assets situated in the State where the proceedings are opened, can Article 35 and Article 7(1) [and] (2)(g) and (h) [of that regulation, read] in conjunction with recital 72 [of that regulation] be interpreted as meaning that application of the law of the State of the opening of the secondary [insolvency] proceedings

"to the treatment of claims arising after the opening of insolvency proceedings" relates to claims arising after the opening of the main [insolvency] proceedings rather than of the secondary [insolvency] proceedings?'

Case C-772/22

32 When the main insolvency proceedings were opened on 1 November 2017, Air Berlin had assets and rights in the territory of Spain. Those assets and rights included a claim secured *in rem* granted over holdings registered in Land Registry No 2 of Ciudad Real (Spain), owned by CR Aeropuertos SL. Insolvency proceedings were opened in respect of the latter company by the Juzgado de Primera Instancia No 4 de Ciudad Real (Court of First Instance No 4, Ciudad Real, Spain) and a claim with special privilege was admitted in favour of Air Berlin.

33 After the insolvency practitioner in the main insolvency proceedings claimed the rights of Air Berlin, the Juzgado de Primera Instancia No 4 de Ciudad Real (Court of First Instance No 4, Ciudad Real) ordered, on 10 May 2019, that the sum of EUR 1 061 291.86 be transferred to the fiduciary account of the insolvency practitioner in payment of the claim with special privilege.

34 Before proceeding with that transfer, the Juzgado de Primera Instancia No 4 de Ciudad Real (Court of First Instance No 4, Ciudad Real) had requested and obtained proof of authorisation from the German court hearing the main insolvency proceedings. By contrast, that court had not been informed that, in order to secure payment to one of the applicants in the main proceedings of a claim in the amount of EUR 245 996.93 arising from an employment contract, the assets and rights connected with Air Berlin Spain had been made subject to a protective attachment ordered on 24 January 2018 by the Juzgado de lo Social No 5 de Palma de Mallorca (Social Court No 5, Palma de Mallorca, Spain).

35 The applicants in the main proceedings brought an action before the Juzgado de lo Mercantil No 1 de Palma de Mallorca (Commercial Court No 1, Palma de Mallorca), which is the referring court, for annulment of the act by which the assets had been removed from the territory of Spain. In that action, they claim that the insolvency practitioner in the main insolvency proceedings abusively removed the assets located in the Member State in which, due to the presence of an establishment, secondary insolvency proceedings could be opened. They submit that, consequently, Articles 34 and 36 of Regulation 2015/848 and recital 46 of that regulation have been infringed. They claim that the local creditors have been adversely affected because that act prevented them from obtaining repayment of their claim.

36 The applicants in the main proceedings add that they have been discriminated against compared with the other employees in the main insolvency proceedings relating to Air Berlin because they have not received any payments.

37 The referring court considers that it is necessary to obtain clarifications regarding the interpretation of Regulation 2015/848.

38 In the first place, it is uncertain as to how to determine the assets that comprise the insolvency estate in secondary insolvency proceedings and, more specifically, as to the time parameter that must be taken into account to determine the assets and rights that form part of that estate.

39 In the second place, the referring court harbours doubts as to whether the act of removing assets from the territory in which the establishment is situated may be unlawful and abusive.

40 That court notes that Article 21(1) of Regulation 2015/848 authorises the insolvency practitioner to remove the debtor's assets from the territory of the Member State in which they are situated.

41 In the present case, the question that arises is whether, on the basis of that power, the insolvency practitioner in the main insolvency proceedings may remove the debtor's assets from the territory of the Member State when that practitioner knows that secondary insolvency proceedings are likely to be opened and despite a court decision ordering a protective attachment of assets.

42 In the third place, the referring court is uncertain as to the right of creditors to bring actions to set aside against the acts performed by the insolvency practitioner in the main insolvency proceedings.

43 That court notes, in that regard, that Article 6(1) of Regulation 2015/848 expressly states that the courts of the Member State within the territory of which insolvency proceedings have been opened in accordance with Article 3 are to have jurisdiction for avoidance actions.

44 However, that court has doubts as to whether the action brought by the applicants in the main proceedings is an action to set aside within the meaning of Article 21(2) of that regulation in so far as their action relates to an act performed by the insolvency practitioner in the main insolvency proceedings, and not by the debtor.

45 Even though such a practitioner acts for or on behalf of the debtor, that act is not performed by the debtor but by that practitioner in exercise of the power conferred on it by Article 21(1) of Regulation 2015/848 to remove the debtor's assets from the territory of the Member State in which they are situated.

46 The referring court therefore considers that the interpretation of Article 21(2) of Regulation 2015/848 is necessary in order to determine whether such an act, performed by the insolvency practitioner in the main insolvency proceedings, may be set aside on application by the insolvency practitioner in the secondary insolvency proceedings.

47 The answer to that question will enable it to determine whether, in accordance with the rules governing the creditors' subsidiary standing to bring proceedings, provided for in Articles 232 and 238 of the Law on insolvency, the local creditors have standing to bring the action in the main proceedings.

48 In those circumstances, the Juzgado de lo Mercantil No 1 de Palma de Mallorca (Commercial Court No 1, Palma de Mallorca) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) May Article 3(2) and Article 34 of [Regulation 2015/848] be interpreted as meaning that the assets situated in the State of the opening of secondary [insolvency] proceedings, to which the effects of [those] proceedings are restricted, are only the assets existing at the time the secondary [insolvency] proceedings are opened and not those that existed when the main [insolvency] proceedings were opened?

(2) May Article 21(1) of Regulation [2015/848] be interpreted as meaning that the decision of the insolvency practitioner in the main insolvency proceedings to remove assets, without requesting the opening of secondary [insolvency] proceedings or avoiding the opening of such proceedings by offering a unilateral undertaking under Articles 36 and 37 [of that

regulation], is in conformity with the power to remove the debtor's assets from the territory of the Member State in which they are situated where it is apparent to that practitioner that there are local creditors with claims arising from employment contracts that have been recognised by judgments and a protective attachment of assets ordered by an employment court of that Member State?

(3) May Article 21(2) of Regulation [2015/848] be interpreted as meaning that the power to bring actions to set aside in the interests of creditors conferred on the insolvency practitioner in the secondary insolvency proceedings applies to a situation such as that described, in which it is sought to revoke an act performed by the insolvency practitioner appointed in the main insolvency proceedings?'

Consideration of the questions referred

49 As a preliminary point, it should be noted that, in so far as Regulation 2015/848 repealed and replaced Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1), the Court's interpretation of the provisions of Regulation No 1346/2000 also applies to the provisions of Regulation 2015/848, whenever those provisions may be regarded as equivalent.

The question referred in Case C-765/22

50 By its single question in Case C-765/22, the referring court asks, in essence, whether Articles 7 and 35 of Regulation 2015/848, read in conjunction with recital 72 of that regulation, must be interpreted as meaning that the law of the State of the opening of the secondary insolvency proceedings is to apply only to the treatment of claims arising after the opening of those proceedings, and not to the treatment of claims arising between the opening of the main insolvency proceedings and the opening of the secondary insolvency proceedings.

51 In that respect, as regards, in the first place, the wording of the relevant provisions, it must be observed, first, that both Article 7(1) of Regulation 2015/848, which applies to main and secondary insolvency proceedings, and Article 35 of that regulation, which concerns only secondary insolvency proceedings, refer to the law of the Member State in which the proceedings have been opened.

52 In accordance with point 8 of Article 2 of that regulation, the time of the opening of proceedings is the time at which the judgment opening insolvency proceedings becomes effective, regardless of whether that judgment is final or not.

53 Second, Article 7(2)(g) of that regulation states that the law of the Member State within the territory of which proceedings have been opened is to determine, inter alia, the treatment of claims arising after the opening of insolvency proceedings.

54 It follows from those observations that Article 7(1) of Regulation 2015/848 is a conflict-of-laws rule, a categorisation that is moreover confirmed by recital 66 of that regulation, which states that the uniform rules on conflict laid down by that regulation replace national rules of private international law (see, by analogy, judgment of 22 November 2012, *Bank Handlowy and Adamiak*, C-116/11, EU:C:2012:739, paragraph 47).

55 Admittedly, it is apparent from recital 72 of that regulation that the effects of insolvency proceedings on the continuation or termination of employment and on the rights and obligations of all parties to such employment should be determined by the law applicable to the relevant employment agreement, not by the law of the State in which the insolvency proceedings have been opened. However, that recital expressly states that that derogation does not apply to the question whether employees' claims are protected by preferential rights and the status such preferential rights may have.

56 Moreover, since the terms of a provision derogating from a principle must be interpreted strictly (see, to that effect, judgments of 18 January 2001, *Commission* v *Spain*, C-83/99, EU:C:2001:31, paragraph 19, and of 10 March 2005, *easyCar*, C-336/03, EU:C:2005:150, paragraph 21), that rule must necessarily apply to Article 13 of Regulation 2015/848, which constitutes an exception to the *lex concursus* principle, set out in recital 66 of that regulation.

57 It follows that the question relating to the treatment of claims such as those at issue in the main proceedings, which arose after the opening of the main insolvency proceedings, and concerning the admission and ranking of those claims, falls within the scope of Article 7(2)(g) of Regulation 2015/848, which contains an express reference to the law of the State of the opening of proceedings. That question must therefore be decided under the *lex concursus* designated as applicable on that basis (see, by analogy, judgment of 22 November 2012, *Bank Handlowy and Adamiak*, C-116/11, EU:C:2012:739, paragraph 50).

58 In the second place, that interpretation of Articles 7 and 35 of Regulation 2015/848, according to which it is the law of the Member State in which the insolvency proceedings were opened that determines the treatment of claims arising after the opening of those proceedings, is supported by a systematic reading of that regulation.

59 First, it follows from Article 3(2) and Article 34 of Regulation 2015/848 that the effects of secondary insolvency proceedings are restricted to the assets of the debtor which, on the date of the opening of those proceedings, are situated within the territory of the Member State in which those proceedings were opened (see, by analogy, judgments of 11 June 2015, *Comité d'entreprise de Nortel Networks and Others*, C-649/13, EU:C:2015:384, paragraph 48, and of 14 November 2018, *Wiemer & Trachte*, C-296/17, EU:C:2018:902, paragraph 40).

60 Second, the applicability of the *lex concursus* principle on the date of the opening of the secondary insolvency proceedings allows the applicable law to be identified easily, while heeding the opportunity afforded by Article 45 of that regulation to creditors to lodge their claims not only in the main insolvency proceedings but also in any secondary insolvency proceedings.

61 In the third place, having regard to the nature of Article 7 of Regulation 2015/848 as a conflict-of-laws rule, such an interpretation is also consistent with the objective of that regulation, which is not to establish uniform proceedings on insolvency but, as is apparent from recital 3 thereof, to ensure that cross-border insolvency proceedings operate efficiently. To that end, as the Court has already had occasion to rule, that regulation lays down rules on recognition and jurisdiction as well as rules on the applicable law in that area (see, by analogy, judgment of 22 November 2012, *Bank Handlowy and Adamiak*, C-116/11, EU:C:2012:739, paragraph 45). The treatment of claims arising after the opening of insolvency proceedings envisaged in that Article 7 must therefore be decided under the *lex concursus* designated as applicable.

62 It follows from the foregoing considerations that Articles 7 and 35 of Regulation 2015/848, read in conjunction with recital 72 of that regulation, must be interpreted as meaning that the law of the State of the opening of the secondary insolvency proceedings is to apply only to the treatment of claims arising after the opening of those proceedings, and not to the treatment of claims arising between the opening of the main insolvency proceedings and the opening of the secondary insolvency proceedings.

The questions referred in Case C-772/22

The first question

63 By its first question, the referring court asks, in essence, whether Article 3(2) and Article 34 of Regulation 2015/848 must be interpreted as meaning that the assets situated in the State of the opening of the secondary insolvency proceedings comprise only the assets which are situated within the territory of that Member State at the time of the opening of those proceedings or whether they also include the assets which were situated within the territory of that Member State when the main insolvency proceedings were opened and which have, in the meantime, been removed by the insolvency practitioner in the main insolvency proceedings.

64 First of all, as is apparent from the case-law cited in paragraph 59 of the present judgment, it follows from the wording of those provisions that the effects of secondary insolvency proceedings are restricted to the assets of the debtor which, on the date of the opening of those proceedings, were situated within the territory of the Member State in which those proceedings were opened.

65 Second, that interpretation is borne out by a systematic reading of Regulation 2015/848.

66 In the first place, although it is apparent from the wording of Article 21(2) of that regulation that the insolvency practitioner in secondary insolvency proceedings is entitled to claim that movable property was removed from the territory of the Member State of those proceedings to the territory of another Member State, that possibility is expressly limited to removals carried out after the opening of those proceedings.

67 In the second place, Article 36(1) of that regulation also provides that the insolvency practitioner in the main insolvency proceedings may give a unilateral undertaking in respect of the assets located in the Member State in which secondary insolvency proceedings could be opened, in order to avoid such proceedings. In the event that such an undertaking has been given, Article 36(6) of that regulation states that, if secondary insolvency proceedings are opened despite the undertaking given by the insolvency practitioner in the main insolvency proceedings, that practitioner must transfer any assets which it has removed from the territory of that Member State after the undertaking was given.

68 That provision highlights the intention of the EU legislature to limit the consequences of the opening of secondary insolvency proceedings with regard to the acts taken by the insolvency practitioner in the main insolvency proceedings.

69 Last, an interpretation of Article 3(2) and Article 34 of Regulation 2015/848 which limits the assets situated in the State of the opening of secondary insolvency proceedings to the assets situated within the territory of that Member State at the time of the opening of those proceedings may reconcile the various objectives pursued by that regulation, as set out, inter alia, in recitals 23 and 40 thereof.

70 While the main objective of secondary insolvency proceedings is to protect local interests, main insolvency proceedings produce universal effects in that they apply to the debtor's assets situated in all the Member States (see, by analogy, judgment of 22 November 2012, *Bank Handlowy and Adamiak*, C-116/11, EU:C:2012:739, paragraph 40). Thus, in that system, and as stated in recital 48 of that regulation, the main insolvency proceedings have a dominant role in relation to the secondary insolvency proceedings (see, by analogy, judgment of 22 November 2012, *Bank Handlowy and Adamiak*, C-116/11, EU:C:2012:739, paragraph 60). Regulation 2015/848 implements the objective of efficient and effective cross-border insolvency proceedings through the coordination of main and secondary insolvency proceedings, while observing the priority of the main insolvency proceedings (see, by analogy, judgment of 22 November 2012, *Bank Handlowy and Adamiak*, C-116/11, EU:C:2012:739, paragraph 72).

71 It follows from the foregoing that Article 3(2) and Article 34 of Regulation 2015/848 must be interpreted as meaning that the assets situated in the State of the opening of the secondary insolvency proceedings comprise only the assets which are situated within the territory of that Member State at the time of the opening of those proceedings.

The second question

72 By its second question, the referring court asks, in essence, whether Article 21(1) of Regulation 2015/848 must be interpreted as meaning that the insolvency practitioner in the main insolvency proceedings may remove the debtor's assets from the territory of a Member State other than that of the main insolvency proceedings, where it is apparent to that practitioner, first, that there are local creditors with claims arising from employment contracts that have been recognised by judgments and, second, that there is a protective attachment of assets ordered by an employment court of the latter Member State.

73 As regards the wording of Article 21(1) of Regulation 2015/848, that provision states that the insolvency practitioner may exercise 'all the powers conferred on it, by the law of the [Member] State of the opening of [the main insolvency] proceedings,' in another Member State, and may do so 'as long as no other insolvency proceedings have been opened there and no preservation measure to the contrary has been taken there further to a request for the opening of insolvency proceedings in that State'. That provision expressly states that those powers include the power to remove assets from the territory of the Member State in which they are situated, subject only to the applicability of Articles 8 and 10 of that regulation, which refer, respectively, to the existence of a right *in rem* on the part of creditors or third parties and to the situation of a reservation of title.

74 As stated in recitals 67 and 68 of that regulation, those exceptions, the objective of which is to protect legitimate expectations and the certainty of transactions in Member States other than that in which main insolvency proceedings are opened, must be interpreted strictly and their scope cannot go beyond what is necessary to achieve that objective (see, by analogy, judgments of 16 April 2015, *Lutz*, C-557/13, EU:C:2015:227, paragraph 34, and of 22 April 2021, *Oeltrans Befrachtungsgesellschaft*, C-73/20, EU:C:2021:315, paragraph 24).

75 Local creditors with claims arising from employment contracts and a protective attachment of assets, as in the case in the main proceedings, are not such as to prevent the insolvency practitioner in the main insolvency proceedings from removing assets from the territory of the Member State in which the secondary insolvency proceedings have been opened, unless those claims or that protective attachment concern rights *in rem* in the light of the law applicable under Article 8 of that regulation.

76 That interpretation is borne out by the context of Article 21(1) of Regulation 2015/848.

77 In the first place, the first sentence of Article 21(2) of that regulation states that the insolvency practitioner in secondary insolvency proceedings may claim that movable property was removed from the territory of the Member State of the opening of those proceedings to the territory of another Member State 'after the opening of [those] insolvency proceedings'. The second sentence of that provision adds that that practitioner may also bring any action to set aside which is in the interests of the creditors. The latter clarification has practical effect only if it covers property other than the property covered by the first sentence of the provision, so that it necessarily covers property that was removed from the territory of the Member State of the secondary insolvency proceedings before those proceedings were opened.

78 Article 21(1) and (2) of Regulation 2015/848 thus ensures that the way in which the powers of the insolvency practitioner and the mechanisms for safeguarding the interests of local creditors interact is in accordance with the intention of the EU legislature, as expressed in recital 46 of that regulation. Under that recital, the insolvency practitioner in the main insolvency proceedings should not be able to realise or relocate, in an abusive manner, assets situated in the Member State where an establishment is located, in particular, with the purpose of frustrating the possibility that such interests can be effectively satisfied if secondary insolvency proceedings are opened subsequently.

79 In the second place, such an interpretation of Article 21(1) of Regulation 2015/848, according to which the insolvency practitioner in the main insolvency proceedings may remove the debtor's assets from the territory of a Member State other than that of the main insolvency proceedings, is borne out by Article 36(6) of that regulation.

80 Where secondary insolvency proceedings are opened even though the insolvency practitioner in the main insolvency proceedings has previously given a unilateral undertaking within the meaning of Article 36(1) of Regulation 2015/848, Article 36(6) of that regulation requires only that that practitioner transfer any assets which it removed 'after the undertaking was given', which implies that that practitioner has the power to remove those assets. Since the unilateral undertaking given by the insolvency practitioner is merely an option, as demonstrated by the use of the verb 'may' in Article 36(1) of that regulation, the scope of that practitioner's powers, in particular the possibility of removing assets, cannot *a fortiori* be restricted where that practitioner has not given any undertaking within the meaning of that provision.

81 It follows from the foregoing that Article 21(1) of Regulation 2015/848 must be interpreted as meaning that the insolvency practitioner in the main insolvency proceedings may remove the debtor's assets from the territory of a Member State other than that of the main insolvency proceedings, where it is apparent to that practitioner, first, that there are local creditors with claims arising from employment contracts that have been recognised by judgments and, second, that there is a protective attachment of assets ordered by an employment court of the latter Member State.

The third question

82 By the third question, the referring court asks, in essence, whether Article 21(2) of Regulation 2015/848 must be interpreted as meaning that the insolvency practitioner in the secondary insolvency proceedings may bring an action to set aside against an act that was performed by the insolvency practitioner in the main insolvency proceedings.

83 Under that provision, the secondary insolvency practitioner may bring any action to set aside which is in the interests of the creditors. As the applicants in the main proceedings and the European Commission have emphasised in their observations, the class of persons against whom such an action may be brought is thus in no way limited.

84 It follows that there is nothing in the wording of that provision to support an interpretation of it that would prevent the insolvency practitioner in the secondary insolvency proceedings from bringing an action to set aside against an act of the insolvency practitioner in the main insolvency proceedings if it considers that action to be in the interests of the creditors.

85 That interpretation is, moreover, consistent with one of the primary objectives of Regulation 2015/848, which aims, through the possibility of opening secondary insolvency proceedings, as is apparent from recitals 40 and 46 of that regulation, to protect local interests (see, by analogy, judgment of 4 September 2014, *Burgo Group*, C-327/13, EU:C:2014:2158, paragraph 36).

86 It follows from the foregoing that Article 21(2) of Regulation 2015/848 must be interpreted as meaning that the insolvency practitioner in the secondary insolvency proceedings may bring an action to set aside against an act that was performed by the insolvency practitioner in the main insolvency proceedings.

Costs

87 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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. **Articles 7 and 35 of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, read in conjunction with recital 72 of that regulation,**

   must be interpreted as meaning that the law of the State of the opening of the secondary insolvency proceedings is to apply only to the treatment of claims arising after the opening of those proceedings, and not to the treatment of claims arising between the opening of the main insolvency proceedings and the opening of the secondary insolvency proceedings.

2. **Article 3(2) and Article 34 of Regulation 2015/848**

must be interpreted as meaning that the assets situated in the State of the opening of the secondary insolvency proceedings comprise only the assets which are situated within the territory of that Member State at the time of the opening of those proceedings.

3. Article 21(1) of Regulation 2015/848

must be interpreted as meaning that the insolvency practitioner in the main insolvency proceedings may remove the debtor's assets from the territory of a Member State other than that of the main insolvency proceedings, where it is apparent to that practitioner, first, that there are local creditors with claims arising from employment contracts that have been recognised by judgments and, second, that there is a protective attachment of assets ordered by an employment court of the latter Member State.

4. Article 21(2) of Regulation 2015/848

must be interpreted as meaning that the insolvency practitioner in the secondary insolvency proceedings may bring an action to set aside against an act that was performed by the insolvency practitioner in the main insolvency proceedings.

[Signatures]