Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

16 January 2014*

(Reference for a preliminary ruling — Judicial cooperation in civil matters — Regulation (EC) No 1346/2000 — Insolvency proceedings — Action to set a transaction aside by virtue of the debtor's insolvency — Defendant resident in a third country — Jurisdiction of the court of the Member State where the debtor has the centre of his main interests)

In Case C-328/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Germany), made by decision of 21 June 2012, received at the Court on 11 July 2012, in the proceedings

Ralph Schmid, acting as liquidator of the assets of Aletta Zimmermann,

v

Lilly Hertel,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, K. Lenaerts, Vice-President of the Court, acting as a Judge of the First Chamber, A. Borg Barthet, E. Levits and M. Berger (Rapporteur), Judges,

Advocate General: E. Sharpston,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 10 April 2013,

after considering the observations submitted on behalf of:

— Mr Schmid, acting as liquidator of the assets of Ms Zimmermann, by G.S. Mohnfeld, Rechtsanwalt,

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

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

after hearing the Opinion of the Advocate General at the sitting on 10 September 2013,

gives the following

* Language of the case: German.

Judgment

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

2 The request has been made in the context of a dispute between Mr Schmid, acting as liquidator of the assets of Ms Zimmermann ('the debtor'), and Ms Hertel, who is resident in Switzerland, concerning an action to set a transaction aside.

Legal context

3 Recitals 2 to 4, 8, 12 and 14 in the preamble to the Regulation state:

'(2) The proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively ...

(3) The activities of undertakings have more and more cross-border effects and are therefore increasingly being regulated by Community law. While the insolvency of such undertakings also affects the proper functioning of the internal market, there is a need for a Community act requiring coordination of the measures to be taken regarding an insolvent debtor's assets.

(4) 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).

...

(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 a Community law measure which is binding and directly applicable in Member States.

...

(12) This Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of his main interests. These proceedings have universal scope and aim at encompassing all the debtor's assets. ...

...

(14) This Regulation applies only to proceedings where the centre of the debtor's main interests is located in the Community.'

4 Article 1(1) of the Regulation states:

'This Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.'

5 Article 3 of the Regulation, headed 'International jurisdiction', provides in paragraph 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. …'

6 Article 5(1) of the Regulation provides:

‘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.’

7 Article 6(1) of the Regulation states:

‘The opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor’s claim.’

8 Article 14 of the Regulation is worded as follows:

‘Where, by an act concluded after the opening of insolvency proceedings, the debtor disposes, for consideration, of:

— an immoveable asset, or

— a ship or an aircraft subject to registration in a public register, or

— securities whose existence presupposes registration in a register laid down by law,

the validity of that act shall be governed by the law of the State within the territory of which the immoveable asset is situated or under the authority of which the register is kept.’

9 Article 25(1) of the Regulation provides:

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

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

...’

10 Under Article 44(3)(a), the Regulation is not to apply ‘in any Member State, to the extent that it is irreconcilable with the obligations arising in relation to bankruptcy from a convention concluded by that State with one or more third countries before the entry into force of [the] Regulation’.

11 Annex A to the Regulation contains a list of the insolvency proceedings referred to in Article 1(1).

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

12 Mr Schmid is the liquidator of the debtor’s assets, appointed in the insolvency proceedings opened in her regard in Germany on 4 May 2007. The defendant, Ms Hertel, resides in Switzerland. Mr Schmid brought an action against Ms Hertel before the German courts to have a transaction set aside, seeking to recover EUR 8 015.08 plus interest as part of the debtor’s estate. This action was dismissed as

inadmissible at first instance and on appeal on the ground that the German courts lacked international jurisdiction. Mr Schmid pursued his action to have the transaction set aside by appealing on a point of law to the Bundesgerichtshof (Federal Court of Justice).

13 The Bundesgerichtshof observes that the dispute in the main proceedings falls within the scope *ratione materiae* of Article 3(1) of the Regulation. It refers in this regard to Case C-339/07 *Seagon* [2009] ECR I-767 and recalls that, in that judgment, the Court ruled 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 that is brought against a person whose registered office is in another Member State.

14 The Bundesgerichtshof states that it has, however, not yet been decided whether Article 3(1) of the Regulation is also applicable where insolvency proceedings have been opened in a Member State, but the place of residence or registered office of the person against whom the action to have a transaction set aside is brought is not in a Member State, but in a third country.

15 The Bundesgerichtshof considers that, according to the wording of Article 3(1) of the Regulation, it is sufficient for the purpose of application of that provision that the centre of the debtor's main interests be situated in a Member State. However, a cross-border element has to be present in order for the Regulation to apply and it is unclear whether that element must relate to another Member State or to a third country.

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

'Do the courts of the Member State within the territory of which insolvency proceedings regarding the debtor's assets 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 place of residence or registered office is not within the territory of a Member State?'

Consideration of the question referred

17 By its question, the referring court asks, in essence, whether Article 3(1) of the Regulation must be interpreted as meaning that the courts of the Member State within the territory of which insolvency proceedings are opened have jurisdiction to hear and determine an action to set a transaction aside by virtue of insolvency that is brought against a person whose place of residence is not within the territory of a Member State.

18 In answering this question, it should be noted at the outset that Article 3(1) of the Regulation merely provides that the courts of the Member State within the territory of which the centre of a debtor's main interests is situated are to have jurisdiction to open insolvency proceedings against that debtor. In the main proceedings, the centre of the debtor's main interests is situated in Germany.

19 First of all, however, it should be determined whether, where the only cross-border element that the situation in question entails is between a Member State and a third country, the courts of that Member State have jurisdiction over the insolvency proceedings by virtue of Article 3(1) of the Regulation or whether, on the other hand, this issue of international jurisdiction must be resolved by applying that Member State's national law.

20 With regard to the question which arises, when making this determination, of whether, in order for the Regulation to apply, there must in any event be cross-border elements in the sense that only situations involving connecting factors with two or several Member States fall within the Regulation's scope, it is to be observed that a general and absolute condition of this kind does not result from the wording of the Regulation's provisions.

21 As the Advocate General has noted in point 25 of her Opinion, neither Article 1 of the Regulation, headed 'Scope', nor Annex A thereto, which contains a list of the insolvency proceedings referred to in Article 1, limits the application of the Regulation to proceedings that involve a cross-border element within the meaning referred to in the previous paragraph. The same is true of recital 14 in the preamble to the Regulation, according to which application of the Regulation is precluded only if the centre of the debtor's main interests is located outside the European Union.

22 It is true that the application of a number of the Regulation's provisions requires the presence of connecting factors with the territory or the legal system of at least two Member States, as is the case with Article 5(1) of the Regulation, which lays down a rule relating to third parties' rights *in rem* in respect of assets of the debtor which are situated within the territory of 'another Member State' at the time of the opening of proceedings, or the provisions of Chapter III thereof ('Secondary insolvency proceedings'), which apply only to secondary proceedings that have been opened in another Member State.

23 However, other provisions of the Regulation, such as Articles 6 and 14, do not contain express restrictions of this kind. Furthermore, Article 44(3)(a) provides that the Regulation is not to apply, in any Member State, to the extent that it is irreconcilable with the obligations arising in relation to bankruptcy from a convention concluded by that Member State with one or more third countries before the entry into force of the Regulation. That provision would, in principle, be superfluous if the Regulation did not apply to relations between a Member State and a third country.

24 So far as concerns, in this context, the provisions of the Regulation which do not expressly prescribe a cross-border element involving at least two Member States, it must be stated that the objectives pursued by the Regulation, as resulting in particular from the recitals in its preamble, likewise do not support a narrow interpretation of the Regulation's scope, requiring the presence of such an element.

25 Although recitals 2 to 4 in the preamble show that the Regulation's objective is, in particular, to ensure the 'proper functioning of the internal market', it is apparent, however, from recital 4 that that objective makes it necessary, in particular, '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)'. Recital 8 refers to the objective of 'improving the efficiency and effectiveness of insolvency proceedings having cross-border effects' and recital 12 states that insolvency proceedings falling within the Regulation's field of application 'have universal scope and aim at encompassing all the debtor's assets'. The latter objectives may encompass not solely relations between Member States but, by their nature and in accordance with their wording, any cross-border situation.

26 Nor, finally, do the specific objectives particular to Article 3(1) of the Regulation give rise to a limitation of the Regulation's scope to situations necessarily involving at least two Member States.

27 It should be recalled that Article 3(1) of the Regulation merely lays down a rule on international jurisdiction, according to which '[t]he 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'. Thus, read in the light of recital 8 in the preamble to the Regulation, Article 3(1) is intended to promote foreseeability and, therefore, legal certainty as regards bankruptcy and liquidation jurisdiction.

28 The Court has already held that, in order to determine which court has jurisdiction to open insolvency proceedings, the centre of the debtor's main interests must be determined at the time when the request to open insolvency proceedings has been lodged (see Case C-1/04 *Staubitz-Schreiber* [2006] ECR I-701, paragraph 29). As the Advocate General has observed in point 29 of her Opinion, at that early stage, the existence of any cross-border element may be unknown. However, determination of the court which has jurisdiction cannot be postponed until such time as the locations of various aspects of the proceedings in addition to the centre of the debtor's main interests, such as the residence of a potential defendant to an ancillary action, are known. To wait for knowledge of these matters would frustrate the objectives of improving the efficiency and effectiveness of insolvency proceedings having cross-border effects.

29 Application of Article 3(1) of the Regulation cannot therefore, as a general rule, depend on the existence of a cross-border link involving another Member State.

30 That being so, as regards the specific point as to whether the courts of the Member State within the territory of which insolvency proceedings have been opened have jurisdiction to hear and determine an action to set a transaction aside by virtue of insolvency that is brought against a person whose place of residence is not within the territory of a Member State, it should be recalled that the Court held in *Seagon*, paragraph 21, that Article 3(1) of the Regulation 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.

31 It is true that, in paragraph 25 of that judgment, the Court also held that those courts therefore 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.

32 However, the mere fact that in *Seagon* the Court confined itself to finding that the court in which proceedings have been opened has jurisdiction to decide actions brought against persons established in another Member State does not enable it to be concluded that such jurisdiction is immediately ruled out where the defendant is established in a third country, given that the Court was not called upon to decide that question. The defendant in the case which gave rise to the judgment in *Seagon* was established in a Member State.

33 Furthermore, the objectives pursued by Article 3(1) of the Regulation, consisting, as has been pointed out in paragraph 27 of the present judgment, in the promotion of foreseeability as regards bankruptcy and liquidation jurisdiction and, therefore, of legal certainty, support an interpretation to the effect that that provision also creates jurisdiction to decide an action to set a transaction aside by virtue of insolvency that is brought against a person whose place of residence is in a third country. Harmonisation, in the European Union, of the rules governing jurisdiction over actions to set a transaction aside by virtue of insolvency contributes to the attainment of those objectives irrespective of whether the defendant's place of residence is in a Member State or a third country.

34 This conclusion cannot be called into question by the fact, stressed by the German Government at the hearing, that the defendant in such an action to set a transaction aside would be sued before a court in a State other than the State where his place of residence is located.

35 The criterion, established by the Regulation, for determining the court which has jurisdiction to decide that action, namely the criterion of the centre of the debtor's main interests, is normally foreseeable for the defendant, who may take it into account at the time when he participates, with the debtor, in an act liable to be set aside in insolvency proceedings. Accordingly, the objectives of foreseeability of jurisdiction as regards bankruptcy and liquidation and of legal certainty, resulting from recital 8 in the preamble to the Regulation, and, as the case may be, the objective of avoiding incentives for the parties

to transfer assets from one Member State to another, or to choose a particular forum, in order to obtain a more favourable legal position, referred to in recital 4, prevail over the concern to avoid the defendant being sued in a foreign court.

36 Nor can the argument succeed that the courts of a third country would be under no obligation at all to recognise or enforce a judgment delivered by a court having jurisdiction within the European Union, or, in other words, that application of Article 3(1) of the Regulation would be ineffective if the defendant's place of residence were in a third country.

37 As the Advocate General has stated in points 36 and 38 of her Opinion, the fact that the provisions of the Regulation concerning recognition and enforcement of judgments delivered by the court which has opened the insolvency proceedings cannot bind third countries does not preclude the application of the rule governing jurisdiction which is laid down in Article 3(1) of the Regulation. Moreover, even if, in a particular case, it is not possible to rely on the Regulation itself for the recognition and enforcement of judgments, it is sometime possible to obtain under a bilateral convention the recognition and enforcement of a judgment delivered by the court with jurisdiction.

38 Furthermore, even if such a judgment is not recognised and enforced, on the basis of a bilateral convention, by the State in which the defendant's place of residence is located, it may be recognised and enforced by the other Member States under Article 25 of the Regulation, in particular if part of the defendant's assets are in the territory of one of those States.

39 In the light of all of the foregoing, the answer to the question referred is that Article 3(1) of the Regulation must be interpreted as meaning that the courts of the Member State within the territory of which insolvency proceedings have been opened have jurisdiction to hear and determine an action to set a transaction aside by virtue of insolvency that is brought against a person whose place of residence is not within the territory of a Member State.

Costs

40 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 (First 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 courts of the Member State within the territory of which insolvency proceedings have been opened have jurisdiction to hear and determine an action to set a transaction aside by virtue of insolvency that is brought against a person whose place of residence is not within the territory of a Member State.

[Signatures]