



Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

15 October 2015*

(Reference for a preliminary ruling — Regulation (EC) No 1346/2000 — Articles 4 and 13 — Insolvency proceedings — Detrimental legal acts — Action for restitution of payments made before the date on which insolvency proceedings were opened — Law of the Member State in which insolvency proceedings were opened — Law of the Member State governing the legal act at issue — Law not allowing ‘any means of challenging that act in the relevant case’ — Burden of proof)

In Case C-310/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Helsingin hovioikeus (Court of appeal, Helsinki) (Finland), made by decision of 26 June 2014, received at the Court on 30 June 2014, in the proceedings

Nike European Operations Netherlands BV

v

Sportland Oy, in liquidation,

THE COURT (Sixth Chamber),

composed of F. Biltgen, President of the Tenth Chamber, acting as President of the Sixth Chamber, M. Berger (Rapporteur) and S. Rodin, Judges,

Advocate General: M. Wathelet,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Nike European Operations Netherlands BV, by A. Saarikivi, asianajaja,
- the Finnish Government, by H. Leppo, acting as Agent,
- the Belgian Government, by M. Jacobs, acting as Agent,
- the German Government, by T. Henze and J. Kemper, acting as Agents,
- the Spanish Government, by L. Banciella Rodríguez-Miñón, acting as Agent,

* Language of the case: Finnish.

— the European Commission, by E. Paasivirta and M. Wilderspin, acting as Agents,
having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Articles 4(2)(m) and 13 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1).
- 2 The request has been made in proceedings between Nike European Operations Netherlands BV ('Nike') and Sportland Oy, in liquidation ('Sportland'), concerning an action to have certain transactions declared void by virtue of insolvency.

Legal context

EU law

- 3 Recital 24 in the preamble to Regulation No 1346/2000 states:

'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.'
- 4 Article 4 of that regulation 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:

...

(m) the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors.'
- 5 Article 13 of that regulation provides:

'Article 4(2)(m) shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that:

— the said act is subject to the law of a Member State other than that of the State of the opening of proceedings,

and

— that law does not allow any means of challenging that act in the relevant case.'

Finnish law

- 6 Paragraph 10 of the Law on recovery of assets (takaisinsaannista konkurssipesään annettu laki) provides that the payment of a debt within three months of the prescribed date may be challenged if it is paid with an unusual means of payment, is paid prematurely, or in an amount which, in view of the amount of the debtor's estate, may be regarded as significant.

Netherlands law

- 7 According to Article 47 of the Law on insolvency (Faillissementswet), the payment of an outstanding debt may be challenged only if it is proven that when the recipient received the payment he was aware that the application for insolvency proceedings had already been lodged or that the payment was agreed between the creditor and the debtor in order to give priority to that creditor to the detriment of the other creditors.

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

- 8 Sportland, established in Helsinki (Finland), was a retailer of goods supplied by Nike, established in Hilversum (the Netherlands), under a franchising agreement. Under that contract, governed by Netherlands law, Sportland paid Nike outstanding debts arising from the purchase of stocks set out in the agreement in ten separate instalments made between 10 February 2009 and 20 May 2009, totalling EUR 195108.15.
- 9 Following an application brought on 5 May 2009, the Helsingin käräjäoikeus (District Court, Helsinki) opened insolvency proceedings in respect of Sportland on 26 May 2009. Sportland brought an action before the Helsingin käräjäoikeus seeking an order that the payments referred to in paragraph 8 above be annulled and that Nike be required to make restitution of the amounts paid plus interest, in accordance with Paragraph 10 of the Law on recovery of assets.
- 10 Nike sought an order that the action be dismissed. It relied, inter alia, on Article 13 of Regulation No 1346/2000 and claimed that the payments at issue were governed by Netherlands law. On the basis of Article 47 of the Law on insolvency, those payments were not able to be annulled.
- 11 The Helsingin käräjäoikeus (District Court, Helsinki) granted Sportland's action. It ruled, inter alia, that the expert who appeared before the court did not address the issue of the possibility under Netherlands law, in the light of all the circumstances of the case in the main proceedings, of recovering the payments for the general body of assets available to creditors. The court therefore found that Nike had not demonstrated that, for the purposes of Article 13 of Regulation No 1346/2000, the payments could not be challenged.
- 12 Nike, which considered that it had adduced sufficient evidence on the content of the Netherlands legislation, appealed against that decision before the Helsingin hovioikeus (Court of Appeal, Helsinki). Sportland claimed that the appeal should be dismissed on the ground, inter alia, that Nike had not adduced evidence as to the content of provisions of Netherlands law other than those in the insolvency legislation, or any general principles of Netherlands law.
- 13 In its order for reference, the Helsingin hovioikeus recalls that, according to Article 4(1) of Regulation No 1346/2000, the law applicable to insolvency proceedings and their effects is that of the State of the opening of proceedings. Article 4(2)(m) of the regulation provides that that law determines, inter alia, the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors. However, under Article 13 of the regulation, Article 4(2)(m) would not apply where the

person who benefited from an act detrimental to all the creditors provides proof that the act is governed by the law of a Member State other than that of the State of the opening of proceedings and that that law does not allow any means of challenging that act in the relevant case.

- 14 The referring court observes that the parties in the main proceedings are at odds as to, first, the interpretation to be given to the expression ‘does not allow any means of challenging that act in the relevant case’, second, the scope of Nike’s obligation to adduce evidence regarding the content of Netherlands law and, third, the party which is to bear the burden of proof.
- 15 In those circumstances, the Helsingin hovioikeus (Court of appeal, Helsinki) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Is Article 13 of Regulation No 1346/2000 to be interpreted to the effect that “the act in the relevant case” means that the act cannot be challenged after taking account of all the circumstances of the case?
- (2) If the answer to question 1 is affirmative and if the party affected by the application to challenge the act has relied on a provision of the law within the meaning of the first indent of Article 13, according to which the payment of an outstanding debt may be challenged only in the circumstances provided for therein, which are not mentioned in the action based on the law of the State in which the insolvency proceedings have been opened,
- (a) are there reasons prohibiting an interpretation of Article 13 to the effect that the party seeking to challenge the act must, after becoming aware of that legal provision, plead those circumstances if, in accordance with the national law of the State of the opening of insolvency proceedings, that party has to plead all the circumstances founding the action to challenge the act, or
- (b) must the party affected by action to challenge the act prove that those circumstances did not exist and that therefore it is not possible to challenge the act under the provision in question, and the party seeking to challenge it does not need to rely specifically on those circumstances?
- (3) Regardless of the answer to question 2(a), is Article 13 to be interpreted as meaning that
- (a) the party affected by the action to challenge the act has the burden of proving that the circumstances provided for in the provision do not exist in the specific case, or
- (b) may the burden of proof as to the existence of those circumstances be determined in accordance with the law of a Member State other than the State in which the insolvency proceedings were opened that is applicable to the act and which provides that the party challenging the act has the burden of proof, or
- (c) may Article 13 also be interpreted in such a way that the issue of the burden of proof is determined in accordance with the national law of the State of the court seised?
- (4) Is Article 13 to be interpreted as meaning that the expression “that law does not allow any means of challenging that act in the relevant case” includes the general provisions and principles of the law applicable to the act in addition to the insolvency rules of the law applicable to that act?
- (5) If the answer to question 4 is affirmative,

- (a) is Article 13 to be interpreted as meaning that the party affected by the action to challenge the act must prove that the law within the meaning of Article 13 does not contain any general or other provisions or principles on the basis of which it would be possible to challenge the act in the light of the facts presented, and
- (b) under Article 13, may the court, if it considers that this party has adduced sufficient evidence, rule that the other party must establish the existence of a provision or principle of the insolvency law or general law of a Member State other than the State of the opening of insolvency proceedings within the meaning of Article 13 which is applicable to the act and on the basis of which that act may indeed be challenged?’

Consideration of the questions referred

The first question

- 16 By its first question, the referring court asks, in essence, whether Article 13 of Regulation No 1346/2000 must be interpreted as meaning that its application is subject to the condition that the act at issue cannot be challenged on the basis of the law governing the act (*lex causae*), after taking account of all the circumstances of the case.
- 17 In that regard, the Court notes that the wording of Article 13 of the regulation differs slightly in the Finnish language version from that of the other language versions, in so far as the former does not appear to include the words ‘in the relevant case’ or a similar expression. According to settled case-law of the Court, the need for a uniform interpretation of a provision of EU law means that, where there is divergence between the various language versions of the provision, the latter must be interpreted by reference to the context and purpose of the rules of which it forms part (see judgment in *Christie’s France*, C-41/14, EU:C:2015:119, paragraph 26 and the case-law cited).
- 18 As for the context and purpose of Article 13 of Regulation No 1346/2000, it must, first, be recalled that that article provides, in Article 4(1), for an exception to the general rule that the law applicable to insolvency proceedings and their effects is the law of the State of the opening of proceedings (*lex fori concursus*). Second, that exception, which, as stated in recital 24 in the preamble to the regulation, aims to protect legitimate expectations and the certainty of transactions in Member States other than that in which proceedings are opened, must be interpreted strictly, and its scope cannot go beyond what is necessary to achieve that objective (see judgment in *Lutz*, C-557/13, EU:C:2015:227, paragraph 34).
- 19 Thus, Article 13 of Regulation No 1346/2000 aims to protect the legitimate expectations of a person who has benefited from an act detrimental to all the creditors by providing that the act will continue to be governed, even after insolvency proceedings have been opened, by the law that was applicable at the date on which it was concluded, namely the *lex causae*.
- 20 It is clear from that objective that the application of Article 13 of Regulation No 1346/2000 requires that all the circumstances of the case be taken into account. There cannot be legitimate expectations where, after insolvency proceedings have been opened, the validity of an act is to be assessed without regard being had to those circumstances whereas, where such proceedings are not opened, such circumstances would need to be taken into account.

- 21 Moreover, the obligation to interpret strictly the exception laid down in Article 13 of the regulation precludes a broad interpretation of the scope of that article which would allow a person who has benefited from an act detrimental to all the creditors to avoid the application of the *lex fori concursus* by relying solely, in a purely abstract manner, on the unchallengeable character of the act at issue on the basis of a provision of the *lex causae*.
- 22 In those circumstances, the answer to the first question is that Article 13 of Regulation No 1346/2000 must be interpreted as meaning that its application is subject to the condition that, after taking account of all the circumstances of the case, the act at issue cannot be challenged on the basis of the law governing the act ('*lex causae*').

The second and third questions

- 23 By its second and third questions, which it is appropriate to examine together, the referring court asks, in essence, for the purposes of the application of Article 13 of Regulation No 1346/2000 and in the event that the defendant in an action relating to the voidness, voidability or unenforceability of an act relies on a provision of the *lex causae* under which the act can be challenged only in the circumstances provided for in that provision, which party is required to plead that those circumstances do not exist and to bear the burden of proof in that regard.
- 24 It should be recalled that, under Article 13 of the Regulation No 1346, Article 4(2)(m) of the regulation can be disapplied only where the person who has benefited from an act detrimental to all the creditors provides proof that the act is governed by the law of a Member State other than that in which insolvency proceedings were opened and that that law does not allow any means of challenging the act.
- 25 It is therefore apparent from the wording of Article 13 of Regulation No 1346/2000 that it is for the defendant in an action relating to the voidness, voidability or unenforceability of an act to provide proof, on the basis of the *lex causae*, that the act cannot be challenged. Furthermore, by providing that the defendant must provide proof that an act cannot be challenged by 'any means' and, as follows from paragraph 22 above, after taking account of all the circumstances of the case, Article 13 of the regulation also, at least implicitly, places the burden on the defendant to prove both the facts from which the conclusion can be drawn that the act is unchallengeable and the absence of any evidence that would militate against that conclusion.
- 26 Since Article 13 of Regulation No 1346/2000 therefore expressly places the burden of proof on the defendant relying on that article, where an action is founded on the relevant provisions of the *lex fori concursus*, the applicant cannot be required to claim, or even prove, that the conditions for the application of a provision of the *lex causae* which, in principle, would enable the act at issue to be challenged, such as Article 47 of the Law on insolvency at issue in the main proceedings, are satisfied.
- 27 Nevertheless, although Article 13 of the regulation expressly governs where the burden of proof lies, it does not contain any provisions on more specific procedural aspects. For instance, that article does not set out, inter alia, the ways in which evidence is to be elicited, what evidence is to be admissible before the appropriate national court, or the principles governing that court's assessment of the probative value of the evidence adduced before it.
- 28 According to settled case-law, in the absence of harmonisation of such rules under EU law, it is for the national legal order of each Member State to establish them in accordance with the principle of procedural autonomy provided, however, that those rules are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (principle of effectiveness) (see, to that effect, judgment in *Kušionová*, C-34/13, EU:C:2014:2189, paragraph 50 and the case-law cited).

- 29 In particular, in so far as the principle of effectiveness mentioned in paragraph 28 above is concerned, that principle precludes, first, the application of national rules of procedure that would make reliance on Article 13 of Regulation No 1346/2000 impossible or excessively difficult by providing for rules which are too onerous, especially in connection with proof of the negative, namely that certain circumstances did not exist. Second, that principle precludes national rules of evidence that are not sufficiently rigorous, the application of which would, in fact, have the effect of shifting the burden of proof laid down in Article 13 of the regulation.
- 30 However, the mere difficulty of proving that circumstances exist in which the *lex causae* prevents the act at issue from being challenged or, where relevant, that circumstances laid down in the *lex causae* do not exist in which the act can be challenged, does not in itself impinge upon the principle of effectiveness but rather reflects the need to interpret that article strictly, as stated in paragraph 18 above.
- 31 In those circumstances, the answer to the second and third questions is that, for the purposes of the application of Article 13 of Regulation No 1346/2000 and in the event that the defendant in an action relating to the voidness, voidability or unenforceability of an act relies on a provision of the *lex causae* under which that act can be challenged only in the circumstances provided for in that provision, it is for that defendant to plead that those circumstances do not exist and to bear the burden of proof in that regard.

The fourth question

- 32 By its fourth question, the referring court asks, in essence, whether Article 13 of Regulation No 1346/2000 is to be interpreted as meaning that the expression ‘does not allow any means of challenging that act ...’ applies, in addition to the insolvency rules of the *lex causae*, to the general provisions and principles of that law, taken as a whole.
- 33 In that regard, as is apparent from paragraph 19 above, Article 13 of the regulation aims to protect the legitimate expectations of a person who has benefited from an act detrimental to all the creditors, by providing that even after insolvency proceedings have been opened the act will continue to be governed by the *lex causae*. Moreover, as is apparent from paragraph 22 above, the application of Article 13 in favour of such a person benefiting from a detrimental act requires that all the circumstances of the case be taken into account.
- 34 The aim of protecting legitimate expectations and the need for all the circumstances of the case to be taken into account require Article 13 of the regulation to be interpreted as meaning that a person benefiting from a detrimental act must prove that the act at issue cannot be challenged either on the basis of the insolvency provisions of the *lex causae* or on the basis of the *lex causae*, taken as a whole.
- 35 First, the wording of Article 13 of Regulation No 1346/2000 clearly supports such an interpretation, since it requires a person benefiting from a detrimental act to bear the burden of proving that the act cannot be challenged ‘[by] any means’. Second, there cannot be legitimate expectations in the fact that an act, which may be challenged on the basis of a provision or general principle of the *lex causae*, is to be assessed, after insolvency proceedings have been opened, solely in the light of the insolvency provisions of the *lex causae*.
- 36 In those circumstances, the answer to the fourth question is that Article 13 of Regulation No 1346/2000 must be interpreted as meaning that the expression ‘does not allow any means of challenging that act ...’ applies, in addition to the insolvency rules of the *lex causae*, to the general provisions and principles of that law, taken as a whole.

The fifth question

- 37 By its fifth question, the referring court asks, in essence, whether Article 13 of Regulation No 1346/2000 is to be interpreted as meaning that the defendant in an action relating to the voidness, voidability or unenforceability of an act must show that the *lex causae*, taken as a whole, does not allow for that act to be challenged. Furthermore, the national court asks, in essence, whether a national court before which such an action is brought may, where it considers that the defendant has adduced sufficient evidence, consider that it is for the applicant to furnish evidence that a provision or principle of the *lex causae* exists on the basis of which that act may be challenged.
- 38 In the first place, as for the question whether, for the purposes of the application of Article 13 of the regulation, the defendant in an action relating to the voidness, voidability or unenforceability of an act must show that the *lex causae*, taken as a whole, does not allow for the act at issue to be challenged, the Court points out, as is apparent from paragraph 31 above, that it is for the defendant to plead that circumstances enabling the act to be challenged on the basis of the *lex causae* do not exist and to bear the burden of proof in that regard.
- 39 Article 13 of Regulation No 1346/2000 does not distinguish insolvency provisions of the *lex causae* from the provisions and principles of the *lex causae* applicable to other areas of law, but provides that it is for the defendant to prove that the act at issue cannot be challenged by ‘any means’. It is thus clear from its wording that that article must be interpreted as meaning that the defendant must show that the *lex causae*, taken as a whole, does not enable that act to be challenged.
- 40 That conclusion is also consistent with the principle, noted in paragraph 18 above, that Article 13 of Regulation No 1346/2000 must be interpreted strictly. To hold otherwise, to the effect that the burden of proof relating to the absence of any provision or principle of the *lex causae* enabling an act to be challenged lies with the party challenging the act, would facilitate excessively reliance on that provision and would broaden its scope considerably.
- 41 Moreover, that is the only conclusion which is consistent with the aim of Article 13 of the regulation, stated in paragraph 19 above, to protect the legitimate expectations of a person who has benefited from an act detrimental to all the creditors by providing that that act will continue to be governed by the law that was applicable at the date on which it was concluded. At that date, the act was governed by the *lex causae*, taken as a whole, as applicable in the absence of insolvency proceedings since, according to the case-law of the Court, Article 13 of the regulation is not, in principle, applicable to acts which take place after the opening of insolvency proceedings (see judgment in *Lutz*, C-557/13, EU:C:2015:227, paragraph 36).
- 42 In the second place, as for the question whether the national court before which an action relating to the voidness, voidability or unenforceability of an act is brought may, where it considers that the defendant has adduced sufficient evidence, take the view that the applicant is required to establish the existence of a provision or principle of the *lex causae* on the basis of which the act can be challenged, it is clear from paragraph 25 above that it is for the defendant to prove that the act cannot be challenged.
- 43 Furthermore, as is apparent from paragraphs 27 to 29 above, since Article 13 of Regulation No 1346/2000 does not set out, *inter alia*, the ways in which evidence is to be elicited, what evidence is admissible before the appropriate national court, or the principles governing that court’s assessment of the probative value of the evidence adduced before it, it is for the national legal order of each Member State to establish such details in accordance with the principle of procedural autonomy provided, however, that the principles of equivalence and effectiveness are respected. National rules of evidence that are not sufficiently rigorous, the application of which would, in practice, shift the burden of proof, would not be consistent with the principle of effectiveness.

- 44 It follows that the national court with jurisdiction can rule that it is for the applicant in an action relating to the voidness, voidability or unenforceability of an act to establish the existence of a provision or principle of the *lex causae* on the basis of which that act can be challenged only where that court considers that the defendant has first proven, in accordance with the rules generally applicable under national rules of procedure, that the act at issue cannot be challenged on the basis of the *lex causae*. Nevertheless, the issue of determining the criteria for ascertaining whether the applicant has in fact proven that the act can be challenged falls within the procedural autonomy of the relevant Member State, regard being had to the principles of effectiveness and equivalence.
- 45 In those circumstances, the answer to the fifth question is that Article 13 of Regulation No 1346/2000 must be interpreted as meaning that the defendant in an action relating to the voidness, voidability or unenforceability of an act must show that the *lex causae*, taken as a whole, does not allow for that act to be challenged. The national court before which such an action is brought may rule that it is for the applicant to establish the existence of a provision or principle of the *lex causae* on the basis of which that act can be challenged only where that court considers that the defendant has first proven, in accordance with the rules generally applicable under its national rules of procedure, that the act at issue cannot be challenged on the basis of the *lex causae*.

Costs

- 46 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 (Sixth Chamber) hereby rules:

1. **Article 13 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted as meaning that, after taking account of all the circumstances of the case, the article applies provided that the act at issue cannot be challenged on the basis of the law governing that act (*lex causae*).**
2. **For the purposes of the application of Article 13 of Regulation No 1346/2000 and in the event that the defendant in an action relating to the voidness, voidability or unenforceability of an act relies on a provision of the law governing that act (*lex causae*) under which that act can be challenged only in the circumstances provided for in that provision, it is for the defendant to plead that those circumstances do not exist and to bear the burden of proof in that regard.**
3. **Article 13 of Regulation No 1346/2000 must be interpreted as meaning that the expression ‘does not allow any means of challenging that act ...’ applies, in addition to the insolvency rules of the law governing that act (*lex causae*), to the general provisions and principles of that law, taken as a whole.**
4. **Article 13 of Regulation No 1346/2000 must be interpreted as meaning that the defendant in an action relating to the voidness, voidability or unenforceability of an act must show that the law governing that act (*lex causae*), taken as a whole, does not allow for that act to be challenged. The national court before which such an action is brought may rule that it is for the applicant to establish the existence of a provision or principle of the *lex causae* on the basis of which that act can be challenged only where that court considers that the defendant has first proven, in accordance with the rules generally applicable under its national rules of procedure, that the act at issue cannot be challenged on the basis of the *lex causae*.**

[Signatures]