Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 30 April 2019[1]

Case C‑198/18

CeDe Group AB
v
KAN Sp. z o.o. (in insolvency)

(Request for a preliminary ruling from the Högsta domstolen (Supreme Court, Sweden))

(Reference for a preliminary ruling — Area of freedom, security and justice — Judicial cooperation in civil matters — Insolvency proceedings — Regulation (EC) No 1346/2000 — Article 4 — Applicable law — Set-off)

I. Introduction

1. The liquidator of PPUB Janson sp.j. ('PPUB'), a Polish company the subject of insolvency proceedings in Poland, lodged before the Swedish courts an application against CeDe Group AB ('CeDe'), a Swedish company, claiming payment for goods delivered under a pre-existing contract between PPUB and CeDe, which is governed by Swedish law. In the course of those proceedings, CeDe claimed a set-off in respect of a larger debt owed to it by PPUB. The liquidator had previously refused that set-off within the framework of the Polish insolvency proceedings. During the course of the procedure before the Swedish courts, PPUB's liquidator assigned the claim against CeDe to another company, KAN sp. z o.o. ('KAN'), which subsequently became insolvent. However, KAN's liquidator refused to take over the claim at issue, with the result that KAN (in insolvency) is now party to the litigation.

2. The Högsta domstolen (Supreme Court, Sweden) harbours doubts as to the law applicable to such a set-off claim. Before the referring court, KAN claimed that the set-off claim should be heard under Polish law, whereas CeDe submitted that that issue should be examined under Swedish law.

3. The present case gives the Court the opportunity to interpret the specific provisions on applicable law contained in Regulation (EC) No 1346/2000 on insolvency proceedings[2] and their interaction with the general regime on the law applicable to contractual obligations.[3] What law is applicable to a set-off claim invoked against an insolvent company in the context of proceedings initiated by an action for payment brought by the liquidator of that company?

1 Original language: English.

2 Council Regulation of 29 May 2000 (OJ 2000 L 160, p. 1) ('the Insolvency Regulation').

3 As determined by Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177, p. 6) ('the Rome I Regulation').

II. Legal framework

A. The Rome I Regulation

4. According to Article 17 of the Rome I Regulation, entitled 'Set-off': 'Where the right to set-off is not agreed by the parties, set-off shall be governed by the law applicable to the claim against which the right to set-off is asserted.'

B. The Insolvency Regulation

5. Recitals 23 and 24 of the Insolvency Regulation read as follows:

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

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

6. Recital 26 of the Insolvency Regulation states that: 'If a set-off is not permitted under the law of the opening State, a creditor should nevertheless be entitled to the set-off if it is possible under the law applicable to the claim of the insolvent debtor. In this way, set-off will acquire a kind of guarantee function based on legal provisions on which the creditor concerned can rely at the time when the claim arises.'

7. Article 4 of the Insolvency Regulation, entitled 'Law applicable', provides:

'1. Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the "State of the opening of proceedings".

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

…

(d) the conditions under which set-offs may be invoked;

…'

8. Article 6 of the Insolvency Regulation, entitled 'Set-off', provides:

'1. 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.

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

III. Facts, procedure and the questions referred for a preliminary ruling

9. On 9 June 2010, PPUB, a company established in Poland, entered into an agreement for the delivery of goods with CeDe, a company established in Sweden. The contract provided that Swedish law shall apply to any disputes concerning its interpretation.

10. At the end of January 2011, insolvency proceedings were opened against PPUB in Poland. In July of the same year, the liquidator appointed in the context of those insolvency proceedings lodged an application for a European order for payment[4] against CeDe with the Kronofogdemyndigheten (Enforcement Authority, Sweden) on the grounds that CeDe owed 1 532 489 Swedish kronor (SEK), together with interest, for goods delivered by PPUB under their agreement.

11. The case was subsequently transferred to the Malmö tingsrätt (District Court, Malmö, Sweden). CeDe disputed PPUB's claim by invoking a set-off for an amount exceeding the amount claimed by PPUB. CeDe claims that that debt corresponds to compensation in respect of unfulfilled deliveries and defects in goods delivered by PPUB. CeDe contends that the right of set-off had arisen before insolvency proceedings were opened against PPUB.

12. It appears from the information given by the referring court that the liquidator of PPUB refused to allow the set-off claimed by CeDe in the context of the insolvency proceedings in Poland.

13. Before the Malmö tingsrätt (District Court, Malmö), the liquidator of PPUB claimed that the right of set-off should be heard under Polish law on the basis of Article 4(1) of the Insolvency Regulation. According to that provision, save as otherwise provided in that regulation, the law applicable to insolvency proceedings and their effects is to be that of the Member State within the territory of which such proceedings are opened (the law of the State of the opening of proceedings or *lex concursus*). According to the liquidator, it follows from Article 4(2)(d) of the Insolvency Regulation that the *lex concursus* is to determine, in any event, the conditions under which set-offs may be invoked. The reason for this is that Article 6(1) of that regulation, which provides that insolvency proceedings shall not affect the right of set-off as long as such right is permitted under the law applicable to the debtor's claim, only applies if set-off is not permitted under the law of the State of the opening of proceedings. Therefore, in the liquidator's view, this provision does not apply to the case in the main proceedings, because Polish law does permit set-off.

14. Conversely, CeDe argued that the set-off should be examined under Swedish law. It submitted, first, that the liquidator's action concerns a claim stemming from the agreement between CeDe and PPUB, which contains a choice-of-law clause according to which Swedish law shall apply to any disputes regarding its interpretation. This means that Swedish law is applicable by virtue of Article 3(1) of the Rome I Regulation. Furthermore, CeDe submitted that, if the parties did not agree on the right of set-off, that issue would be governed by the law applicable to the claim against which set-off is sought under Article 17 of the Rome I Regulation.

4 In accordance with Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (OJ 2006 L 399, p. 1).

15. CeDe contended, secondly, that Article 6(1) of the Insolvency Regulation means that insolvency proceedings do not affect the right of set-off, if set-off is permitted under the law applicable to the debtor's claim. Since, in the view of CeDe, Swedish law applies to the liquidator's claim, the question of set-off should also be examined under Swedish law.

16. The Malmö tingsrätt (District Court, Malmö) found that, in accordance with the general rule in Article 4 of the Insolvency Regulation, Polish law could not be regarded as limiting or prohibiting set-off. As a result, it found that the exception provided for in Article 6(1) of that regulation was not applicable and that Polish law should apply in the case in the main proceedings.

17. That judgment was confirmed on appeal by the Hovrätten över Skåne och Blekinge (Court of Appeal, Scania and Blekinge, Sweden) on the basis that, inter alia, there were no grounds for departing from the general rule of the *lex concursus* in Article 4(1) of the Insolvency Regulation. The fact that the liquidator did not accept CeDe's claim for a set-off did not alter that finding.

18. During the proceedings before the Hovrätten över Skåne och Blekinge (Court of Appeal, Scania and Blekinge), the liquidator of PPUB transferred the main claim to KAN, a company established in Poland, which entered the proceedings in the place of the liquidator.

19. CeDe appealed against the judgment of the Hovrätten över Skåne och Blekinge (Court of Appeal, Scania and Blekinge) before the Högsta domstolen (Supreme Court). It claimed that Swedish law should apply to the set-off claim. KAN contended that the judgment of the Hovrätten över Skåne och Blekinge (Court of Appeal, Scania and Blekinge) should not be varied.

20. During the proceedings before the Högsta domstolen (Supreme Court), KAN became insolvent. The liquidator in those insolvency proceedings declared that the insolvent estate was not taking over the debtor's claim against CeDe. Thus, it is now KAN in insolvency, and not the insolvent estate, which is a party to the proceedings.

21. Under those circumstances, the Högsta domstolen (Supreme Court) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 4 of Regulation No 1346/2000 be interpreted as meaning that it applies to an action which is brought before a Swedish court by the liquidator of a Polish company — which is the subject of insolvency proceedings in Poland — against a Swedish company for payment of goods delivered under an agreement into which the companies entered before that insolvency?

(2) If the answer to the first question is in the affirmative, is it of any importance that, during the proceedings before the courts, the liquidator transfers the claim at issue to a company which enters the proceedings in the place of the liquidator?

(3) If the answer to the second question is in the affirmative, is it of any importance if the company which has entered the proceedings thereafter becomes insolvent?

(4) If the defendant in the proceedings before the courts in the situation set out in the first question claims that the liquidator's claim for payment should be set off against a counterclaim which arises from the same agreement as the claim, is that set-off situation covered by Article 4(2)(d)?

(5) Is the relationship between Article 4(2)(d) and Article 6(1) of Regulation No 1346/2000 to be interpreted as meaning that Article 6(1) applies only if it is not possible under the law of the State of the opening of proceedings to apply a set-off, or can Article 6(1) also apply to other situations, for example where there is only a certain difference between the level of possibility of set-off in the legal orders in question or where there are no differences at all but set-off is nonetheless refused in the State of the opening of proceedings?'

22. The European Commission and the Spanish Government lodged written submissions in the present case.

IV. Assessment

23. This Opinion is structured as follows. I will start with the first preliminary question, concluding that Article 4 of the Insolvency Regulation does not apply with regard to the issue of the law applicable to the claim of PPUB's liquidator against CeDe ('the main claim') (A). Hence, there is no need to address the second and third questions. Next, I will explain why, after the assignment of the main claim to KAN, the fourth and fifth questions became hypothetical and, therefore, inadmissible (B). Nevertheless, I shall briefly address the substance of those questions in order to assist the Court should it hold those questions to be admissible (C).

A. The first question: applicability of Article 4 of the Insolvency Regulation to the main claim

24. By its first question, the referring court asks the Court whether Article 4 of the Insolvency Regulation covers the action launched by PPUB's liquidator. If that is the case, the second and third questions enquire about the potential implications of the fact that that claim has been assigned to another legal entity (KAN) and that that entity has subsequently become insolvent.

25. However, the exact scope of the first question is not entirely clear, as reflected in the different interpretations of that question by the interested parties that made written submissions.

26. The Commission understood the first question to refer to the temporal scope of Article 4 of the Insolvency Regulation. Its submissions therefore examine whether that provision covers a claim arising from a contract entered into before the opening of the insolvency proceedings. The Commission concludes that it does.

27. The Spanish Government examines jointly the first, fourth and fifth questions. In relation to the first question, that government submits that, in so far as the *lex concursus* governs the conditions to invoke a set-off, the *lex concursus* should apply to the action launched by the liquidator.

28. While I do agree in principle with the views of the Commission on the temporal scope of Article 4 of the Insolvency Regulation, I understand the first question to be broader.

29. Indeed, the referring court asks whether the rules on the applicable law contained in Article 4 of the Insolvency Regulation cover an *action* such as the one launched by PPUB's liquidator before the Swedish courts.

30. What is to be understood by an 'action' in this context? First, the question could be understood as asking whether Article 4 of the Insolvency Regulation applies to the main (originally contractual) *claim* of PPUB's liquidator, which forms the basis of his action. Second, the question could be understood as referring to the possibility that Article 4 of the Insolvency Regulation might apply to certain (other) *aspects* of the proceedings triggered by the action of the liquidator, such as the set-off claim.

31. Starting with the first (and indeed more plausible) understanding of the first question, it is to be noted at the outset that the main claim that is the subject of the original action launched by PPUB's liquidator is a claim for payment arising out of the *contractual* relationship between PPUB and CeDe. As such, there is nothing in that claim, besides the fact that it was brought by the liquidator of PPUB, which connects it with insolvency proceedings and their effects, in the sense of Article 4(1) of the Insolvency Regulation.

32. In its order for reference, the national court specifically asks about the relevance of the case-law of this Court concerning the interpretation of Article 3 of the Insolvency Regulation, as regards jurisdiction for insolvency proceedings. According to that line of case-law, Article 3(1) of the Insolvency Regulation confers jurisdiction only with regard to those actions which derive directly from insolvency proceedings and are closely connected with them. The decisive criterion for that purpose 'is not the procedural context of which that action is part, but the legal basis of the action. According to that approach, it must be determined whether the right or obligation which forms the basis of the action has its source in the ordinary rules of civil and commercial law or in derogating rules specific to insolvency proceedings'. [5]

33. It is true that, from a combined reading of Articles 3 and 4 of the Insolvency Regulation, it becomes apparent that that regulation seeks to align the courts having international jurisdiction with the law applicable to the insolvency proceedings. [6] Even if that general proposition cannot be doubted, it must be acknowledged that the correspondence of *ius* and *forum* cannot be ensured in all cases, inasmuch as the applicable law provisions of the Insolvency Regulation are relevant for proceedings other than those that qualify as insolvency proceedings. Indeed, whereas Article 3(1) of the Insolvency Regulation is confined to the issue of jurisdiction to open insolvency proceedings, Article 4(1) is broader, pointing to the law applicable to insolvency proceedings and *their effects*.

34. It should thus clearly be acknowledged that the case-law of the Court on the interpretation of Article 3 of the Insolvency Regulation is not automatically transposable, in all its aspects, to the interpretation of Article 4 of that regulation. The latter provision is broader in scope.

35. Having clarified that point, the issue of whether Article 4 of the Insolvency Regulation applies to the main claim in the present case must be answered bearing in mind the specific content of that provision. Article 4 of the Insolvency Regulation contains the general rule regarding the determination of the law applicable to 'insolvency proceedings and their effects'. That law, according to Article 4(1) of that regulation shall be, unless otherwise provided in that regulation, the law of the Member State within the territory of which such proceedings are opened (the *lex concursus*). Further, Article 4(2) of the regulation contains 'a non-exhaustive list of the various matters in the proceedings which are governed by the law of State of the opening of proceedings', [7] which includes, inter alia, 'the conditions under which set-offs may be invoked' (Article 4(2)(d)) and 'the effects of insolvency proceedings on current contracts to which the debtor is party' (Article 4(2)(e)).

36. The fact that Article 4(2) of the Insolvency Regulation makes reference to the conditions for invoking set-offs and to the effects of insolvency on current contracts cannot entail, in my view, that any claim relating to a contract where a party to that contract is subject to insolvency proceedings (and/or where a set-off is invoked against that claimant) falls automatically within the concept of 'insolvency proceedings and their effects' for the purposes of determining which provision governs the applicable law. The mere fact that it is the liquidator who has lodged such an action does not, in my view, change that conclusion. [8]

5 See, most recently, judgment of 6 February 2019, *NK* (C-535/17, EU:C:2019:96, paragraphs 26 and 28 and the case-law cited).

6 See also my Opinion in *NK (liquidator in the bankruptcies of PI)* (C-535/17, EU:C:2018:850, point 90). That leads to a correspondence of jurisdiction and applicable law in many cases. In particular, when a provision is categorised as being covered by insolvency law for the purposes of determining international jurisdiction under Article 3 of the Insolvency Regulation, that finding may also be relevant for the purposes of determining whether an issue is covered by the law applicable to insolvency proceedings and their effects, within the meaning of Article 4(1) of that regulation. See, to that effect, judgment of 10 December 2015, *Kornhaas* (C-594/14, EU:C:2015:806, paragraph 17).

7 Judgment of 21 January 2010, *MG Probud Gdynia* (C-444/07, EU:C:2010:24, paragraph 25).

8 Similarly, in the context of jurisdiction as governed by Article 3(1) of the Insolvency Regulation, the Court has declared that 'the fact that, after the opening of insolvency proceedings, a claim is brought by the liquidator appointed in those proceedings and that he acts in the interests of the creditors does not substantially amend the nature of the claim, which is independent from the insolvency proceedings and remains subject, in terms of the substance of the matter, to the rules of ordinary law'. Judgment of 6 February 2019, *NK* (C-535/17, EU:C:2019:96, paragraph 29). Similarly, judgment of 10 September 2009, *German Graphics Graphische Maschinen* (C-292/08, EU:C:2009:544, paragraph 33). See also my Opinion in *NK (liquidator in the bankruptcies of PI)* (C-535/17, EU:C:2018:850, point 60). See, however, on the limits to transposing the case-law of the Court regarding Article 3(1) of the Insolvency Regulation to the interpretation of Article 4(1) of that regulation, points 32 to 34 of this Opinion.

37. A case like the present one neatly demonstrates why any other conclusion would lead to unpredictable, or even bizarre, results. The law governing the contractual claim would not only differ from the one that the parties agreed on, but it would also change repeatedly, due to subsequent assignments and/or the assignees themselves eventually becoming subject to insolvency proceedings. All such changes to the applicable law would be based on events not only post-dating the conclusion of the contract and the choice of applicable law, but also largely unconnected to the contract. In addition, all this could be happening while proceedings are pending before the same court.

38. In those circumstances, it is my view that Article 4 of the Insolvency Regulation must be interpreted in the sense that it does not apply to the determination of the law applicable to a main claim which is the subject of an action brought before the courts of a Member State by the liquidator of a company subject to insolvency proceedings in another Member State, where that action seeks payment from another company arising from contractual obligations entered into before that insolvency.

39. In the light of that answer, it is not necessary to address questions two and three posed by the referring court. However, to the extent that the issues raised generally by those questions become relevant in the context of the assessment of the admissibility of the fourth and fifth questions, I will examine the impact of the assignment of PPUB's main claim to KAN and the subsequent insolvency of the latter company in Section B of this Opinion.

40. Finally, as pointed out in point 30 of this Opinion, a second understanding of the first question is also possible. According to that understanding, the first question refers to the possibility of finding that Article 4 of the Insolvency Regulation applies to *certain aspects of the proceedings triggered by the action* of the liquidator, such as the set-off claim. Thus on that understanding, the first question would not concern (just, or even at all) a change in the law applicable to the main contractual claim, but potentially (also) a change applicable to other elements of the action.

41. If such an understanding of the first question were correct, then clearly the first question would in fact overlap with the content of the fourth question, to which I will turn in Section C.1 of this Opinion. Here, suffice it to say that, in general, the fact that the main proceedings are not themselves insolvency proceedings does not preclude that Article 4 of the Insolvency Regulation may be relevant to certain aspects of those proceedings.

42. That provision determines the law applicable to insolvency proceedings and to *their effects*. The fact that insolvency proceedings in the sense of Article 1(1) of the Insolvency Regulation have been opened means that the status of one of the parties has changed. This of course might have repercussions (and, in this sense, *produce effects*) in *other proceedings*. This is confirmed by Article 4(2) of the Insolvency Regulation when it refers to the effects that insolvency proceedings may have on other proceedings, such as 'on proceedings brought by individual creditors, with the exception of lawsuits pending'.[9] The case-law offers further examples in this regard. For instance, in *Senior Home*, the issue of applicable law (in particular, the interpretation of Article 5 of the Insolvency Regulation, on the law applicable to rights *in rem*) arose outside the insolvency proceedings (and the Member State of the opening of proceedings).[10]

B. The fourth and fifth questions: admissibility

43. The fourth question asks, essentially, whether the set-off invoked by CeDe against the claim for payment introduced by PPUB's liquidator and arising from the same agreement is covered by Article 4(2)(d) of the Insolvency Regulation.

9 Article 4(2)(f) of the Insolvency Regulation.

10 Judgment of 26 October 2016 (C-195/15, EU:C:2016:804).

44. That question therefore presupposes that the set-off is invoked against a claim introduced by the liquidator of a company subject to insolvency proceedings. However, as the referring court explains in the reference for a preliminary ruling, the main claim, originally introduced by PPUB's liquidator, has in the meantime been assigned. Therefore, the set-off claim is now being asserted in the framework of proceedings between CeDe and KAN.

45. The issue of assignment, raised by the referring court in the second question with regard to the main action,[11] is relevant for the assessment of the fourth and fifth questions, which concern the applicability of Articles 4 and 6 of the Insolvency Regulation to the set-off claim.

46. As the Commission rightly points out, the assignment of the main claim raises doubts as to the need to give a response to questions four and five. Indeed, as recalled in point 35 of this Opinion, the provisions of the Insolvency Regulation on applicable law and, in particular, Article 4 of that regulation, apply to issues appertaining to insolvency proceedings themselves and to their effects, as further clarified by the second paragraph of that provision.

47. With that in mind, the assignment of a claim previously held by an insolvent company such as PPUB (or by its liquidator) to a (initially solvent) third party means that insolvency proceedings will no longer *produce any effects* in that regard. Thus, irrespective of the potential scope of interpretation of that form of words, I fail to see, in line with the response proposed by the Commission with regard to the second question concerning the assignment of the claim, how the provisions of the Insolvency Regulation concerning the applicable law, including Article 4(2)(d) and Article 6(1), would be of any relevance for the solution of the case in the main proceedings since, through the assignment, the claim is no longer connected to insolvency proceedings.

48. The subsequent insolvency of the new creditor (KAN) does not affect that result in the present case. According to the information provided by the referring court, the liquidator in the insolvency proceedings affecting KAN has not taken over the claim of KAN against CeDe, with the consequence that KAN is acting in the procedure before the referring court in its own name. That means that that claim has not been drawn into another insolvency mass and that it cannot affect the insolvent estate of KAN as administered by its liquidator. Accordingly, the set-off claim at issue no longer appears to be affected by any pending insolvency proceedings, and therefore, is outside the scope of the Insolvency Regulation.

49. Bearing that in mind, and regardless of whether CeDe's set-off claim would initially have fallen within the scope of Article 4(2)(d) of the Insolvency Regulation,[12] it must be concluded that, due to the assignment of PPUB's main claim to KAN, CeDe's set-off claim is no longer affected by insolvency proceedings. Therefore, I fail to see how any response given by the Court to the fourth question could assist the national court in making a decision in the main proceedings. The fourth question posed by the referring court, to the extent that it refers to the applicability of Article 4(2)(d) of the Insolvency Regulation to a set-off claim invoked against an action launched by PPUB's liquidator, has to be considered hypothetical and, therefore, inadmissible.[13]

50. The same fate must befall the fifth question posed by the referring court, which concerns the relationship between Article 4(2)(d) and Article 6(1) of the Insolvency Regulation and the specific situations to which Article 6(1) may apply.

11 Since the Insolvency Regulation does not govern the law applicable to the main claim, that question does not need to be addressed. See point 39 of this Opinion.

12 I think that this would indeed have been the case, as I explain in my response to question four, offered as an alternative argument, in Section C.1 of the present Opinion.

13 Indeed, according to established case-law, 'the justification for a request for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute concerning EU law'. See, for example, judgment of 7 November 2013, *Romeo* (C-313/12, EU:C:2013:718, paragraph 40 and the case-law cited).

51. As a result, questions four and five, in the specific context of the present case, are hypothetical and, therefore, inadmissible.

C. In the alternative: fourth and fifth questions (substance)

52. In order to assist the Court fully, if it were to reach a different conclusion on the admissibility of the fourth and fifth questions, I will briefly conclude by addressing the substantive issues raised by those questions in the remaining part of this Opinion. I must, however, point out that the order for reference offers a rather incomplete factual and legal framework. This renders my alternative analysis necessarily brief and abstract, because the exact nature of the problem before the national court remains somewhat unclear to me.

1. Fourth question: interpretation of Article 4(2)(d)

53. By its fourth question, the referring court asks whether the set-off invoked by CeDe against the claim of PPUB's liquidator is covered by Article 4(2)(d) of the Insolvency Regulation.

54. It should be noted at the outset that, even though Article 4 of the Insolvency Regulation (as clarified in response to question one) does not govern the law applicable to the main claim, this does not preclude, as indicated in points 41 and 42 of this Opinion, that that provision may indeed be relevant with regard to some other elements of those proceedings, including the possibility of and the conditions for a set-off claim. Indeed, insolvency proceedings may have an effect on the possibility of invoking such a set-off against the insolvent party.

55. Article 4 of the Insolvency Regulation constitutes a *lex specialis* in relation to the general rule in Article 17 of the Rome I Regulation, [14] according to which, 'where the right to set-off is not agreed by the parties, set-off shall be governed by the law applicable to the claim against which the right to set-off is asserted'.

56. As a result, even if the main claim is governed by the law of a Member State, it remains possible, by application of the special rule contained in Article 4 of the Insolvency Regulation, that a set-off may be governed by the law of another Member State.

57. Therefore, even if the order for reference suggests that the fourth question is only posed in case of a positive response to the first question (that is to say, if Article 4 were applicable to the main claim), I do not share the view that the fate of a set-off is sealed by that of the main claim.

58. Having clarified this, the exact scope of the fourth question remains, however, to be ascertained. Indeed, a claim like the one invoked by CeDe against the main claim requires the national court to determine (i) the substantive merits of the claim regarding non-contractual performance and (ii) the conditions for set-off. This second layer may cover different issues, depending on whether the national system differentiates between conditions for the existence of the right of set-off and their invocability under the rules of insolvency. Whereas it is clear that Article 4(2)(d) does not concern the issues as to the substantive merits that may arise under (i), [15] which will be determined by the law applicable to the contract as agreed by the parties, it is not readily apparent what aspects of (ii) are covered by Article 4(2)(d) of that regulation.

14 See, to that effect, judgments of 16 April 2015, *Lutz* (C-557/13, EU:C:2015:227, paragraph 46), and of 8 June 2017, *Vinyls Italia* (C-54/16, EU:C:2017:433, paragraph 29).

15 Based on the understanding that it was actually CeDe who brought a counterclaim against PPUB. In general, the exact structure of the litigation would depend on the national law and the way in which the set-off claim was brought at the national level in the individual case (whether as a parallel main claim, a counterclaim, or a defence). However, for the purposes of the present case, it appears clear that both of the (substantive) claims concerning (non-)performance of the contract, brought by PPUB and CeDe respectively, in whatever form, would be governed by the same (Swedish) law as the law of the original contract.

59. Indeed, the wording of Article 4(2)(d) of the Insolvency Regulation is far from clear in this regard. Some linguistic versions seem to imply that what is governed by that provision are the conditions under which set-offs may be 'invoked' (suggesting therefore the possibility of invoking them in insolvency proceedings),[16] whereas other linguistic versions merely refer to the conditions for set-off,[17] which could be understood as comprising the substantive conditions for set-off as well.

60. This uncertainty has fuelled scholarly discussion on the interpretation of Article 4(2)(d) of the Insolvency Regulation. There appear to be three approaches to this issue. According to the first interpretation, the *existence of the right of set-off* is a preliminary question, governed by the law applicable to the main claim, and Article 4(2)(d) then only applies to the *procedural* possibility of invoking set-off in the insolvency proceedings. Under the second interpretation, Article 4(2)(d) covers the law applicable to the right of set-off itself. The third interpretation says that the specific scope of Article 4(2)(d) depends on the *lex concursus*. This allows Article 4(2)(d) to remain neutral and not give preference to any national system over others.[18]

61. This issue should be assessed having in mind the particular nature of set-off. As stated by the Court, a set-off 'extinguishes simultaneously two obligations existing mutually between two persons'.[19] It is at the same time, and for both parties involved, a means of payment (discharging an obligation) and of enforcement: by invoking a set-off, one party forces its debtor to pay.[20] This means that, in the context of insolvency proceedings, set-offs directly affect the *par conditio creditorum*, as the creditors who have set-off claims can obtain complete satisfaction of their claims outside the insolvency proceedings. Taking this fact into account, the national legal systems of the different Member States have taken different, and sometimes quite divergent, stances towards the issue of set-off in insolvency, either by adopting a protective view of the individual creditor (regarding set-off as a means of guarantee) or of all the creditors of the insolvent debtor (limiting set-offs by reference to the *pari passu* principle).[21]

62. In view of both the divergent legal frameworks for set-off in the context of insolvency in the different Member States, and the different rationales underlying those systems, I find the third approach outlined above more reasonable in practical terms. The specific scope of Article 4 with regard to set-off arises from a combined reading of paragraphs 1 and 2 of Article 4 of the Insolvency Regulation. Whereas Article 4(1) of that regulation establishes as the general rule that the law applicable to insolvency proceedings *and their effects* shall be determined by the *lex concursus*, Article 4(2) contains a non-exhaustive list of those effects, which include, inter alia, '(d) the conditions under which set-offs may be invoked'. That suggests that, whenever the *lex concursus* establishes that insolvency produces some effects on set-offs, those effects are governed by it. As a result, in national systems where set-off operates as an effect of insolvency itself, it will fall, as such, under Article 4 of the regulation.

16 For example: EN: 'the conditions under which set-offs may be invoked'; ES: 'las condiciones de oponibilidad de una compensación'; DE: 'die Voraussetzungen für die Wirksamkeit einer Aufrechnung'; FR: 'les conditions d'opposabilité d'une compensation'; IT: 'le condizioni di opponibilità della compensazione'; NL: 'onder welke voorwaarden een verrekening kan worden tegengeworpen'; PT: 'As condições de oponibilidade de uma compensação'.

17 For example: CS: 'podmínky, za kterých může dojít k započtení pohledávek'; EL: 'οι προϋποθέσεις συμψηφισμού'; FI: 'kuittauksen edellytykset'; SV: 'förutsättningarna för kvittning'.

18 Summarising this debate see, for example, Pannen and Riedermann, 'Article 4. Law applicable' in Pannen, K., (ed.), *European Insolvency Regulation*, De Gruyter Recht, Berlin, 2007, p. 225; Garcimartín Alférez, F.J., 'El Reglamento de Insolvencia: una aproximación general' in *Cuadernos de derecho judicial*, No 4, 2001, pp. 229 to 352, at p. 286 et seq.; and, supporting the third interpretation, Virgós, M., and Garcimartín Alférez, F., *The European Insolvency Regulation: Law and Practice*, Kluwer Law International, The Hague, 2004, p. 112 et seq.

19 Judgment of 10 July 2003, *Commission* v *CCRE* (C-87/01 P, EU:C:2003:400, paragraph 59).

20 Pichonnaz, P., and Gullifer, L., *Set-off in Arbitration and Commercial Transactions*, Oxford University Press, Oxford, 2014, p. 72, point 4.10.

21 See, generally, on the different systematic approaches to set-off in insolvency, Zimmermann, R., *Comparative Foundations of a European Law of Set-Off and Prescription*, Cambridge University Press, Cambridge, 2002; and Johnston, W., Werlen, T. and Link, F., *Set-Off Law and Practice: An International Handbook*, 3rd ed., Oxford University Press, Oxford, 2018.

63. That being said, I would nonetheless discourage the Court from taking a stance on this issue in the context of the present case. The issues raised by questions four and five run much deeper. They deserve a proper and fully informed legal discussion, and not a passing statement in a case where the facts underpinning the questions asked, as well as the relevance of those questions, remain unclear.

2. Fifth question: interpretation of Article 6(1)

64. By its fifth question, the referring court seeks clarification of the meaning of Article 6(1) of the Insolvency Regulation. The national court harbours doubts about the precise scope of Article 6(1) of the Insolvency Regulation: Does it only apply if set-off is not possible under the *lex concursus*? Does it also apply where there are certain differences between the possibilities for set-off offered by the *lex concursus* and the law applicable to the main claim? Is it applicable even if there are no differences in terms of the law, but a set-off has been refused in the Member State of the opening of proceedings?

65. Article 6 of the Insolvency Regulation is an expression of the 'attenuated universality' model of the Insolvency Regulation, according to which 'first, the law applicable to the main insolvency proceedings and its effects is that of the Member State within the territory of which those proceedings were opened, albeit that, secondly, that regulation lays down a number of exceptions to that rule'.[22] As highlighted by recital 24 of the Insolvency Regulation, the introduction of a number of exceptions to the general rule seeks to protect legitimate expectations and the certainty of transactions in Member States other than that in which proceedings are opened.

66. The specific rationale that inspired the set-off exception is further clarified by recital 26 of the Insolvency Regulation, according to which Article 6 of that regulation is designed to address situations where a set-off is not permitted under the *lex concursus*. In such circumstances, the creditor should nevertheless 'be entitled to the set-off if it is possible under the law applicable to the claim of the insolvent debtor'. That recital further explains the reason behind this exception: set-offs acquire a 'kind of guarantee function based on legal provisions on which the creditor concerned can rely at the time when the claim arises'.

67. It therefore appears from a literal and systematic reading that Article 6 of the Insolvency Regulation (like other specific provisions, such as Article 5), functions as an exception with regard to Article 4 of that regulation. Indeed, Article 6(1) of the Insolvency Regulation 'corrects' the general rule in Article 4 (which establishes the general rule of the *lex concursus*) in order to preserve the legal certainty of those creditors which would have enjoyed a right of set-off under the law applicable to the insolvent debtor's claim.[23]

68. In that context, the question from the referring court boils down to the issue of whether the 'non-permissibility' of set-offs in the *lex concursus* under Article 4 of the Insolvency Regulation is to be addressed in concrete or abstract terms in order to trigger the exception laid down in Article 6(1) of that regulation.

69. The referring court outlines three possible interpretations: Article 6 could be understood as applying (a) where set-off claims are not allowed by the *lex concursus*; or, (b) where they are allowed under different conditions; or even, (c) where, after applying the conditions for set-off — which may be identical — a set-off is not allowed in a specific case.

22 See, by analogy, judgment of 26 October 2016, *Senior Home* (C-195/15, EU:C:2016:804, paragraph 17) and Opinion of Advocate General Szpunar in that case (EU:C:2016:369, points 21 to 23).

23 See, also Virgós, M., and Schmit, E., Report on the Convention on Insolvency Proceedings of 3 May 1996 (Document of the Council of the European Union, No 6500/96, DRS 8 (CFC)), point 109: 'In this way, set-off becomes, in substance, a sort of guarantee governed by a law on which the creditor concerned can rely at the moment of contracting or incurring the claim.'

70. The Commission considers that, due to its function as a 'guarantee', Article 6(1) of the Insolvency Regulation applies regardless of whether the *lex concursus* does not permit compensation by means of set-off generally or in a specific case. Conversely, the Spanish Government seems to argue that, if the *lex concursus* permits set-off (in any way), then it shall be the applicable law, with no possibility of recourse to the exception provided for in Article 6(1) of the Insolvency Regulation.

71. I agree with the Commission.

72. First, Article 6(1) of the Insolvency Regulation establishes that 'the opening of insolvency proceedings shall not affect *the right of creditors* to demand the set-off of their claims …, *where such a set-off is permitted* by the law applicable to the insolvent debtor's claim.'[24] The reference to the fact that the 'right … to demand the set-off' shall not be affected suggests that such a right to demand the set-off of claims already exists in a *specific* case.

73. Second, the objective of Article 6(1) of the Insolvency Regulation of safeguarding legal certainty in commercial transactions laid down by recital 26 can only be fulfilled if the 'non-permissibility' test is addressed *in concreto*. Indeed, in order to fulfil its function as a 'guarantee', Article 6(1) of the Insolvency Regulation must apply where the law applicable to the insolvent debtor's claim would have permitted such a set-off in the specific case.

74. In sum, adopting an approach focused on the concrete outcomes produced by the respective applicable laws in conflict in a given case, the test to be applied must zero in on the specific solution that would be arrived at by the law applicable to the main claim (including insolvency law).

75. That means that Article 6(1) of the Insolvency Regulation should apply not only where the *lex concursus* entirely excludes the possibility of applying a set-off, but also in cases where the specific conditions of access to a set-off differ, so that, according to the *lex concursus*, set-off would not be possible in a specific case, whereas it would have been possible under the law applicable to the main claim. In other words, for Article 6(1) of the Insolvency Regulation not to apply, there must be 'material equivalence' between the two sets of rules, so that the *lex concursus* remains applicable. Therefore, the mere fact that the *lex concursus* allows, under certain conditions, for the possibility of set-offs does not preclude the applicability of Article 6(1) of the Insolvency Regulation.

76. Finally, the last sub-question posed by the referring court asks about the situation where the rules of the *lex concursus* and the *lex causae* are equivalent, but their application in the specific case leads to different conclusions.

77. The description of the facts provided by the referring court is again unfortunately very thin in this regard. The only information provided states that the liquidator rejected the set-off claim in the framework of insolvency proceedings, without indicating any underlying reasons. Lacking the specific set of facts underlying this question, as well as any indication concerning the content of the *lex concursus* or the law governing the main claim, it is my view that the Court does not have the elements necessary to provide an answer to this question.

78. In any event, as a final and closing consideration, it should be emphasised that, according to Article 16 of the Insolvency Regulation, the main insolvency proceedings in one Member State are to be recognised in all the other Member States and that Article 25 of the regulation extends that rule of recognition to all judgments relating to the conduct and closure of proceedings.[25]

24 Emphasis added.

25 Judgment of 22 November 2012, *Bank Handlowy and Adamiak* (C-116/11, EU:C:2012:739, paragraph 41 and the case-law cited).

V. Conclusion

79. In the light of the foregoing, I propose that the Court should reply as follows to the first question referred for a preliminary ruling by the Högsta domstolen (Supreme Court, Sweden):

Article 4 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted in the sense that it does not apply to the determination of the law applicable to a claim which is the subject of an action brought before the courts of a Member State by the liquidator of a company subject to insolvency proceedings in another Member State, where that action seeks payment from another company on the basis of contractual obligations entered into before that insolvency.