



## Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

22 April 2021 \*

(Reference for a preliminary ruling – Regulation (EC) No 1346/2000 – Insolvency proceedings – Article 4 – Law applicable to insolvency proceedings – Law of the Member State within the territory of which the proceedings are opened – Article 13 – Acts detrimental to all the creditors – Exception – Conditions – Act subject to the law of a Member State other than the State of the opening of proceedings – Act which is not open to challenge on the basis of that law – Regulation (EC) No 593/2008 – Law applicable to contractual obligations – Article 12(1)(b) – Scope of the law applicable to the contract – Performance of the obligations arising from the contract – Payment made in performance of a contract subject to the law of a Member State other than the State of the opening of proceedings – Performance by a third party – Action for repayment of that payment in insolvency proceedings – Law applicable to that payment)

In Case C-73/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Federal Court of Justice, Germany), made by decision of 23 January 2020, received at the Court on 13 February 2020, in the proceedings

**ZM**, in his capacity as liquidator in the insolvency of Oeltrans Befrachtungsgesellschaft mbH,

v

**E.A. Frerichs**,

THE COURT (First Chamber),

composed of J.-C. Bonichot, President of the Chamber, R. Silva de Lapuerta (Rapporteur), Vice-President of the Court, L. Bay Larsen, C. Toader and M. Safjan, Judges,

Advocate General: G. Hogan,

Registrar: A. Calot Escobar,

having regard to the written procedure,

\* Language of the case: German.

after considering the observations submitted on behalf of:

- ZM, in his capacity as liquidator in the insolvency of Oeltrans Befrachtungsgesellschaft mbH, by J. Froehner, Rechtsanwalt,
- E.A. Frerichs, by J. van Zuethem, advocaat,
- the Portuguese Government, by L. Inez Fernandes, P. Barros da Costa, L. Medeiros and S. Duarte Afonso, acting as Agents,
- the European Commission, by M. Wilderspin and H. Leupold, 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 Article 13 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1) and Article 12(1)(b) of 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).
- 2 The request has been made in proceedings between ZM, in his capacity as liquidator in the insolvency of Oeltrans Befrachtungsgesellschaft mbH, and E.A. Frerichs, concerning the repayment by the latter of a payment made to it by Oeltrans Befrachtungsgesellschaft under a contract concluded between E.A. Frerichs and a company belonging to the Oeltrans group.

### **Legal context**

#### ***European Union law***

#### ***Regulation No 1346/2000***

- 3 Regulation No 1346/2000 was repealed by Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (OJ 2015 L 141, p. 19). However, at the time of the facts in the main proceedings, Regulation No 1346/2000 was applicable.
- 4 Recitals 23 and 24 of Regulation No 1346/2000 state:
  - ‘(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.'

5 Article 4 of that 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:

...

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

6 Article 13 of that regulation, entitled 'Detrimental acts', is worded as follows:

'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.'

### ***Regulation No 593/2008***

7 According to recital 16 of Regulation No 593/2008:

'To contribute to the general objective of this Regulation, legal certainty in the European judicial area, the conflict-of-law rules should be highly foreseeable. The courts should, however, retain a degree of discretion to determine the law that is most closely connected to the situation.'

8 Article 12 of that regulation, entitled 'Scope of the law applicable', provides, in paragraph 1 thereof:

'The law applicable to a contract by virtue of this Regulation shall govern in particular:

...

(b) performance;

...'

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

- 9 Oeltrans Befrachtungsgesellschaft and Tankfracht GmbH are companies established in Germany. They belonged to the Oeltrans group.
- 10 E.A. Frerichs, which is established in the Netherlands, and Tankfracht concluded a contract relating to an inland waterway vessel, under which the latter company was required to pay the former the sum of EUR 8 259.30 by way of remuneration. On 9 November 2010, Oeltrans Befrachtungsgesellschaft paid E.A. Frerichs the sum owed by Tankfracht in performance of that contract.
- 11 On 29 April 2011, insolvency proceedings were opened against Oeltrans Befrachtungsgesellschaft by the Amtsgericht Hamburg (Local Court, Hamburg, Germany). On 21 December 2014, the initial liquidator in those proceedings brought before the court having jurisdiction an action for repayment of that sum of EUR 8 259.30 together with interest, on the basis of the voidability of the company's legal acts. Owing to omissions on the part of that court, the application was not served on E.A. Frerichs until December 2016. ZM has been the liquidator in those proceedings since 25 March 2016.
- 12 Taking the view that the action in the main proceedings was governed by German law, the Landgericht (Regional Court, Germany) granted the liquidator's application.
- 13 The appeal court varied the decision of the Landgericht (Regional Court), upholding E.A. Frerichs' objection that the action was time-barred, and dismissed that application, also on the basis of German law.
- 14 ZM brought an appeal on a point of law (*Revision*) before the referring court, the Bundesgerichtshof (Federal Court of Justice, Germany), seeking reinstatement of that decision.
- 15 According to that court, the outcome of that appeal depends on the interpretation of Article 13 of Regulation No 1346/2000 and Article 12(1)(b) of Regulation No 593/2008.
- 16 Under point (m) of the second sentence of Article 4(2) of Regulation No 1346/2000, the law of the Member State within the territory of which insolvency proceedings are opened is to determine, in particular, the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors. That court notes that since the insolvency proceedings against Oeltrans Befrachtungsgesellschaft were opened in Germany, the question of the voidability of the payment of EUR 8 259.30 made by that company to E.A. Frerichs should be assessed in the light of German law and that, in accordance with German law, the application brought before it should be granted because, contrary to what was held by the appeal court, the referring court considers that the action at issue in the main proceedings is not time-barred.
- 17 The referring court states, however, that E.A. Frerichs is relying on the applicability of Article 13 of Regulation No 1346/2000, has submitted that that payment must be assessed in the light of Netherlands law and has adduced evidence that that law does not allow any means of challenging the payment.

- 18 In that regard, that court considers that the contract concluded between Tankfracht and E.A. Frerichs is, whatever its legal classification, governed by Netherlands law.
- 19 Nevertheless, the referring court finds that the question whether the first condition set out in Article 13 of Regulation No 1346/2000, according to which the detrimental act in question is subject to the law of a Member State other than the State within the territory of which insolvency proceedings are opened, is satisfied in the dispute before it depends on whether, under Article 12(1)(b) of Regulation No 593/2008, the payment made by a third party, in this case Oeltrans Befrachtungsgesellschaft, for the purposes of settling the claim held, on the basis of that contract, by E.A. Frerichs against Tankfracht is also subject to Netherlands law.
- 20 In those circumstances, the Bundesgerichtshof (Federal Court of Justice) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:
- ‘Are Article 13 of [Regulation No 1346/2000] and Article 12(1)(b) of Regulation [No 593/2008] to be interpreted as meaning that the law applicable to a contract under the latter regulation also governs the payment made by a third party in performance of a contracting party’s contractual payment obligation?’

### **Consideration of the question referred**

- 21 By its question, the referring court asks, in essence, whether Article 13 of Regulation No 1346/2000 and Article 12(1)(b) of Regulation No 593/2008 must be interpreted as meaning that the law applicable to the contract under the latter regulation also governs the payment made by a third party in performance of a contracting party’s contractual payment obligation where, in insolvency proceedings, that payment is challenged as an act detrimental to all the creditors.
- 22 As a preliminary point, it should be recalled that Article 13 of Regulation No 1346/2000 provides for an exception to the general rule, in Article 4(1) of that regulation, that 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 (judgment of 16 April 2015, *Lutz*, C-557/13, EU:C:2015:227, paragraph 34).
- 23 Under Article 13 of that regulation, Article 4(2)(m) thereof does not apply where the person who benefited from an act detrimental to all the creditors provides proof that the act is subject to the law of a Member State other than the State within the territory of which insolvency proceedings are opened and that that law does not allow any means of challenging that act in the relevant case.
- 24 As stated in recital 24 of Regulation No 1346/2000, that exception, the objective of which is to protect legitimate expectations and the certainty of transactions in Member States other than that in which insolvency proceedings are opened, must be interpreted strictly and its scope cannot go beyond what is necessary to achieve that objective (judgment of 15 October 2015, *Nike European Operations Netherlands*, C-310/14, EU:C:2015:690, paragraph 18 and the case-law cited).
- 25 As regards the objective pursued by Article 13 of Regulation No 1346/2000, the Court has held that the aim of that article is 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 (judgment of 8 June 2017, *Vinyls Italia*, C-54/16, EU:C:2017:433, paragraph 30 and the case-law cited).

- 26 The Court has also held that Articles 4 and 13 of Regulation No 1346/2000 constitute a *lex specialis* in relation to Regulation No 593/2008 and must be interpreted in the light of the objectives pursued by Regulation No 1346/2000 (judgment of 8 June 2017, *Vinyls Italia*, C-54/16, EU:C:2017:433, paragraph 48 and the case-law cited).
- 27 In the present case, since the insolvency proceedings at issue in the main proceedings were opened in Germany, the law applicable to those proceedings and their effects is, in accordance with Article 4(1) of Regulation No 1346/2000, German law.
- 28 It follows that, as the referring court points out, pursuant to point (m) of the second sentence of Article 4(2) of that regulation, according to which the law of the Member State within the territory of which insolvency proceedings are opened is to determine, in particular, the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors, the question of the voidability of the payment of EUR 8 259.30 made by Oeltrans Befrachtungsgesellschaft to E.A. Frerichs must, in principle, be assessed in the light of German law.
- 29 However, since that payment was made in order to perform a contractual obligation incumbent on Tankfracht on the basis of the contract concluded with E.A. Frerichs and that contract is governed by Netherlands law, the referring court raises the question whether, for the purposes of applying Article 13 of Regulation No 1346/2000, that payment must be regarded as also subject to that law.
- 30 In that regard, it must be borne in mind that, according to recital 23 of that regulation, the regulation should set out uniform rules on conflict of laws which replace, within their scope of application, national rules of private international law.
- 31 Furthermore, it should be noted that, in accordance with the objectives pursued by Article 13 of that regulation, as recalled in paragraph 25 above, a party to a contract which has received a payment in performance of that contract must be able to expect that the law applicable to that contract will also govern that payment, even after insolvency proceedings have been opened.
- 32 The same applies where that payment is made not by the contracting partner of that party but by a third party, since, for that party, it is clear that, by the payment concerned, that third party intends to perform the contractual payment obligation incumbent on that contracting partner. Thus, in that case, the party in question must also be able to expect that, even after insolvency proceedings have been opened, the payment at issue will continue to be governed by the law applicable to the contract which constitutes its legal basis.
- 33 A party to a contract who has benefited from a payment made by its contracting partner or by a third party in performance of that contract cannot reasonably be required to foresee that insolvency proceedings may be opened against that contracting partner or that third party and, if so, in which Member State those proceedings will be opened.

- 34 Furthermore, as the Portuguese Government and the European Commission submitted in their written observations, a contrary interpretation of Article 13 of Regulation No 1346/2000 would undermine the effectiveness of that provision and would run counter to its purpose, namely to allow derogation from the general rule laid down in Article 4(1) of that regulation for the purposes, inter alia, of protecting the legitimate expectations of those who have benefited from acts detrimental to all the creditors, since it would have the consequence that such payments made by third parties would always be governed by the law of the Member State within the territory of which insolvency proceedings are opened.
- 35 Moreover, the interpretation that, for the purposes of applying Article 13 of Regulation No 1346/2000, the law applicable to the performance, by a contracting partner or a third party, of a contractual obligation is the law governing the contract from which that obligation arises is supported by the wording of Article 12(1)(b) of Regulation No 593/2008.
- 36 That provision states that the law applicable to the contract under the latter regulation is to govern, in particular, the performance of the obligations arising from the contract.
- 37 It therefore follows from the wording of that provision that the performance of a contractual payment obligation is governed by the law applicable to the contract constituting the legal basis of that obligation.
- 38 Moreover, as stated in recital 16 of Regulation No 593/2008, the conflict-of-law rules laid down in that regulation should be highly foreseeable in order to contribute to the achievement of the general objective of that regulation, namely legal certainty in the European judicial area.
- 39 It must be stated that an interpretation of Article 13 of Regulation No 1346/2000 to the effect that the law applicable to a contract also governs the performance, by a contracting partner or by a third party, of an obligation arising from that contract is consistent with that objective of legal certainty, since it ensures that, even after insolvency proceedings have been opened, that obligation will continue to be governed by that law.
- 40 In the light of all the foregoing considerations, the answer to the question referred is that Article 13 of Regulation No 1346/2000 and Article 12(1)(b) of Regulation No 593/2008 must be interpreted as meaning that the law applicable to the contract under the latter regulation also governs the payment made by a third party in performance of a contracting party's contractual payment obligation where, in insolvency proceedings, that payment is challenged as an act detrimental to all the creditors.

### **Costs**

- 41 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

**Article 13 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings and Article 12(1)(b) of 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) must be interpreted as meaning that the law applicable to the contract under the latter regulation also governs the payment made by a third party in performance of a contracting party's contractual payment obligation where, in insolvency proceedings, that payment is challenged as an act detrimental to all the creditors.**

[Signatures]