



Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

4 September 2014 *

(Reference for a preliminary ruling — Judicial cooperation in civil matters — Regulation (EC) No 1346/2000 — Article 3(1) — Concept of an ‘action related to insolvency proceedings and closely connected with those proceedings’ — Regulation (EC) No 44/2001 — Article 1(2)(b) — Concept of ‘bankruptcy’ — Action for payment of a debt brought by the insolvency administrator — Debt arising out of the international carriage of goods — Relationship between Regulations Nos 1346/2000 and 44/2001 and the Convention for the International Carriage of Goods by Road (CMR))

In Case C-157/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Lietuvos Aukščiausiasis Teismas (Lithuania), made by decision of 20 March 2013, received at the Court on 26 March 2013, in the proceedings

Nickel & Goeldner Spedition GmbH

v

“Kintra” UAB,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, A. Borg Barthet, E. Levits, M. Berger (Rapporteur), and S. Rodin, Judges,

Advocate General: N. Jääskinen,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Nickel & Goeldner Spedition GmbH, by F. Heemann, advokatas
- “Kintra” UAB, by V. Onačko, advokatas,
- the Lithuanian Government, by D. Kriauciūnas and G. Taluntytė, acting as Agents,
- the German Government, by T. Henze, J. Möller and J. Kemper, acting as Agents,
- the Swiss Government, by M. Jametti, acting as Agent,

* Language of the case: Lithuanian.

— the European Commission, by A. Steiblytė 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 3(1) and 44(3) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1), and – Articles 1(2)(b) and 71 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).
- 2 The request has been made in proceedings between Nickel & Goeldner Spedition GmbH ('Nickel & Goeldner Spedition'), a company incorporated under German law, and "Kintra" UAB ('Kintra'), a company incorporated under Lithuanian law that has been placed in liquidation, concerning the payment, the principal sum of 194 077,76 litai (LTL) in respect of services comprising the international carriage of goods.

Legal context

Regulation No 1346/2000

- 3 In accordance with recital 6 in the preamble to Regulation No 1346/2000, that regulation is confined to 'provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings'.
- 4 Article 3(1) of that regulation, which deals with international jurisdiction, sets out the following basic rule of jurisdiction:

'The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.'

- 5 Article 44(3)(a) of that regulation provides:

'This Regulation shall not apply:

- (a) in any Member State, to the extent that it is irreconcilable with the obligations arising in relation to bankruptcy from a convention concluded by that State with one or more third countries before the entry into force of this Regulation'.

Regulation No 44/2001

- 6 Pursuant to recital 7 in the preamble to Regulation No 44/2001, '[t]he scope of this Regulation must cover all the main civil and commercial matters apart from certain well-defined matters'.

7 Article 1 of that regulation defines the scope of that regulation in these terms:

‘1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.

2. The Regulation shall not apply to:

...

(b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;

...’

8 As regards the rules of jurisdiction, Article 2(1) of that regulation sets out the following fundamental rule:

‘Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.’

9 In matters relating to a contract, Article 5(1) of that regulation lays down a special rule, worded as follows:

‘A person domiciled in a Member State may, in another Member State, be sued:

1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

— in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,

— in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,

(c) if subparagraph (b) does not apply then subparagraph (a) applies.’

10 Article 71(1) of Regulation No 44/2001, which deals with relations with conventions on particular matters (‘specialised conventions’) to which the Member States are parties, provides:

‘This Regulation shall not affect any conventions to which the Member States are parties and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments.’

The CMR

11 The Convention on the Contract for the International Carriage of Goods by Road, signed in Geneva on 19 May 1956, as amended by the Protocol signed in Geneva on 5 July 1978 (‘the CMR’) applies, in accordance with Article 1(1) thereof, ‘to every contract for the carriage of goods by road in vehicles for reward, when the place of taking over of the goods and the place designated for delivery ... are situated in two different countries, of which at least one is a contracting country, ... irrespective of the place of residence and the nationality of the parties’.

12 The CMR was negotiated under the auspices of the United Nations Economic Commission for Europe. More than 50 States, including the Republic of Lithuania, the Federal Republic of Germany and the French Republic, have acceded to the CMR.

13 Under Article 31(1) of the CMR:

‘In legal proceedings arising out of carriage under this Convention, the plaintiff may bring an action in any court or tribunal of a contracting country designated by agreement between the parties and, in addition, in the courts or tribunals of a country within whose territory:

- (a) The defendant is ordinarily resident, or has his principal place of business, or the branch or agency through which the contract of carriage was made, or
- (b) The place where the goods were taken over by the carrier or the place designated for delivery is situated.’

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

14 On 28 May 2009, the Vilniaus apygardos teismas (Regional Court, Vilnius) opened insolvency proceedings against Kintra, which has its registered office in Lithuania.

15 The insolvency administrator of Kintra applied to the Vilniaus apygardos teismas for an order that Nickel & Goeldner Spedition, which has its registered office in Germany, pay, by way of principal sum, LTL 194 077,76 in respect of services comprising the international carriage of goods provided by Kintra for Nickel & Goeldner Spedition, inter alia in France and in Germany.

16 According to the insolvency administrator of Kintra, the jurisdiction of the Vilniaus apygardos teismas was based on Article 14(3) of the Lithuanian Law on the insolvency of undertakings. Nickel & Goeldner Spedition disputed that jurisdiction claiming that the dispute fell within the scope of Article 31 of the CMR and of Regulation No 44/2001.

17 By judgment of 29 August 2011, the Vilniaus apygardos teismas granted the application of the insolvency administrator of Kintra, holding that its jurisdiction resulted from the provisions of the Lithuanian Law on the insolvency of undertakings and from Regulation No 1346/2000.

18 By decision of 6 June 2012, the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania) upheld the judgment at first instance. It held that the dispute related to the exception concerning bankruptcy, laid down in Article 1(2)(b) of Regulation No 44/2001, and that the court with jurisdiction in the dispute must be decided in accordance with Article 3(1) of Regulation No 1346/2000 and with the provisions of the Lithuanian Law on the insolvency of undertakings.

19 Hearing the case on appeal, the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- ‘1. Where an action is brought by an insolvency administrator, acting in the interests of all the creditors of the undertaking and seeking to restore the undertaking’s solvency and to increase the amount of the assets of the insolvent undertaking so that as many creditors’ claims as possible may be satisfied — whilst it should be noted that the same effects are also sought, for instance, by an insolvency administrator’s actions to set transactions aside (*actio Pauliana*), which have been recognised as closely connected with the insolvency proceedings — and given the fact that in the case at issue payment of a sum owed is claimed under the [CMR] and the Lithuanian Civil Code (general provisions of civil law) for the international carriage of goods that was performed, is

that action to be considered to be connected closely (by direct link) with the applicant's insolvency proceedings, must jurisdiction to hear it be determined in accordance with the rules of Regulation No 1346/2000 and does it fall within the exception to the application of Regulation No 44/2001?

2. In the event that the first question is answered in the affirmative, the Lietuvos Aukščiausiasis Teismas requests the Court to explain whether, where the obligation at issue (the defendant's obligation, based on the improper performance of its contractual obligations, to pay the sum owed and default interest to the insolvent applicant for the international carriage of goods) has arisen prior to the opening of insolvency proceedings in respect of the applicant, Article 44(3)(a) of Regulation No 1346/2000 must be relied upon and this regulation is inapplicable because jurisdiction over the case is established in accordance with Article 31 of the [CMR] as provisions of a specialised convention?
3. In the event that the first question is answered in the negative and the dispute under consideration falls within the scope of Regulation No 44/2001, the Lietuvos Aukščiausiasis Teismas requests the Court to explain whether, in the present instance, inasmuch as Article 31(1) of the CMR ... and Article 2(1) of Regulation No 44/2001 do not conflict with each other, it should be considered that, upon placing the relations at issue within the scope of the [CMR] (the specialised convention), the legal rules in Article 31 of the [CMR] are to be applied when establishing which State's courts have jurisdiction over the action under consideration, if the legal rules in Article 31(1) of the [CMR] do not run counter to the fundamental objectives of Regulation No 44/2001, do not lead to results which are less favourable for achieving sound operation of the internal market and are sufficiently clear and precise?

The questions referred

The first question

- 20 By its first question the referring court asks, in essence, whether an action for the payment of a debt based on the provision of carriage services brought by the insolvency administrator of an insolvent undertaking in the course of insolvency proceedings opened in one Member State and directed against the recipient of those services, established in another Member State, falls within the scope of Regulation No 1346/2000 or of Regulation No 44/2001.
- 21 In this respect, it should be noted that, relying inter alia on the preparatory documents relating to the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1978 L 304, p. 36), which was replaced by Regulation No 44/2001, the Court has held that that regulation and Regulation No 1346/2000 must be interpreted in such a way as to avoid any overlap between the rules of law that those texts lay down and any legal vacuum. Accordingly, actions excluded, under Article 1(2)(b) of Regulation No 44/2001, from the application of that regulation in so far as they come under 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings' fall within the scope of Regulation No 1346/2000. Following the same reasoning, actions which fall outside the scope of Article 3(1) of Regulation No 1346/2000 fall within the scope of Regulation No 44/2001 (judgment in *F-Tex*, C-213/10, EU:C:2012:215, paragraphs 21, 29 and 48).
- 22 The Court also noted that, as inter alia recital 7 in the preamble to Regulation No 44/2001 states, the intention on the part of the EU legislature was to provide for a broad definition of the concept of 'civil and commercial matters' referred to in Article 1(1) of that regulation and, consequently, to provide that the article should be broad in its scope. By contrast, the scope of application of Regulation

No 1346/2000, in accordance with recital 6 in the preamble thereto, should not be broadly interpreted (judgment in *German Graphics Graphische Maschinen*, C-292/08, EU:C:2009:544, paragraphs 23 to 25).

- 23 Applying those principles, the Court has found that only actions which derive directly from insolvency proceedings and are closely connected with them are excluded from the scope of Regulation No 44/2001. Consequently, only those actions fall within the scope of Regulation No 1346/2000 (judgment in *F-Tex*, EU:C:2012:215, paragraphs 23 and 29 and the case-law cited).
- 24 As regards the application of that distinction, the Court has held that an application to make good a deficiency in the assets, which, under French law, may be taken by the insolvency administrator against the managers of the company in order to have them declared liable, must be considered to be an action which derives directly from insolvency proceedings and is closely connected with them. In order to reach that conclusion, the Court relied, in essence, on the consideration that that action was based on provisions derogating from the general rules of civil law (see, in the context of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial proceedings, judgment in *Gourdain*, 133/78, EU:C:1979:49, paragraphs 4 to 6). The Court has adopted a similar view in relation to an action to set a transaction aside which, in German law, may be taken by the insolvency administrator in order to challenge acts undertaken before the insolvency proceedings were opened which are detrimental to the creditors. It noted, in that context, that the action was based in the national rules relating to insolvency proceedings (judgment in *Seagon*, C-339/07, EU:C:2009:83, paragraph 16).
- 25 By contrast, the Court has held that an action brought on the basis of a reservation of title clause against an insolvency administrator has only an insufficiently direct and insufficiently close link with insolvency proceedings on the ground, in essence, that the question of law raised in such an action is independent of the opening of insolvency proceedings (judgment in *German Graphics Graphische Maschinen*, EU:C:2009:544, paragraphs 30 and 31). Similarly, an action brought by an applicant on the basis of an assignment of claims granted by an insolvency administrator and relating to the right to have a transaction set aside conferred on the latter by the German insolvency law was considered to be not closely connected with the insolvency proceedings. The Court noted in that respect that the exercise of the right acquired by an assignee of the right acquired is subject to rules other than those applicable in insolvency proceedings (judgment in *F-Tex*, EU:C:2012:215, paragraphs 41 and 42).
- 26 It is apparent from that case-law that it is true that, in its assessment, the Court has taken into account the fact that the various types of actions which it heard were brought in connection with insolvency proceedings. However, it has mainly concerned itself with determining on each occasion whether the action at issue derived from insolvency law or from other rules.
- 27 It follows that the decisive criterion adopted by the Court to identify the area within which an action falls is not the procedural context of which that action is part, but the legal basis thereof. According to that approach, it must be determined whether the right or the obligation which respects the basis of the action finds its source in the common rules of civil and commercial law or in the derogating rules specific to insolvency proceedings.
- 28 In the main proceedings, it is not disputed that the action at issue is an action for the payment of a debt arising out of the provision of services in implementation of a contract for carriage. That action could have been brought by the creditor itself before its divestment by the opening of insolvency proceedings relating to it and, in that situation, the action would have been governed by the rules concerning jurisdiction applicable in civil and commercial matters.

- 29 The fact that, after the opening of insolvency proceedings against a service provider, the action for payment is taken by the insolvency administrator appointed in the course of those proceedings and that the latter acts in the interest of the creditors does not substantially amend the nature of the debt relied on which continues to be subject, in terms of the substance of the matter, to the rules of law which remain unchanged.
- 30 It is therefore necessary to hold that the action at issue in the main proceedings does not have a direct link with the insolvency proceedings opened in relation to the applicant.
- 31 Therefore, and with it being necessary to examine whether the action is closely connected with the insolvency proceedings, it must be held that that action is not covered by Article 3(1) of Regulation No 1346/2000 and, following the same reasoning, that it does not concern bankruptcy or winding-up for the purposes of Article 1(2)(b) of Regulation No 44/2001.
- 32 Consequently, the answer to the first question is that Article 1(1) of Regulation No 44/2001 must be interpreted as meaning that an action for the payment of a debt based on the provision of carriage services taken by the insolvency administrator of an insolvent undertaking in the course of insolvency proceedings opened in one Member State and taken against a service recipient established in another Member State comes under the concept of ‘civil and commercial matters’ within the meaning of that provision.

The second question

- 33 The second question was raised only if the dispute in the main proceedings were to fall within the scope of Regulation No 1346/2000.
- 34 Given the answer to the first question, there is no need to answer the second question.

The third question

- 35 By its third question, the referring court seeks to ascertain whether, in a situation where a dispute falls within the scope of both Regulation No 44/2001 and the CMR a Member State may, in accordance with Article 71(1) of that regulation, apply the rules concerning jurisdiction provided for in the CMR and not those set by that regulation.
- 36 Although it is apparent from the answer to the first question that the dispute in the main proceedings falls within the scope of Regulation No 44/2001, it is for the referring court, which alone has jurisdiction to determine the facts, to determine whether the carriage services to which the request for payment before it relates meet the conditions for application of the CMR, as set out in Article 1 thereof.
- 37 In the event that the referring court so determines, it must be noted that, according to the interpretation given by the Court of Article 71 of Regulation No 44/2001, the rules governing jurisdiction, the recognition or enforcement of judgments laid down in the specialised conventions to which the Member States were already party at the time of entry into force of that regulation had, in principle, the effect of precluding the application of provisions of that regulation relating to the same question (judgment in *TNT Express Nederland*, C-533/08, EU:C:2010:243, paragraphs 39, 45 to 48). The CMR, relating to the international carriage of goods by road, to which the Republic of Lithuania acceded in 1993, is one of the specialised conventions covered by that provision.
- 38 However, the Court stated that the application, in relation to matters governed by specialised conventions, of the rules provided for by those conventions cannot compromise the principles which underlie judicial cooperation in civil and commercial matters in the EU such as the principles,

recalled in recitals 6, 11, 12 and 15 to 17 in the preamble to Regulation No 44/2001, of the free movement of judgments in civil and commercial matters, predictability as to the courts having jurisdiction and therefore legal certainty for litigants, the sound administration of justice, minimisation of the risk of concurrent proceedings, and mutual trust in the administration of justice in the EU (judgments in *TNT Express Nederland*, EU:C:2010:243, paragraph 49, and *Nipponkoa Insurance Co. (Europe)*, C-452/12, EU:C:2013:858, paragraph 36).

- 39 As regards the rules covered by the third question, namely the rules concerning jurisdiction laid down in Article 31(1) of the CMR, it is apparent *inter alia* from that provision that it allows the applicant to choose between the courts of the country in which the defendant is ordinarily resident, those of the country where the goods were taken over by the carrier and those of the country designated for delivery.
- 40 The choice thus open to the applicant corresponds, in essence, to that provided for by Regulation No 44/2001. In matters relating to a contract, the claimant may, under Articles 2(1) and 5(1) of that regulation, choose between the courts of the Member State in which the defendant is domiciled and those for the place of performance of the obligation in question. As regards a contract for carriage, which comes under the category of contracts for the provision of services (see, to that effect, judgment in *Rehder*, C-204/08, EU:C:2009:439, paragraphs 29 and 30), that place is, in accordance with the second indent of Article 5(1)(b) of that regulation, the place in a Member State where, under the contract, the services were provided or should have been provided.
- 41 It is true that the second indent of Article 5(1)(b) of Regulation No 44/2001, the wording of which refers to only one place of performance, offers the claimant less choice than Article 31(1) of the CMR, which allows him to choose between the place where the goods were taken over by the carrier and the place designated for delivery of the goods. However, that fact is not such as to affect the compatibility of Article 31(1) of the CMR with principles which underlie judicial cooperation in civil and commercial matters in the EU. The Court has accepted in relation to contracts for carriage that, in certain circumstances, the applicant may have the choice between the courts of the place of departure and those of the place of arrival. In that respect, it has stated that such a choice granted to the applicant, apart from respecting the criterion of proximity, also satisfies the requirement of predictability, in so far as it allows the applicant, as well as the defendant, easily to identify the courts before which proceedings may be brought. What is more, it is consistent with the objective of legal certainty, since the applicant's choice is limited to two possible judicial fora within the framework of the second indent of Article 5(1)(b) of Regulation No 44/2001 (judgment in *Rehder*, EU:C:2009:439, paragraph 45).
- 42 In light of the foregoing, the answer to the third question is that Article 71 of Regulation No 44/2001 must be interpreted as meaning that, in a situation where a dispute falls within the scope of both the regulation and the CMR, a Member State may, in accordance with Article 71(1) of that regulation, apply the rules concerning jurisdiction laid down in Article 31(1) of the CMR.

Costs

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

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

1. **Article 1(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that an action for the payment of a debt based on the provision of**

carriage services taken by the insolvency administrator of an insolvent undertaking in the course of insolvency proceedings opened in one Member State and taken against a service recipient established in another Member State comes under the concept of ‘civil and commercial matters’ within the meaning of that provision.

2. **Article 71 of Regulation No 44/2001 must be interpreted as meaning that, in a situation where a dispute falls within the scope of both that regulation and the Convention on the Contract for the International Carriage of Goods by Road, signed in Geneva on 19 May 1956, as amended by the Protocol signed in Geneva on 5 July 1978, a Member State may, in accordance with Article 71(1) of that regulation, apply the rules concerning jurisdiction laid down in Article 31(1) of that convention.**

[Signatures]