Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

8 June 2017*

(Reference for a preliminary ruling — Area of freedom, security and justice — Insolvency proceedings — Regulation (EC) No 1346/2000 — Articles 4 and 13 — Acts detrimental to all the creditors — Conditions in which the act in question may be challenged — 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 — Article 3(3) — Law chosen by the parties — Location of all the elements of the situation concerned in the State of the opening of proceedings — Effect)

In Case C-54/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale Ordinario di Venezia (District Court, Venice, Italy), by decision of 7 January 2016, received at the Court on 29 January 2016, in the proceedings

Vinyls Italia SpA, in liquidation

v

Mediterranea di Navigazione SpA

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, M. Berger (Rapporteur), A. Borg Barthet, E. Levits and F. Biltgen, Judges,

Advocate General: M. Szpunar,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 1 December 2016,

after considering the observations submitted on behalf of:

— Vinyls Italia SpA, in liquidation, by S. Girotto, F. Marrella and M. Pizzigati, avvocati,

— Mediterranea di Navigazione SpA, by M. Maresca, F. Campodonico, L. Fabro and G. Duca, avvocati,

— the Italian Government, by G. Palmieri, acting as Agent, assisted initially by D. Del Gaizo, and subsequently by P. Pucciariello, avvocati dello Stato,

* Language of the case: Italian.

— the Greek Government, by E. Zisi and S. Charitaki, acting as Agents,

— the European Commission, by E. Montaguti, M. Heller and M. Wilderspin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 2 March 2017,

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).

2 The request has been made in proceedings between Vinyls Italia SpA, in liquidation, and Mediterranea di Navigazione SpA ('Mediterranea') concerning an action to set certain transactions aside and for the repayment, by Mediterranea, of sums which Vinyls Italia SpA paid to it in the six months preceding the declaration of insolvency.

Legal context

The Rome Convention

3 Article 3(1) of the Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (OJ 1980 L 266, p. 1) ('the Rome Convention') provides as follows:

'A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. …'

4 Article 2 of the First Protocol on the interpretation by the Court of Justice of the European Communities of the Rome Convention (OJ 1989 L 48, p. 1) lists the courts of the Member States which may request the Court to give a preliminary ruling on a question raised in a case pending before them and concerning the interpretation of the provisions of that Convention. In the case of the Italian Republic, that power is reserved to the Corte suprema di cassazione (Supreme Court of Cassation) and to the Consiglio di Stato (Council of State).

EU law

Regulation No 1346/2000

5 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.'

6 Article 4 of Regulation No 1346/2000 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, nullity, voidability or unenforceability of legal acts detrimental to all the creditors.'

7 Under Article 13 of Regulation No 1346/2000:

'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

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

The Rome I Regulation

8 The first subparagraph of Article 1(1) 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; 'the Rome I Regulation') provides:

'This Regulation shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters.'

9 Article 3 of the Rome I Regulation, entitled 'Freedom of choice', provides in paragraphs (1) and (3):

'1. A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.

…

3. Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.'

Italian law

10 Article 67(2) of the legge fallimentare (Law on insolvency), approved by regio decreto No 267 (Royal Decree No 267) of 16 March 1942 (GURI No 81, of 6 April 1942), provides:

'The following shall also be set aside if the insolvency administrator demonstrates that the other party was aware of the debtor's insolvency: liquidated and payable debts, acts done for consideration and those conferring preferential creditor status in respect of debts, including of third parties, established at the same time, if they were completed within six months of the declaration of insolvency.'

11 Under Article 167 of the codice di procedura civile (Civil Procedure Code, 'the CPC'):

'In his statement of defence, the defendant must plead all the grounds of defence, by addressing the claims made by the applicant, provide his contact details, his tax identification number, the evidence which he intends to rely on and the documents which he is attaching to the case-file, and set out the form of order sought.

The defendant must raise any counterclaims and procedural or substantive objections which cannot be raised by the court of its own motion, failing which they will be time-barred.'

12 Article 183 of the CPC states:

'At the hearing scheduled for the first attendance of the parties …

… the parties may clarify and amend the applications, objections and submissions already formulated.

…

Where that is necessary, the court may allow the parties the following strict time-limits:

(1) an additional period of 30 days in order to lodge pleadings limited solely to clarifications of, or amendments to, applications, objections and submissions already made.

…

(3) an additional period of 20 days solely for the provision of contrary evidence.'

United Kingdom law

13 Section 239(2) and (3) of the Insolvency Act 1986 ('the IA 1986'), applicable in England and Wales, provides:

'2. Where the company has at a relevant time (defined in the next section) given a preference to any person, the [insolvency administrator] may apply to the court for an order under this section.

3. Subject as follows, the court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the company had not given that preference.

…'

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

14 The dispute in the main proceedings before the Tribunale Ordinario di Venezia (District Court, Venice, Italy) is between Vinyls Italia, in liquidation, a company established in Venice, and Mediterranea, whose registered office is in Ravenna (Italy), concerning an action to set aside two payments ('the contested payments'), made pursuant to a ship charter contract concluded on 11 March 2008, the term of which was extended by an addendum of 9 December 2009. Those payments totalling EUR 447740.27 had been made by Vinyls Italia to Mediterranea before the former was made the subject of a special administration procedure which subsequently led to it being put into liquidation.

15 In the dispute in the main proceedings, the insolvency administrator of Vinyls Italia claimed that the contested payments were made after the contractual deadlines had expired, at a time when it was well known that that company was insolvent and that those payments could be set aside pursuant to Article 67(2) of the Law on insolvency.

16 Mediterranea objects to the disputed payments being set aside and contends that they were made pursuant to a contract which the parties elected to be subject to English law. Under English law, which it claims is conclusive by virtue of Article 13 of Regulation No 1346/2000, the contested payments cannot be challenged. In support of that line of argument, Mediterranea produced a sworn statement from a lawyer established in the United Kingdom which concludes that, in the present case, English law does not allow the contested transactions to be set aside.

17 By contrast, Vinyls Italia submits that Article 13 of Regulation No 1346/2000 makes provision for a procedural objection. As such, that line of argument cannot be raised by the court of its own motion, but must be raised by the party concerned within the time-limit laid down by the procedural law of the Member State of the court hearing the action to set aside. In the present case, that objection was raised out of time.

18 The referring court states, first of all, that, by virtue of Article 4(2)(m) of Regulation No 1346/2000, the applicable rules on voidness, voidability or unenforceability of legal acts detrimental to all the creditors are those laid down by the *lex fori concursus*, that is to say, the provisions of Italian law on insolvency, namely, in the present case, Article 67(2) of the Law on insolvency. That provision would allow the contested payments to be set aside if Mediterranea had been aware that Vinyls Italia was facing insolvency at the time that they were made.

19 On the other hand, the referring court states that, in accordance with Article 13 of Regulation 1346/2000, Article 4(2)(m) of that regulation does not apply where the person who benefited from an act detrimental to all the creditors provides proof that the act is governed by the law of a Member State other than that of the State of the opening of proceedings and that that law does not allow any means of challenging that act in the relevant case. The referring court states that, although Mediterranea raised an exception in that regard, it did so after the expiry of the time-limits laid down by Italian procedural law for raising 'procedural objections', for the purposes of that law.

20 The referring court next observes that the contractual clause making the contract at issue in the main proceedings subject to English law may fall within the scope of the Rome I Regulation. That regulation, in accordance with Article 1(1), concerns 'situations involving a conflict of laws', and, in Article 3(3), it imposes limitations on the effects of a law chosen by the parties. However, it is unclear whether the situation at issue in the main proceedings involves a conflict of laws. That situation concerns a ship charter contract, concluded in Italy between two companies under Italian law whose registered offices are located in that Member State, for the transport of chemical substances by vessels flying the Italian flag. On the other hand, that contract is drafted in English and contains a clause stating that English law is the chosen law and a clause choosing the jurisdiction of the London Maritime Arbitrators Association.

21 Finally, according to the referring court, it is clear from the sworn statement produced by Mediterranea in the main proceedings that English law does not exclude, in general or in the abstract, any possibility of challenging the contested payments, but requires the challenge to meet certain substantive requirements which differ from those laid down by the *lex fori concursus*. Section 239(2) of the IA 1986 requires the administrator to provide proof of the debtor's specific intention to provide the creditor in receipt of the payment with an advantage, rather than proof that the creditor knew of the debtor's insolvency.

22 In those circumstances the Tribunale Ordinario di Venezia (District Court, Venice) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does the "proof" which Article 13 of Regulation No 1346/2000 requires of the person who benefited from an act detrimental to all the creditors, in order to prevent that act from being challenged in accordance with the rules of the *lex fori concursus*, include a requirement to raise a procedural objection in the strict sense of that term within the periods laid down by the procedural rules of the *lex fori*, when seeking to rely on the derogation provided in the regulation and to prove that the two conditions laid down by that provision have been met? Or does Article 13 of Regulation No 1346/2000 apply when the party concerned has requested its application during the proceedings, even when the time-limits laid down by the procedural rules of the *lex fori* for lodging procedural objections have expired, or even where that provision is applied by the court of its own motion, provided that the party concerned has provided proof that the detrimental act is subject to the *lex causae* of another Member State whose law does not permit the act to be challenged by any means in the specific circumstances of the case?

(2) Must the reference to the rules of the *lex causae* in Article 13 of Regulation No 1346/2000, for establishing whether 'that law does not allow any means of challenging that act in the relevant case', be interpreted as meaning that the party bearing the burden of proof must show that, in the specific circumstances of the case, the *lex causae* does not provide, in general or in the abstract, any means to challenge an act such as that which, in the present case, was considered detrimental — namely the payment of a contractual debt — or as meaning that the party bearing the burden of proof must show that, where the *lex causae* allows an act of that type to be challenged, the conditions to be met in order for such a challenge to be upheld in the relevant case, which differ from those of the *lex fori concursus*, have not actually been fulfilled?

(3) Is the derogation provided for in Article 13 of Regulation 1346/2000 — bearing in mind its objective of protecting the legitimate expectations of the parties concerning the stability of the act in accordance with the *lex causae* — applicable even when the parties to a contract have their head offices in a single Member State, whose law can therefore be expected to be intended to become the *lex fori concursus* in the event of insolvency on the part of one of those parties, and the parties, via a contractual clause designating the law of another Member State as the law applicable, exclude the setting aside of acts performed under the contract from the application of the mandatory rules of the *lex fori concursus* imposed in order to protect the principle that all creditors should be treated equally, to the detriment of all the creditors in the event of insolvency?

(4) Must Article 1(1) of the Rome I Regulation be interpreted as meaning that 'situations involving a conflict of laws' for the purposes of the application of that regulation also include a situation involving a charter contract concluded in a Member State between companies with their head offices in the same Member State, with a clause designating the law of another Member State as the law applicable?

(5) If the answer to Question 4 is in the affirmative, must Article 3(3) of the Rome I Regulation, read in conjunction with Article 13 of Regulation No 1346/2000, be interpreted as meaning that, where the parties choose to subject a contract to the law of a Member State other than that in which 'all

the other elements relevant to the situation' are located, that does not affect the application of mandatory rules under the law of the latter Member State, which apply as the *lex fori concursus*, for the purpose of challenging acts performed before the insolvency to the detriment of all the creditors, thereby prevailing over the derogation provided for in Article 13 of Regulation No 1346/2000?'

Consideration of the questions referred for a preliminary ruling

The first question

23 By its first question, the referring court asks, in essence, whether Article 13 of Regulation No 1346/2000 must be interpreted to the effect that it requires a person benefiting from an act that is detrimental to all the creditors, in order to challenge an action to have that act set aside in accordance with the *lex fori concursus*, to raise a procedural objection in the form and within the time-limits laid down by the procedural law of the Member State on whose territory the dispute is pending, or whether Article 13 of Regulation No 1346/2000 may also be applied by the court of its own motion, if necessary, after the time-limit allowed to the party concerned has expired.

24 It must be recalled, first of all, that, in accordance with Article 13 of Regulation 1346/2000, Article 4(2)(m) of that regulation does not apply where the person who benefited from an act detrimental to all the creditors provides proof that the act is governed by the law of a Member State other than that of the State of the opening of proceedings ('the *lex causae*') and that the *lex causae* does not allow any means of challenging that act in the relevant case.

25 As the Court has held, Article 13 of Regulation No 1346/2000 expressly governs the allocation of the burden of proof, but it does not contain any provisions on more specific procedural aspects. For instance, that article does not set out, inter alia, the ways in which evidence is to be elicited, what evidence is to be admissible before the appropriate national court, or the principles governing that court's assessment of the probative value of the evidence adduced before it (judgment of 15 October 2015, *Nike European Operations Netherlands*, C-310/14, EU:C:2015:690, paragraph 27). It is the same for other procedural aspects, such as the form and time-limit for relying on that article in the context of proceedings.

26 According to settled case-law, in the absence of harmonisation of such rules under EU law, it is for the national legal order of each Member State to establish them in accordance with the principle of procedural autonomy provided, however, that those rules are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (principle of effectiveness) (judgment of 15 October 2015, *Nike European Operations Netherlands*, C-310/14, EU:C:2015:690, paragraph 28 and the case-law cited).

27 Accordingly, the form and time-limits for relying on Article 13 of Regulation 1346/2000 in the context of proceedings relating to the setting aside, in accordance with the rules laid down by the *lex fori concursus*, of an act that is detrimental to all the creditors, and the issue whether the court hearing those proceedings may apply that article of its own motion, come under the procedural law of the Member State on whose territory those proceedings are pending.

28 That conclusion is not called into question by the fact that the exception introduced in Article 13 of Regulation No 1346/2000 also includes limitation periods or other time-bars relating to actions to set aside transactions under the *lex causae*, as the Court held in its judgment of 16 April 2015, *Lutz* (C-557/13, EU:C:2015:227, paragraph 49).

29 The conclusion reached by the Court in the judgment referred to in the previous paragraph is based on the consideration that Articles 4 and 13 of Regulation No 1346/2000 constitute a *lex specialis* in relation to other legislation governing the international law of the Member States, in particular in relation to the Rome I Regulation, and must be interpreted in the light of the objectives pursued by Regulation No 1346/2000 (see, to that effect, judgment of 16 April 2015, *Lutz*, C-557/13, EU:C:2015:227, paragraph 46).

30 As regards, more specifically, the objective pursued by Article 13 of Regulation No 1346/2000, it is clear from the case-law 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, namely the *lex causae* (judgment of 15 October 2015, *Nike European Operations Netherlands*, C-310/14, EU:C:2015:690, paragraph 19).

31 In those circumstances, it must be stated that neither the wording of, nor the aims pursued by Article 13 of Regulation No 1346/2000 lead to the conclusion that the form and the time-limit in which a party must rely on that article in court proceedings are determined by the *lex causae*. Regulation No 1346/2000 and, in particular, Article 13 do not aim to protect the litigant against the usual risk of having to defend himself in such proceedings, whether that be before the courts of the Member State on whose territory the person concerned resides or before the courts of another Member State, nor therefore, against the procedural law applied by the competent jurisdiction.

32 Therefore, it must be held that national legislation such as Article 167 of the CPC which provides, in essence, that the defendant must plead all the grounds of defence and, in order not to be time-barred, raise any procedural or substantive objections which may not be raised by the court of its own motion, in its statement of defence, that article being read in conjunction with Article 183 of the CPC which provides that the parties may, however, clarify and amend the applications, objections and submissions at the hearing scheduled for the first attendance of the parties, may, subject to compliance with the principles of equivalence and effectiveness referred to in paragraph 26 above, be applied in proceedings concerning an action to set aside, as provided for in Article 4(2)(m) of Regulation No 1346/2000, and in which Article 13 of that regulation is invoked.

33 Accordingly, the answer to the first question is that Article 13 of Regulation No 1346/2000 must be interpreted to the effect that the form and the time-limit in which a person benefiting from an act that is detrimental to all the creditors must raise an objection under that article, in order to challenge an action to have that act set aside in accordance with the *lex fori concursus*, and the question whether that article may also be applied by the competent court of its own motion, if necessary, after the time-limit allowed to the party concerned has expired, fall within the procedural law of the Member State on whose territory the dispute is pending. That law must not, however, be less favourable than the law governing similar domestic situations (principle of equivalence) and must not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (principle of effectiveness), that being a matter for the referring court to determine.

The second question

34 By its second question, the referring court asks whether Article 13 of Regulation No 1346/2000 must be interpreted to the effect that the party bearing the burden of proof must show that, in the specific circumstances of the case, the *lex causae* does not provide, in general or in the abstract, any means to challenge an act which was considered detrimental, or to the effect that that party must show that, where the *lex causae* allows an act of that type to be challenged, the conditions to be met in order for that challenge to be upheld, and which differ from those of the *lex fori concursus*, have not actually been fulfilled.

35 In that regard, the Court has held, first of all, that it is clear from the objective pursued by Article 13 of Regulation No 1346/2000, as recalled in paragraph 30 above, that the application of that article requires that all the circumstances of the case be taken into account. There cannot be legitimate expectations where, after insolvency proceedings have been opened, the validity of an act is to be assessed without regard being had to those circumstances whereas, where such proceedings are not opened, such circumstances would need to be taken into account (judgment of 15 October 2015, *Nike European Operations Netherlands*, C-310/14, EU:C:2015:690, paragraph 20).

36 Next, the Court held that the obligation to interpret strictly the exception laid down in Article 13 of Regulation No 1346/2000 precludes a broad interpretation of the scope of that article which would allow a person who has benefited from an act detrimental to all the creditors to avoid the application of the *lex fori concursus* by relying solely, in a purely abstract manner, on the unchallengeable character of the act at issue on the basis of a provision of the *lex causae* (judgment of 15 October 2015, *Nike European Operations Netherlands*, C-310/14, EU:C:2015:690, paragraph 21).

37 Finally, the Court also held that, for the purposes of the application of Article 13 of Regulation No 1346/2000 and in the event that the defendant in an action relating to the voidness, voidability or unenforceability of an act relies on a provision of the *lex causae* under which that act can be challenged only in the circumstances provided for in that provision, it is for that defendant to plead that those circumstances do not exist and to bear the burden of proof in that regard (judgment of 15 October 2015, *Nike European Operations Netherlands*, C-310/14, EU:C:2015:690, paragraph 31).

38 Accordingly, the Court implicitly excluded an interpretation whereby that defendant would have to show that the *lex causae* does not provide, in general or in the abstract, any means to challenge the act in question, an interpretation which would, moreover, be excessively narrow, given the fact that such means of challenging the act almost always exist, at least in the abstract, and which would therefore deprive Article 13 of Regulation No 1346/2000 of its effectiveness.

39 In view of the foregoing considerations, the answer to the second question is that Article 13 of Regulation No 1346/2000 must be interpreted to the effect that the party bearing the burden of proof must show that, where the *lex causae* makes it possible to challenge an act regarded as being detrimental, the conditions to be met in order for that challenge to be upheld, which differ from those of the *lex fori concursus*, have not actually been fulfilled.

The third to fifth questions

40 The third to fifth questions, which it is appropriate to examine together, concern, in essence, the interpretation of Article 13 of Regulation No 1346/2000, in particular as regards the possibility of relying on that provision in the situation provided for in Article 3(3) of the Rome I Regulation, that is to say, where all the elements relevant to the situation in question between the parties to a contract are located in a country other than the country whose law is chosen by those parties.

41 It must be noted at the outset that, by virtue of Article 28, the Rome I Regulation applies only to contracts concluded after 17 December 2009. As is apparent from the information before the Court, the contract governing the payments at issue in the main proceedings was concluded on 11 March 2008 and its term was extended by an addendum dated 9 December 2009.

42 Accordingly, the Rome I Regulation does not apply to the main proceedings.

43 In those circumstances, and since, by virtue of Article 2 of the First Protocol on the interpretation by the Court of Justice of the European Communities of the Rome Convention, the referring court does not have jurisdiction to submit a question to the Court concerning the interpretation of that convention, this judgment shall refer to the Rome I Regulation only in so far as such a reference makes it possible to clarify the scope of Article 13 of Regulation No 1346/2000.

44 In the light of those considerations, it is appropriate to understand the third to fifth questions as seeking to establish whether Article 13 of Regulation No 1346/2000 may be validly relied upon where the parties to a contract, who have their head offices in a single Member State on whose territory all the other elements relevant to the situation in question are located, have designated the law of another Member State as the law applicable to that contract.

45 In that regard, it is well known that, in international trade, the parties to a contract regularly exercise the option to make the contract subject to the law of a particular Member State through a contractual term to that effect, in particular to ensure legal certainty as to the law applicable to the rights and obligations of the parties arising from the contract in question. Article 3(1) of the Rome I Regulation and Article 3(1) of the Rome Convention — the latter was in force in all Member States when Regulation No 1346/2000 was adopted — make provision for that possibility.

46 Accordingly, since that possibility existed when Regulation No 1346/2000 was adopted and neither Article 13 of that regulation nor its other provisions contain any limitation to that effect, it must be held that Article 13 applies even in a situation where the parties made that contract subject to the law of a Member State other than the Member State in which those parties are both established.

47 In addition, it should be noted that recital 23 of Regulation No 1346/2000 states that that 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.’

48 Thus, as was recalled in paragraph 29 above, the Court has held that Articles 4 and 13 of Regulation No 1346/2000 constitute a *lex specialis* in relation to the Rome I Regulation and must be interpreted in the light of the objectives pursued by Regulation No 1346/2000 (judgment of 16 April 2015, *Lutz*, C-557/13, EU:C:2015:227, paragraph 46).

49 Accordingly, it must be held that Article 3(3) of the Rome I Regulation does not govern the question whether, when all the other elements of a situation, apart from the choice by the parties of the applicable law, are located in a Member State other than the one whose law is chosen, the choice of the parties must be taken into account for the purposes of applying Article 13 of Regulation No 1346/2000. That question must be examined having regard only to the provisions of Regulation No 1346/2000 and in particular the objectives pursued by that regulation.

50 In that regard, it must be stated that Regulation No 1346/2000 does not contain any derogating provision comparable to Article 3(3) of the Rome I Regulation. Accordingly, in the absence of any indication to the contrary in Regulation No 1346/2000, it must be held that Article 13 of that regulation may be validly relied on, even where the parties to a contract, who have their head offices in a single Member State on whose territory all the other elements relevant to the situation are located, have designated the law of another Member State as the law applicable to that contract.

51 However, it must be recalled in that context that, in accordance with the Court’s settled case-law, EU law cannot be relied on for abusive or fraudulent ends.

52 In that context, it is apparent from well-established case-law that a finding of abuse requires a combination of objective and subjective elements. First, with regard to the objective element, that finding requires that it must be apparent from a combination of objective circumstances that, despite formal observance of the conditions laid down by Community rules, the purpose of those rules has

not been achieved. Second, such a finding requires a subjective element, namely that it must be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain an undue advantage. The prohibition of abuse is not relevant where the economic activity carried out may have some explanation other than the mere attainment of an advantage (judgment of 28 July 2016, *Kratzer*, C-423/15, EU:C:2016:604, paragraphs 38 to 40 and the case-law cited).

53 The Court also held that, in order to establish the existence of the second element, which relates to the intention of operators, account may be taken, in particular, of the purely artificial nature of the transactions concerned. It is for the referring court to verify in accordance with the rules of evidence of national law, provided that the effectiveness of EU law is not undermined, whether action constituting such an abusive practice has taken place in the case before it (judgment of 28 July 2016, *Kratzer*, C-423/15, EU:C:2016:604, paragraphs 41 to 42 and the case-law cited).

54 Thus, as regards the application of Article 13 of Regulation No 1346/2000 in a situation such as that at issue in the main proceedings, that application may be disregarded only in a situation where it would appear objectively that the objective pursued by that application, in this context, of ensuring the legitimate expectation of the parties in the applicability of specific legislation, has not been achieved, and that the contract was made subject to the law of a specific Member State artificially, that is to say, with the primary aim, not of actually making that contract subject to the legislation of the chosen Member State, but of relying on the law of that Member State in order to exempt the contract, or the acts which took place in the performance of the contract, from the application of the *lex fori concursus*.

55 On the other hand, and in any event, it should be recalled, as the Commission submitted, that the mere fact that the parties exercised the option to choose, in a situation such as that at issue in the main proceedings, a law of a Member State other than the Member State in which they are established does not create any presumption regarding an intention to circumvent the rules on insolvency for abusive or fraudulent ends.

56 In the light of the foregoing considerations, the answer to the third to fifth questions is that Article 13 of Regulation No 1346/2000 may be validly relied upon where the parties to a contract, who have their head offices in a single Member State on whose territory all the other elements relevant to the situation in question are located, have designated the law of another Member State as the law applicable to that contract, provided that those parties did not choose that law for abusive or fraudulent ends, that being a matter for the referring court to determine.

Costs

57 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 (Fifth Chamber) hereby rules:

1. **Article 13 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted to the effect that the form and the time-limit in which a person benefiting from an act that is detrimental to all the creditors must raise an objection under that article, in order to challenge an action to have that act set aside in accordance with the *lex fori concursus*, and the question whether that article may also be applied by the competent court of its own motion, if necessary, after the time-limit allowed to the party concerned has expired, fall within the procedural law of the Member State on whose territory the dispute is pending. That law must not, however, be less favourable than the law**

governing similar domestic situations (principle of equivalence) and must not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (principle of effectiveness), that being a matter for the referring court to determine.

2. **Article 13 of Regulation No 1346/2000 must be interpreted to the effect that the party bearing the burden of proof must show that, where the *lex causae* makes it possible to challenge an act regarded as being detrimental, the conditions to be met in order for that challenge to be upheld, which differ from those of the *lex fori concursus*, have not actually been fulfilled.**

3. **Article 13 of Regulation No 1346/2000 may be validly relied upon where the parties to a contract, who have their head offices in a single Member State on whose territory all the other elements relevant to the situation in question are located, have designated the law of another Member State as the law applicable to that contract, provided that those parties did not choose that law for abusive or fraudulent ends, that being a matter for the referring court to determine.**

[Signatures]