Case C-498/20

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

29 September 2020

Referring court:

Rechtbank Midden-Nederland (Netherlands)

Date of the decision to refer:

2 September 2020

Applicant:

ZK, in his capacity as successor to JM, liquidator in the bankruptcy of BMA Nederland BV

Defendant:

BMA Braunschweigische Maschinenbauanstalt AG

Intervening party:

Stichting Belangbehartiging Crediteuren BMA Nederland

Subject of the action in the main proceedings

The liquidator seeks a declaration that BMA Braunschweigische Maschinenbauanstalt AG ('BMA AG') has breached its duty of care towards the general body of creditors of its sub-subsidiary, namely, the bankrupt company BMA Nederland B.V. ('BMA NL'), that it has thereby acted unlawfully and that it is liable for the damage suffered by the general body of creditors. In addition, he seeks a declaration that BMA AG is obliged to pay to the estate of BMA NL, for the benefit of the general body of creditors, damages equal to the non-recoverable part of the claims of the general body of creditors against BMA NL.

The Stichting Belangbehartiging Crediteuren BMA Nederland (Foundation for the Representation of Creditors; 'the Stichting') seeks a declaration that BMA AG has acted unlawfully (i) towards all the creditors involved in the bankruptcy of BMA

NL, (ii) towards the creditors who relied on BMA NL's having fulfilled its obligations towards them, since BMA AG was supposed to provide BMA NL with adequate financing for that purpose, (iii) or towards the creditors who could have taken measures to prevent their claims against BMA NL from remaining unpaid had they been aware in advance of the cessation of further financing by BMA AG. The Stichting also claims that BMA AG should be ordered as a third party to pay to each of BMA NL's creditors, at its first request, the entire amount (including interest) owed by BMA NL to that creditor.

Subject and legal basis of the request for a preliminary ruling

Interpretation of EU law, Article 267 TFEU

Questions referred

Question 1

(a) Must the term 'place where the harmful event occurred' in Article 7, point 2, of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (OJ 2012 L 351, p. 1; 'Brussels Ia Regulation') be interpreted as meaning that 'the place of the event giving rise to the damage' (*Handlungsort*) is the place of establishment of the company which offers no redress for the claims of its creditors, if that lack of redress is the result of a breach by that company's grandparent company of its duty of care towards those creditors?

(b) Must the term 'place where the harmful event occurred' in Article 7, point 2, of the Brussels Ia Regulation be interpreted as meaning that 'the place where the damage occurred' (*Erfolgsort*) is the place of establishment of the company which offers no redress for claims of its creditors, if that lack of redress is the result of a breach by that company's grandparent company of its duty of care towards those creditors?

(c) Are additional circumstances required which justify the jurisdiction of the courts of the place of establishment of the company which offers no redress and, if so, what are those circumstances?

(d) Does the fact that the Netherlands liquidator of the company which offers no redress for the claims of its creditors has, by virtue of his statutory duty to wind up the estate, made a claim for damages arising from tort/delict for the benefit of (but not on behalf of) the general body of creditors affect the determination of the competent court on the basis of Article 7, point 2, of the Brussels Ia Regulation? Such a claim implies that there is no room for an examination of the individual positions of the individual creditors and that the third party concerned cannot avail

itself of all the defences against the liquidator which it might have been able to use in respect of certain individual creditors.

(e) Does the fact that a portion of the creditors for whose benefit the liquidator makes the claim have their domicile outside the territory of the European Union affect the determination of the competent court on the basis of Article 7, point 2, of the Brussels Ia Regulation?

Question 2

Would the answer to Question 1 be different in the case of a claim made by a foundation which has as its purpose the protection of the collective interests of creditors who have suffered damage as referred to in Question 1? Such a collective claim implies that the proceedings would not determine (a) the domiciles of the creditors in question, (b) the particular circumstances giving rise to the claims of the individual creditors against the company and (c) whether a duty of care as referred to above exists in respect of the individual creditors and whether it has been breached.

Question 3

Must Article 8, point 2, of Brussels Regulation Ia be interpreted as meaning that, if the court seised of the original proceedings reverses its decision that it has jurisdiction in respect of those proceedings, such a reversal also automatically excludes its jurisdiction in respect of the claims made by the intervening third party?

Question 4

(a) Must Article 4(1) of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (OJ 2007 L 199, p. 40) (‘Rome II Regulation’) be interpreted as meaning that ‘the place where the damage occurs’ is the place where the company which offers no redress for the damage suffered by its creditors as a result of the breach of the duty of care referred to above has its registered office?

(b) Does the fact that the claims have been made by a liquidator by virtue of his statutory duty to wind up the estate and by a representative of collective interests for the benefit of (but not on behalf of) the general body of creditors affect the determination of that place?

(c) Does the fact that some of the creditors are domiciled outside the territory of the European Union affect the determination of that place?

(d) Is the fact that there were financing agreements between the Netherlands bankrupt company and its grandparent company which nominated the German courts as the forum of choice and declared German law to be applicable a

circumstance which makes the alleged tort/delict of BMA AG manifestly more closely connected with a country other than the Netherlands within the meaning of Article 4(3) of the Rome II Regulation?

Provisions of EU law cited

Council Regulation (EC) No 1346/2000 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1; 'Insolvency Regulation'): Article 3

Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (OJ 2007 L 199, p. 40; 'Rome II Regulation'): Article 4

Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1; 'Brussels Ia Regulation'): Article 7, point 2; Article 8, points 1 and 2

Judgments of 18 July 2013, *ÖFAB*, C-147/12, EU:C:2013:490 ('*ÖFAB* judgment'); 21 May 2015, *CDC Hydrogen Peroxide*, C-352/13, EU:C:2015:335 ('*CDC* judgment'), and 6 February 2019, *NK*, C-535/17, EU:C:2019:96 ('*NK* judgment')

Provisions of national law cited

Burgerlijk Wetboek (Civil Code; 'BW')

Article 3:305a(1) BW reads as follows:

'1. A foundation or association with full legal capacity may bring an action for the protection of similar interests of multiple persons, provided that its articles of association make provision for the protection of such interests.'

Power of the liquidator to bring a so-called Peeters-Gatzen action

In the judgment of the Hoge Raad (Supreme Court) of 14 January 1983, *Peeters* v. *Gatzen*, NL:HR:1983:AG4521, it was held for the first time that the liquidator may bring an action for damages in tort/delict against a third party who has collaborated in disadvantaging the creditors of the bankrupt entity, without such an action being attributable to the bankrupt entity itself. Where the liquidator brings such a Peeters/Gatzen action, he acts in the interests of the general body of creditors. He brings the action for their benefit and the proceeds of the action go to the insolvent estate.

Brief summary of the facts and the procedure in the main proceedings

1 The Netherlands company BMA NL specialised in the production and sale of machinery for the food industry. The sole shareholder of that company was BMA Groep B.V. ('BMA Groep'), which in turn was wholly owned by the German company BMA AG. BMA Groep had the power to appoint and dismiss directors of BMA NL. In certain periods, BMA AG employees were appointed as statutory directors of BMA NL. There was an obligation to submit important decisions and acts of BMA NL's directors to BMA Groep for approval, which then requested approval from BMA AG.

2 In the period between 2004 and 2011, BMA AG granted loans to BMA NL in a total amount of EUR 38 million. The financing passed through a bank account held by BMA NL with Deutsche Bank Nederland B.V. In addition, BMA AG also guaranteed BMA NL's debts and made capital contributions.

3 When BMA AG discontinued that financial support at the beginning of 2012, BMA NL filed for bankruptcy. It was declared bankrupt on 3 April 2012. The assets of the estate are not sufficient to pay all creditors (in full). 71% of the amount of the provisionally admitted unsecured claims accrues to German creditors, primarily BMA AG itself and other companies established in Germany and belonging to BMA AG. The remaining unpaid creditors are established in various countries: the Netherlands, other Member States of the European Union and countries outside the European Union.

4 The liquidator then brought a Peeters-Gatzen action against BMA AG before the referring court for the benefit of the general body of creditors. By a judgment of 23 May 2018, the referring court declared itself competent to rule on that action pursuant to Article 3 of the Insolvency Regulation.

5 On 21 June 2016, the Stichting was established, with the purpose of looking after the interests of the creditors of BMA NL who have suffered damage as a result of the actions of BMA AG. It has concluded affiliation agreements with more than 50 creditors, whose combined claims represent approximately 40% of all admitted claims of unsecured creditors not connected to BMA AG.

6 On 15 August 2018, the Stichting applied to the referring court to intervene as a third party in the proceedings between the liquidator and BMA AG. The Rechtbank (District Court) granted that request by a judgment of 30 January 2019. In that judgment, the Rechtbank assumed jurisdiction with regard to the third-party proceedings pursuant to Article 8, point 2, of the Brussels Ia Regulation. Under that provision, third-party proceedings may be brought against the defendant in the court seised of the original proceedings.

7 BMA AG requested the referring court to review the judgments of 23 May 2018 and 30 January 2019 following the *NK* judgment delivered on 6 February 2019. In the latter judgment, the Court of Justice held that a Peeters-Gatzen action brought by a liquidator does not fall within the scope of the Insolvency Regulation, but

does fall within the scope of (the predecessor of) the Brussels Ia Regulation. The referring court is of the view that, for that reason, its decision of 23 May 2018 indeed cannot be upheld, but questions whether it must decline jurisdiction or whether an alternative ground of jurisdiction can be found in the Brussels Ia Regulation.

Main arguments of the parties to the main proceedings

General

8 Both the liquidator and the Stichting are of the opinion that BMA AG has acted unlawfully towards the general body of creditors of BMA NL or towards a portion of them. In that regard, the liquidator notes that BMA AG created and operated a risky financial arrangement which led to the undercapitalisation of BMA NL and to the erosion of its own equity in that company. BMA AG gave the creditors the false impression that its sub-subsidiary BMA NL was creditworthy, enabling it to continue incurring debts.

9 After years of unlimited liquidity assistance, BMA AG suddenly stopped financing BMA NL, with the bankruptcy of BMA NL as an inevitable consequence. BMA AG did not have the interests of the general body of creditors of BMA NL at heart either at the start or in the continuation and termination of the financial arrangement. It therefore breached its duty of care towards those creditors since it was closely connected to BMA NL and had potential powers of intervention. It had in-depth knowledge of and control over BMA NL's (financial) policy and business operations.

10 The Stichting also points out that the creditors trusted BMA NL to fulfil its obligations towards them because BMA AG was supposed to (continue to) provide adequate financing for that purpose. As a result of the sudden cessation of BMA NL's financing by its grandparent company, the creditors could not take measures in good time to prevent their claims against that Netherlands company from remaining unpaid.

11 The basis of the claims of the Stichting and of the liquidator is identical. According to the liquidator, BMA AG must however pay the damages corresponding to the amounts owed to the creditors by BMA NL to the estate of BMA NL, whereas, according to the Stichting, the damages should be paid directly to the individual creditors. The action brought by the Stichting is a collective action within the meaning of Article 3:305a BW.

12 Moreover, the parties have differing views as to the application of Article 7, point 2, of the Brussels Ia Regulation. According to that provision, in matters relating to tort, delict or quasi-delict, a person may be sued in the courts for the place where the harmful event occurred. That place includes both the place where

the damage occurred (*Erfolgsort*) and the place of the event which has a causal link with the damage (*Handlungsort*).

13 The liquidator and BMA AG also have differing views on which national law is applicable by virtue of Article 4(1) of the Rome II Regulation. According to that provision, the law applicable to a tort/delict is in principle the law of the country in which the damage occurs (*Erfolgsort*), irrespective of the country in which the event giving rise to the damage occurred (*Handlungsort*) and irrespective of the countries in which the indirect consequences of that event occur.

Arguments of the liquidator concerning the jurisdiction of the Netherlands courts and the applicable law

14 The liquidator argues that the Netherlands courts have jurisdiction to rule on his claims pursuant to Article 7, point 2, of the Brussels Ia Regulation. Referring to the *ÖFAB* judgment of the Court of Justice, he submits that the *Handlungsort* is in the Netherlands. At the heart of the unlawful conduct of BMA AG was the creation and operation of a structural arrangement of undercapitalisation of BMA NL. That conduct took place in the Netherlands as BMA NL had its registered office and carried on its business in that country and its depleted assets could be located there.

15 According to the liquidator, the Netherlands should also be regarded as the *Erfolgsort*, since the initial damage suffered by the general body of creditors occurred in the Netherlands. That initial damage was equivalent to the reduction in BMA NL's assets, with the result that the estate offers less redress. The ultimate damage suffered by the individual creditors stemmed from that. In the liquidator's view, the fact that the *Erfolgsort* is located in the Netherlands is not only a reason why the Netherlands courts must be considered competent to adjudicate his claims, but also means, in his view, that Netherlands law is applicable.

Arguments of BMA AG concerning the jurisdiction of the Netherlands courts and the applicable law

16 BMA AG argues that it is not the Netherlands courts that have jurisdiction to rule on the claims of the liquidator and the Stichting, but the German courts. The main rule that the courts where the defendant is domiciled has jurisdiction must be interpreted strictly. In addition, the jurisdiction to hear a claim must be determined on an individual basis and not on the basis of a bundle of claims, as in a Peeters-Gatzen action or a collective action.

17 According to BMA AG, the Netherlands cannot be regarded either as the *Handlungsort* or as the *Erfolgsort*. The *Handlungsort* is not in the Netherlands since the alleged actions of BMA AG all took place in Germany, where BMA AG has its registered office. In addition, most of BMA NL's debt in relation to its creditors (71%) accrues to creditors who are established in Germany. The

Erfolgsort is not the Netherlands, either, since at issue here is purely financial damage which, in the absence of additional circumstances, cannot be located in the place where BMA NL has its assets.

18 BMA AG takes the view that German law is applicable as it considers Germany to be the *Erfolgsort*.

Arguments of the Stichting concerning the jurisdiction of the Netherlands courts

19 The Stichting has not adopted a position on the applicable law. As regards the question of jurisdiction, it argues that the Netherlands courts have jurisdiction to rule on its claims. If the referring court is deemed not to have jurisdiction to hear the liquidator's claims, it does not mean that it also lacks jurisdiction to hear the Stichting's claims as a third party. Under national procedural law, the courts are, in principle, bound by final binding decisions, such as the admission of the Stichting as a third party under Article 8, point 2, of the Brussels Ia Regulation.

20 According to the Stichting, the Netherlands courts' jurisdiction in the present case may also be based on Article 8, point 1, of the Brussels Ia Regulation, since the admissibility of the claims of the liquidator (domiciled in the Netherlands) depends on whether the actions brought by the Stichting against BMA AG are upheld or dismissed. There is therefore a sufficiently close link between the two claims.

Brief summary of the reasons for the referral

21 In the main proceedings, it is difficult to establish where the *Handlungsort* and the *Erfolgsort* are located. The *Erfolgsort*, like the *Handlungsort*, is important in order to determine which courts have jurisdiction to rule on an action based on tort/delict. Moreover, the *Erfolgsort* is, in principle, decisive in determining the law applicable to the tort/delict.

22 As regards the *Handlungsort*, BMA AG is accused of having breached a duty of care towards the general body of creditors. The conduct actually imputed to BMA AG consisted in creating and operating a (risky, in the liquidator's opinion) method of financing its Netherlands-based sub-subsidiary, then discontinuing it and failing to notify the creditors of that sub-subsidiary of that discontinuance in a timely manner. If the *Handlungsort* is determined on the basis of the place where the decisions to create, operate and discontinue the method of financing chosen by BMA AG were taken, it would seem that Germany should be regarded as the *Handlungsort*. The decisions in question were taken by the directors of BMA AG at its head office in Germany.

23 On the other hand, in the *ÖFAB* judgment, in a comparable case in which the creditors of a company had suffered damage since the shareholder of that company had allowed its activities to continue even though it was undercapitalised, the Court of Justice held that the place where the event giving

rise to the damage occurred is the place to which the activities carried out by that company and the financial situation related to those activities are connected.

24 The case giving rise to the *ÖFAB* judgment concerned the alleged failure of the defendants to comply with their obligation to monitor a company, which obligation ought to have been carried out at the company's place of establishment. In the present case, however, determining the place where the event giving rise to the damage occurred is less straightforward. Indeed, there are several underlying allegations, each referring to actions carried out in different Member States. Depending on the allegation in question, it may be argued that the *Handlungsort* should be located in Germany, in the Netherlands or in the countries in which the creditors are established.

25 The referring court is of the view that, just as in the case giving rise to the *ÖFAB* judgment, there is a close connection between the claim at issue in the main proceedings and (in this case) the Netherlands courts, since the damage consists in the fact that the claims of the creditors of a Netherlands company are not recoverable. The Netherlands courts are best placed to assess the effects of the actions of the German grandparent company on the Netherlands company because the core activities carried out by BMA NL for the creditors (production of machinery for the food industry) were carried out in the Netherlands, and also because information on that company's financial situation and on the creditors' claims is available from the liquidator established in the Netherlands.

26 Particular to the main proceedings is that the claims were not made by the individual victims, but by the liquidator 'for the benefit of' the victims. The referring court refers in that regard to the *CDC* judgment. In the case giving rise to that judgment, the victims had assigned their claims to a claims agency. According to the Court of Justice, however, the transfer of claims by the initial creditors cannot have an impact on the determination of the court having jurisdiction under (the predecessor of) Article 7, point 2 of the Brussels Ia Regulation, meaning that the harmful event must be assessed separately for each claim for damages, independently of any subsequent assignment or consolidation.

27 The referring court questions whether the strict rules set out in the *CDC* judgment also apply to the localisation of the *Handlungsort* in the case of a claim made by a liquidator on behalf of the general body of creditors, since that does not involve any assignment or consolidation of claims, but merely the representation of a collective interest on the basis of the statutory duty of the liquidator to settle the estate. It also questions whether those strict rules apply in respect of a collective claim such as that instituted by the Stichting pursuant to Article 3:305a BW. After all, in the latter case, too, there is only the representation of a collective interest and not an assignment or consolidation of claims.

28 The determination of the *Erfolgsort* raises problems in the present case because it is not clear where the initial damage was suffered. However, the referring court leans towards the view that the place where the assets (the estate) of BMA NL are

located can be regarded as the place where the general body of creditors suffered their initial damage, because the creditors suffered damage as a result of BMA AG's conduct only when BMA NL's assets were affected by the cessation of financing by BMA AG.

29 Furthermore, the referring court questions whether the rule set out in the *CDC* judgment regarding the application of (the predecessor of) Article 8, point 1, of the Brussels Ia Regulation, that the relationship between the actions brought against multiple defendants must be assessed by reference to the time at which the action is brought and that a subsequent circumstance in that relationship does not alter the situation also applies to third-party proceedings within the meaning of Article 8, point 2, of that Regulation. If that is the case, the jurisdiction of the court to hear and determine the third-party proceedings must also be assessed by reference to the time at which those proceedings are brought.

30 The answer to that question is relevant in the present case as the referring court initially erred in declaring that it had jurisdiction to rule on the liquidator's claim pursuant to Article 3 of the Insolvency Regulation. If that question were answered in the negative, that error of assessment would automatically cause the referring court to lose its jurisdiction under Article 8, point 2, of the Brussels Ia Regulation in respect of the application to intervene as a third party submitted by the Stichting and it would have to assess whether it has jurisdiction on a different basis. If, on the other hand, the rule in the *CDC* judgment referred to in the preceding paragraph applies to an application to intervene as a third party within the meaning of Article 8, point 2, of the Brussels Ia Regulation, then it continues to have jurisdiction, by virtue of that provision, to rule on the Stichting's claim. That claim was made after the referring court had declared that it had jurisdiction to hear the original claim made by the liquidator.

31 Finally, the referring court questions whether, in determining the applicable law, significance should be attached to the fact that the damage suffered by the general body of creditors can also be attributed to the fact that BMA AG no longer entered into financing agreements with its sub-subsidiary BMA NL to which German law had been declared applicable. It wishes to know whether that is a circumstance as referred to in Article 4(3) of the Rome II Regulation from which it is clear that the tort/delict is more closely connected with a country other than the Netherlands.