

Case C-186/19**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:**

26 February 2019

Referring court:

Hoge Raad der Nederlanden (Netherlands)

Date of the decision to refer:

22 February 2019

Applicants:

Supreme Site Services GmbH

Supreme Fuels GmbH & Co KG

Supreme Fuels Trading Fze

Respondent:

Supreme Headquarters Allied Powers Europe

Subject of the action in the main proceedings

The main proceedings are an appeal in cassation. The respondent in cassation is an international organisation, namely, Supreme Headquarters Allied Powers Europe ('SHAPE'). The subject of the action in the main proceedings is the action brought by SHAPE to lift the interim garnishee order issued by a Netherlands voorzieningenrechter (judge hearing applications for interim measures) in respect of SHAPE's credit balances in a Belgian account. The referring court is examining of its own motion as to whether it has jurisdiction in this matter.

Subject and legal basis of the request for a preliminary ruling

The present request under Article 267 TFEU relates to the interpretation of the term 'civil and commercial matters' within the meaning of Article 1(1) of Regulation No 1215/2012 ('Brussels I Regulation (recast)') and to the scope of

Article 24(5) of that regulation regarding the ‘enforcement of judgments’. Those terms are at issue in the present case in a situation where an international organisation – in this case SHAPE – has brought an action to lift an interim garnishee order, basing it on a claim of immunity of execution.

Questions referred for a preliminary ruling

1(a) Must 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 I Regulation (recast)’) be interpreted as meaning that a matter such as that at issue in the present case, in which an international organisation brings an action to (i) lift an interim garnishee order levied in another Member State by the opposing party, and (ii) prohibit the opposing party from levying, on the same grounds, an interim garnishee order in the future and from basing those actions on immunity of execution, must be wholly or partially considered to be a civil or commercial matter as referred to in Article 1(1) of the Brussels I Regulation (recast)?

1(b) In answering question 1(a), what significance, if any, should be attached to the fact that the court of a Member State has granted leave to attach for a claim which the opposing party alleges to have against the international organisation, a claim in respect of which substantive proceedings are pending in that Member State, relating to a contractual dispute over the payment for fuels supplied for a peace operation carried out by an international organisation connected to the international organisation concerned?

2(a) If question 1(a) is answered in the affirmative, must Article 24(5) of the Brussels I Regulation (recast) be interpreted as meaning that, in a case in which the court of a Member State has granted leave to levy an interim garnishee order and that garnishee order has subsequently been levied in another Member State, the courts of the Member State where the interim garnishee order was levied have exclusive jurisdiction to hear a claim for the lifting of that garnishee order?

2(b) In answering question 2(a), what significance, if any, should be attached to the fact that the international organisation has based its action to lift the interim garnishee order on immunity of execution?

3 If, in answering the question of whether a civil or commercial matter as referred to in Article 1(1) of the Brussels I Regulation (recast) is at issue, or alternatively, the question of whether a claim falling within the scope of Article 24(5) of the Brussels I Regulation (recast) is at issue, significance is attached to the fact that the international organisation has based its claims on immunity of execution, to what extent is the court seised of the matter obliged to assess whether the reliance on immunity of execution is effective, and in that regard does the rule apply that it must assess all the evidence available to it, including, where appropriate, the disputes involving the respondent, or any other rule?

Provisions of European Union law cited

Article 1(1) and Article 24(5) 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) ('Brussels I Regulation (recast)').

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

- 1 SHAPE is an international organisation established by the Protocol of 28 August 1952 on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty. A regional headquarters was established in Brunssum (the Netherlands), subordinate to SHAPE, namely, the Allied Joint Force Command Brunssum ('JFCB').
- 2 The [applicants] in cassation are hereinafter collectively referred to as Supreme. That company has, among other things, supplied fuels to SHAPE. On the basis of a kind of trust agreement, referred to as the escrow agreement, an escrow account (trust account), specially managed by a third party, was established for dealing with payments to Supreme. After financial audits had been carried out, Supreme had to repay, inter alia, USD 122 million into that account. The group of companies to which Supreme belongs is suspected of extensive fraud relating to the supply of fuels and the calculation of costs in the context of the NATO ISAF mission in Afghanistan.
- 3 At the end of 2015, Supreme summoned SHAPE and JFCB to appear before the Rechtbank Limburg (District Court, Limburg, the Netherlands). Supreme sought a declaratory judgment that it was entitled to the payment of various amounts and that SHAPE and JFCB were to ensure that those would be paid out of the escrow account. SHAPE and JFCB lodged an incidental claim that the Rechtbank should declare itself lacking in jurisdiction. They invoked immunity jurisdiction in that regard. The Rechtbank decided by judgment of 8 February 2017, however, that it did have jurisdiction, after which SHAPE lodged an appeal.
- 4 In the meantime, the judge hearing applications for interim measures of the Rechtbank Limburg had granted Supreme leave to levy an interim garnishee order on a part of the credit balance in the escrow account at BNP Paribas bank in Brussels (Belgium). Then, in fresh proceedings in which questions were referred for a preliminary ruling, SHAPE claimed, inter alia, that the interim garnishee order should be lifted and that Supreme should be prohibited from levying a prejudgment attachment order on the funds in the escrow account in the future. The judge hearing applications for interim measures granted that claim, after which it was ratified by the Gerechtshof 's-Hertogenbosch (Court of Appeal, 's-Hertogenbosch, the Netherlands). Supreme has lodged an appeal in cassation. Moreover, Supreme has not opposed the Gerechtshof's ruling that the Netherlands court has jurisdiction. According to the referring court, however, it is obliged under Article 27 of that regulation to examine of its own motion whether, in the

present case, a court of another Member State has exclusive jurisdiction under Article 24 of that regulation.

- 5 In the meantime, the Belgian court has enforced that judgment of the judge hearing applications for interim measures and the subsequent judgment of the Gerechtshof. Nevertheless, Supreme still has an interest in its appeal in cassation. Indeed, the court hearing applications for interim measures has not only lifted the interim garnishee order, but has also prohibited Supreme from levying a prejudgment attachment order on the escrow account in the future. The Gerechtshof upheld the judgment of the judge hearing applications for interim measures on both points, ordering Supreme to pay the costs of the appeal. In any event, Supreme has an interest in its appeal in cassation in so far as it relates to the prohibition on levying an attachment order in the figure and to the costs order.

Main submissions of the parties to the main proceedings

- 6 In support of the claims brought, SHAPE relied inter alia on immunity of execution. According to the referring court, the immunity invoked by SHAPE may be a relevant factor in the examination of jurisdiction to be carried out of its own motion.

Brief summary of the reasons for the referral

- 7 The referring court finds that, pursuant to Article 27 of the Brussels I Regulation (recast), it must of its own motion examine its jurisdiction and that, in so doing, it is not bound by the grounds of the appeal in cassation (judgment of 15 November 1983, *Duijnste q.q. v Goderbauer*, 288/82, EU:C:1983:326, paragraph 15).
- 8 To that end, it must ascertain whether Article 24(5) of the Brussels I Regulation (recast), which relates to ‘proceedings concerned with the enforcement of judgments’, for which the courts of the Member State in which the judgment has been or is to be enforced have exclusive jurisdiction, also applies to SHAPE’s action to lift the interim garnishee order. If that question is answered in the affirmative, the Belgian courts have exclusive jurisdiction to hear SHAPE’s claim for the lifting of the interim garnishee order, as Supreme levied the interim garnishee order on BNP Paribas in Brussels. That question is preceded by the question of whether the claim for the lifting of the interim garnishee order falls within the material scope of the Brussels I Regulation (recast). Since SHAPE has based its claims on its alleged immunity of execution, the question arises as to whether – and, if so, to what extent – the present case is a civil or commercial matter as referred to in Article 1(1) of that regulation. There may be reasonable doubt in regard to both questions, so it is necessary to refer certain questions for a preliminary ruling.
- 9 The Court of Justice of the European Union (‘the Court of Justice’) has delivered several judgments relevant to the question of whether a civil or commercial matter

is at issue in the present case. That term is an autonomous term of EU law which must be interpreted in the light of the scheme and objective of the Brussels I Regulation (recast) and on the basis of the general principles arising from the national legal orders of the Member States. In order to determine whether a matter is a civil or a commercial matter, the nature of the legal relationship between the parties to the dispute or the subject-matter of the dispute must be examined. Actions between a public authority and a person governed by private law can also be civil or commercial matters, but that is not the case where the public authority is acting in the exercise of its public powers. To determine whether that is the case, it is necessary to examine the basis of, and the rules applicable to, the action brought (see, inter alia, the judgments of 12 September 2013, *Sunico*, C-49/12, EU:C:2013:545, paragraphs 33 to 35; of 23 October 2014, *flyLal*, C-302/13, EU:C:2014:2319, paragraphs 26 and 30, and of 9 March 2017, *Pula Parking*, C-551/15, EU:C:2017:193, paragraphs 33 and 34).

- 10 In the present case, SHAPE has based its claim on its immunity of execution. The question therefore arises as to whether this invocation of immunity of execution is important for determining to what extent SHAPE's claims fall within the material scope of the Brussels I Regulation (recast). It is conceivable that, by invoking immunity, SHAPE must be deemed to be acting in the exercise of its public powers within the meaning of paragraph 9 above. Question 1(a) concerns that matter.
- 11 If, in answering the question of whether a civil or commercial matter is at issue, it is significant whether SHAPE has based its claims on immunity of execution, the question arises to what extent the court seised of the matter is obliged to assess whether the reliance on immunity of execution is effective. The question then also arises as to whether, in that context, the rule that the court must assess all the evidence available to it, including Supreme's challenging of the relevant appeal, or any other rule, applies (judgment of 16 June 2016, *Universal Music v Schilling*, C-12/15, EU:C:2016:449, paragraph 46). Question 3 concerns that matter. Moreover, it is unclear in answering question 1(a) what significance, if any, should be attached to the fact that the leave to attach was granted for a claim which Supreme alleges to have against SHAPE with regard to the payment for fuels that were delivered for the benefit of the NATO ISAF mission in Afghanistan, a claim in relation to which the substantive proceedings are pending. Question 1(b) concerns that matter.
- 12 Article 24(5) of the Brussels I Regulation (recast) provides that in proceedings concerned with the enforcement of judgments, the courts of the Member States in which the judgment has been or is to be enforced, have exclusive jurisdiction. The question arises as to whether the lifting of an interim garnishee order levied with the court's permission can be seen as the enforcement of such a decision, and whether a claim for the lifting of an interim garnishee order therefore falls within the scope of that provision relating to exclusive jurisdiction.

- 13 A negative answer is in line with the strict interpretation which, according to the settled case-law of the Court of Justice, must be given to the provisions relating to exclusive jurisdiction in (the current) Article 24 of the Brussels I Regulation (recast) (see, for example, judgment of 26 March 1992, *Reichert II*, C-261/90, EU:C:1992:149, paragraph 25).
- 14 However, it is also conceivable that an action to lift an interim garnishee order does in fact fall within the scope of Article 24(5) of the Brussels I Regulation (recast). That is in line with the case-law of the Court of Justice according to which proceedings which have a close link with the enforcement procedure are covered by Article 24(5) of the Brussels I Regulation (recast) (see the judgment of 4 July 1985, *AS-Autoteil v Malhé*, 220/84, EU:C:1985:302, paragraph 12). Question 2(a) addresses that matter.
- 15 It may be important for question 2(a) that SHAPE has based its action to lift the interim garnishee order on its immunity of execution. After all, the starting point could be that the courts of the Member State where an interim garnishee order has been levied on an international organisation are best placed to assess whether that order is incompatible with the immunity of execution enjoyed by the international organisation on the basis of a treaty that is binding on that Member State, or on the basis of unwritten international law (also applicable to that Member State). That point is addressed in question 2(b). If it is relevant to answering that question that SHAPE has based its action to lift the interim garnishee order on its immunity of execution, then the previously raised question of the extent to which the court seised of the matter is obliged to assess whether the reliance on immunity of execution is effective is also relevant here, as is also the question of whether the rule mentioned in paragraph 11 above applies. Question 3 addresses that point and is therefore relevant both to question 1(a), concerning the interpretation of the term ‘civil and commercial matter’, and to question 2(a), concerning the scope of Article 24(5) of the Brussels I Regulation (recast) regarding the ‘enforcement of judgments’.