

Anonymised version

Translation

C-73/20 – 1

Case C-73/20

Request for preliminary ruling

Date lodged:

13 February 2020

Referring court:

Bundesgerichtshof (Germany)

Date of the decision to refer:

23 January 2020

Appellant in the appeal on a point of law:

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

Respondent in the appeal on a point of law:

E. A. Frerichs

BUNDESGERICHTSHOF (FEDERAL COURT OF JUSTICE)

ORDER

[...]

Issued on:

23 January 2020

[...]

in the case of

ZM, lawyer, in his capacity as liquidator in the insolvency proceedings relating to the assets of Oeltrans Befrachtungsgesellschaft mbH, [...] Hamburg,

applicant and appellant in the appeal on a point of law,

[...]

v

E. A. Frerichs, [...], the Netherlands,

defendant and respondent in the appeal on a point of law,

[...] **[Or. 2]**

Following the hearing on 23 January 2020, the Ninth Civil Chamber of the Federal Court of Justice

made the following order:

- I. The proceedings are stayed.
- II. The following question is referred to the Court of Justice of the European Union for a preliminary ruling concerning the interpretation of Community law pursuant to point (b) of the first paragraph and the third paragraph of Article 267 of the Treaty on the Functioning of the European Union (TFEU):

Are Article 13 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1) and Article 12(1)(b) of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ('Rome I', OJ 2008 L 177, p. 6) to be interpreted as meaning that the law applicable to a contract under the latter regulation also governs the payment made by a third party in performance of a contracting party's contractual payment obligation? **[Or. 3]**

Grounds:

I.

- 1 Since 25 March 2016, the applicant has been the liquidator in the insolvency proceedings opened on 29 April 2011 by the Amtsgericht Hamburg (Local Court, Hamburg, Germany) relating to the assets of Oeltrans Befrachtungsgesellschaft mbH ('the debtor'), established in Germany. The debtor was part of the Oeltrans group, to which Tankfracht GmbH - similarly established in Germany - also belonged. An inland waterway contract existed between Tankfracht GmbH and the defendant, established in the Netherlands, under which Tankfracht GmbH owed the defendant a payment in the amount of EUR 8 259.30. The defendant states that it was to transport goods by vessel for Tankfracht GmbH from a port of loading in the Netherlands to a port of unloading in Germany. According to the applicant, the contract in question was an inland waterway charter party. On 9

2

November 2010, the debtor paid to the defendant the sum owed by Tankfracht GmbH, ‘on the order of Tankfracht’.

- 2 By a document lodged at the court on 21 December 2014, the original liquidator, who subsequently died, brought an application for repayment of the sum of EUR 8 259.30, together with interest, on the ground that the transaction should be set aside by virtue of insolvency. [Procedural references] [...] **[Or. 4]** [...] As a result of shortcomings at the court, the application was not served on the defendant in the Netherlands until December 2016.
- 3 The Landgericht (regional court) found against the defendant under German law, in accordance with the form of order sought. The Berufungsgericht (appeal court), also on the basis of German law, varied the decision of the regional court and dismissed the application on the basis of the defendant’s plea that it was time-barred. By his appeal on a point of law (Revision), for which leave was granted by the appeal court, the applicant seeks to have the decision of the regional court reinstated.

II.

- 4 The outcome of the appeal on a point of law depends on the interpretation of Article 13 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (‘the old version of the Insolvency Regulation’) and Article 12(1)(b) of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (‘Rome I’). The issue to be determined is whether the law applicable to a contract under Rome I also governs, in the context of Article 13 of the old version of the Insolvency Regulation, the payment made by a third party in performance of a contracting party’s contractual payment obligation. It is therefore necessary to stay the proceedings prior to a decision being made on the applicant’s appeal and to obtain a preliminary ruling from the Court of Justice of the European Union pursuant to point (b) of the first paragraph and the third paragraph of Article 267 TFEU. **[Or. 5]**
- 5
 1. In principle, under Article 4(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, which is applicable in the present case, the law applicable to insolvency proceedings and their effects is that of the State of the opening of proceedings (lex fori concursus). Under Article 4(2)(m) of the old version of the Insolvency Regulation, the law of the State of the opening of proceedings is to determine, in particular, the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors. Accordingly, in the present case, since the insolvency proceedings in respect of the debtor’s assets were opened in Germany, the issue of voidability is, in principle, to be determined under German law.
 2. Under German insolvency law, the debtor’s payment to the defendant is voidable under Paragraphs 143(1) and 134(1) of the Insolvenzordnung (German
- 6

Insolvency Code). The payment of the debt owed by Tankfracht GmbH was an act of performance by the debtor without consideration because Tankfracht GmbH was insolvent and the defendant's claim against it was therefore of no financial value; therefore, when its claim was satisfied, the defendant lost nothing financially that could be regarded as consideration for the payment [...]. In addition, the Federal Court of Justice does not consider that the claim is time-barred, contrary to the view taken by the appeal court. [Explanation as to limitation periods] [...] **[Or. 6]**

- 7 3. On that basis, the application should be upheld. However, the defendant invokes Article 13 of the old version of the Insolvency Regulation. Under that provision, which has been recast without any substantive amendment as Article 16 in Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 ('the new version of the Insolvency Regulation'), Article 4(2)(m) of the old version of the Insolvency Regulation does not apply where the person who benefited from an act detrimental to all the creditors provides proof that the said act is subject to the law of a Member State other than that of the State of the opening of proceedings and that law does not allow any means of challenging that act in the relevant case. The defendant takes the view that the contested payment is to be assessed under Netherlands law and has adduced evidence that that law does not allow any means of challenging the payment.
- 8 (a) The Federal Court of Justice considers that the issue of whether the first prerequisite of Article 13 of the old version of the Insolvency Regulation has been satisfied depends on the answer to the question referred. The act, within the meaning of that provision, which benefited the defendant to the detriment of the debtor's creditors is the debtor's payment to the defendant. The law which governs that act (*lex causae*) is determined by German private international law. That is so irrespective of whether the *lex causae* is determined according to the conflict-of-law rules of the State where the insolvency proceedings are opened (*lex fori concursus*) or according to the conflict-of-law rules of the State of the court seised (*lex fori*) ([...]). In both cases, German conflict-of-laws rules determine in the present dispute the law to which the payment is subject. **[Or. 7]**
- 9 The law governing contractual obligations which have a connection to the law of different States is determined primarily by Regulation (EC) No 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations, which is directly applicable Community law also in Germany. Under that regulation, the contract concluded between Tankfracht GmbH and the defendant is governed by Netherlands law. That follows from Article 5(1) of Rome I if, as the defendant states, the contract in question is for the carriage of goods, because the defendant is habitually resident in the Netherlands and that is also the place of receipt of the goods. If the contract is one of hire, which is what the applicant may mean by describing it as a charter party (see, in that regard, judgment of 6 October 2009 - C-133/08, EuZW 2009, 822), Netherlands law is applicable under Article 4(2) of Rome I.

- 10 The question arises as to whether, as a result, the payment of the insolvency debtor, for the purposes of Article 13 of the old version of the Insolvency Regulation, is also governed by Netherlands law. As regards the relationship between the contracting parties, there is a debate in the legal literature on Article 13 of the old version of the Insolvency Regulation and Article 16 of the new version of the Insolvency Regulation as to whether the law applicable to the performance of a contractual obligation is determined by reference to the contract or separately to the act of performance; according to the current prevailing opinion, as a general rule, the *lex contractus* applies ([...]). Nor are the conflict-of-laws rules laid down by Rome I clear in that regard. Under Article 12(1)(b) of Rome I, the law applicable to the contract also governs the performance of the obligations laid down in that contract. However, it is argued that, [Or. 8] despite the rule in Article 12(1)(b) of Rome I, the validity of a transfer of ownership which amounts to performance of the contract is governed not by the *lex contractus*, but by the law applicable to the disposal. By contrast, the concept of ‘performance’ in Article 12(1)(b) of Rome I is said to relate to all of the conditions under which the performance characteristic of the specific obligation is to be effected ([...]).
- 11 If the creditor’s claim is satisfied not by the other party to the contract but, as in the present case, by a third party, the question arises all the more as to whether the *lex contractus* applies. There is no contractual relationship between the third-party provider and the recipient of the payment. On the other hand, the payment serves to satisfy the creditor’s contractual claim. The creditor’s contract with its debtor constitutes the legal basis upon which it is permitted to retain the payment received. Under German law, the creditor cannot refuse the third party’s payment, provided the other party to the contract does not object to it (Paragraph 267(2) of the Bürgerliches Gesetzbuch (German Civil Code)). If it is necessary for the third party to perform the debtor’s obligation, its payment cannot be equated to a gift which is independent of the claim that has been satisfied ([...]). A further argument in favour of the *lex contractus* being the governing law in such a case is that where there are non-contractual obligations arising out of unjust enrichment which concern a legal relationship existing between the parties that is closely connected [Or. 9] with that unjust enrichment, the applicable law is that which governs the legal relationship, pursuant to Article 10(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 (‘Rome II’). Some take the view that the same applies to payments in respect of another person’s debt ([...]).
- 12 (b) If the question referred is answered in the affirmative and it is Netherlands law which governs the debtor’s payment, the decision in the dispute depends, in accordance with Article 13 of the old version of the Insolvency Regulation, on whether the defendant can prove that Netherlands law does not allow any means of challenging the payment. That is what the defendant has claimed, adducing evidence in that regard.

[...]