

Case C-394/22**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:**

15 June 2022

Referring court:

Hof van beroep te Antwerpen (Belgium)

Date of the decision to refer:

7 June 2022

Appellant:

Oilchart International NV

Respondents:

O.W. Bunker (Netherlands) BV

ING Bank NV

Subject matter of the main proceedings

The proceedings concern a claim by the appellant, the Dutch company, Oilchart International NV, for the payment of an invoice for the bunkering of an ocean-going vessel in the port of Sluiskil (the Netherlands). That invoice was still unpaid when the debtor became insolvent. Due to the provisions contained in bank guarantees, a claim for payment is being brought before a Belgian court.

Subject matter and legal basis of the request for a preliminary ruling

This request under Article 267 TFEU concerns the question whether the Belgian court has jurisdiction in a case where it is necessary, first, to determine whether a claim is governed by provisions specific to Dutch insolvency law which allow it to be brought outside of the insolvency and, second, to determine whether such a claim may be brought at the same time as a claim for payment from the estate submitted to the liquidator in the Netherlands. The referring court also questions

whether the Dutch provisions referred to are contrary to Article 3(1) of Regulation No 1346/2000 ('the Insolvency Regulation').

Questions referred for a preliminary ruling

(a)

Must Article 1(2)(b) of the Brussels Ia Regulation (Regulation No 1215/2012) in conjunction with Article 3(1) of the Insolvency Regulation (Regulation No 1346/2000) be interpreted as meaning that the term 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings' in Article 1(2)(b) of the Brussels Ia Regulation includes also proceedings in which the claim is described in the summons as a pure trade receivable, without any mention of the respondent's previously declared bankruptcy, whereas the actual legal basis of that claim is the specific derogating provisions of Netherlands bankruptcy law (Article 25(2) of the Wet van 30 september 1893, op het faillissement en de surséance van betalen (Law of 30 September 1893 on bankruptcy and suspension of payment; 'NFW')) and whereby:

- it must be determined whether such a claim must be considered a verifiable claim (Article 26 NFW in conjunction with Article 110 thereof) or an unverifiable claim (Article 25(2) NFW),
- it appears that the question whether both claims can be brought simultaneously and whether one claim does not appear to exclude the other, taking into account the specific legal consequences of each of those claims (inter alia, in terms of the possibilities of calling for a bank guarantee deferred after the bankruptcy), may be determined in accordance with the rules specific to Netherlands bankruptcy law?

And further

(b)

Can the provisions of Article 25(2) [NFW] be regarded as compatible with Article 3(1) of the Insolvency Regulation, in so far as that legislative provision would allow such a claim (Article 25(2) NFW) to be brought before the court of another Member State instead of before the insolvency court of the Member State in which the bankruptcy was declared?

Provisions of European Union law relied on

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), Article 1(2)(b).

Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, Article 3(1).

Provisions of national law relied on

Wet van 30 september 1893, op het faillissement en de surséance van betaling (Law of 30 September 1893, on insolvency and the suspension of payments; ‘the Nederlandse faillissementswet’), Articles 25, 26 and 110.

Succinct presentation of the facts and procedure in the main proceedings

- 1 OW Bunker (Netherlands) BV (‘OWB NL’) is one of the companies of the Danish OWB Group. On the instructions of OWB NL, the appellant supplied fuel to the ocean-going vessel Ms Evita K in the port of Sluiskil (the Netherlands). The appellant issued an invoice for this in the amount of USD 116 471.45, which remained unpaid due to the insolvency of OWB NL.
- 2 As the appellant, following the insolvency of OWB NL, had had a number of vessels attached in an effort to obtain payment for the fuel supplied, the appellant had obtained bank guarantees from the ship owners concerned in order to effect a release of that attachment. Those guarantees provided that they could be invoked on the basis of ‘a court ruling or an arbitral award handed down in Belgium against either OWB NL’ or the ship owner.
- 3 It is alleged that, prior to the insolvency, ING Bank NV (‘ING’), together with others, had granted a loan. As security, the various entities of the OWB group, including OWB NL, had allegedly assigned their current and future claims on end customers to ING. ING intervened in the proceedings and sought to prohibit the invocation of the bank guarantees or other securities relating to the bunkered vessel before the conclusion of the insolvency proceedings relating to OWB NL.
- 4 The court at first instance declared the appellant’s claim against OWB NL inadmissible. With regard to ING’s claim, the court declared that it lacked international jurisdiction. On appeal, the referring court finds that, by not entering an appearance on the first day of the hearing, as was the case at first instance, the respondent OWB NL is deemed to have challenged the court’s international jurisdiction under Article 28(1) of Regulation No 1215/2012 (‘the Brussels I bis Regulation’). That article provides that, in the absence of the respondent, the court must first examine whether it has jurisdiction under that regulation.

Essential arguments of the parties in the main proceedings

- 5 The appellant is claiming payment of the outstanding invoice for fuel supplied. The summons contained nothing about OWB NL’s insolvency proceedings, which by then had already lasted for four months, with the claim being described as an

ordinary civil trade receivable. However, in its pleadings it stated that its claim was based on Article 25(2) of the Nederlandse Faillissementswet ('the NFW').

- 6 This article 25 NFW concerns non-verifiable claims. These stand in contrast to ordinary verifiable claims, also known as insolvency claims, which the creditor submits to the liquidator in order to obtain payment from the estate (in Dutch insolvency law, these are claims under Article 26 in conjunction with Article 110 NFW). The referring court also refers to these as claims 'from the estate'. The unverifiable claims referred to in Article 25(1) of the NFW concern claims in which the estate is directly involved, such as claims relating to property. These claims are submitted to the liquidator. However, under Article 25(2) of the NFW, it is also possible to bypass the liquidator and to bring unverifiable claims directly against the insolvent legal person. In the case of such a claim 'outside of the estate', a ruling pursuant to the second paragraph of that article does not operate against the estate. These claims therefore only concern the insolvent person personally.
- 7 The referring court explained that, by its claim 'outside of the estate', the manifest aim of the appellant is to be able to invoke the bank guarantees issued after the insolvency of OWB NL. Meanwhile, at the same time as the present case in the Netherlands, the appellant submitted an ordinary verifiable claim for payment 'from the estate' to the liquidator.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 8 In the questions referred for a preliminary ruling, the referring court raises the issue of whether it has jurisdiction. That is the case only if the claim is not connected to insolvency. Indeed, Article 1(2)(b) of the Brussels I bis Regulation provides that that regulation does not apply to 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings'. In addition, according to Article 3(1) of the Insolvency Regulation, the Member State within the territory of which insolvency proceedings were opened, in this case the Netherlands, also has international jurisdiction to hear and determine actions which derive directly from those proceedings and which are closely connected to them (see also the judgment of 12 February 2009, *Seagon*, C-339/07, EU:C:2009:83).
- 9 In order to determine jurisdiction, it is not the procedural context of an action that is decisive, but its legal basis. It must be determined whether the right or obligation which forms the basis of the action has its source in the ordinary rules of civil and commercial law or in derogating rules specific to insolvency proceedings (judgment of 6 February 2019, *NK*, C-535/17, EU:C:2019:96, paragraph 28). In addition, according to the case-law of the Court, it is the closeness of the link between a court action and the insolvency proceedings that is decisive for the purposes of deciding whether the exclusion provided for in Article 1(2)(b) of Regulation No 44/2001 is applicable (judgment of 9 November

2017, *Tünkers France and Tünkers Maschinenbau*, C-641/16, EU:C:2017:847, paragraph 28 and the case-law cited therein).

- 10 In the light of that case-law, it is relevant to the jurisdiction of the referring court whether the claim at issue is in fact a claim ‘outside of the estate’ under Article 25(2) NFW, as the appellant contends, or whether it must be regarded as an ordinary, verifiable claim ‘from the estate’ under Article 26 in conjunction with Article 110 NFW (with regard to that distinction, see paragraph 6 above). Indeed, as stated in paragraph 8 above, under Article 1(2)(b) of the Brussels I bis Regulation and Article 3(1) of the Insolvency Regulation, the referring court has jurisdiction only in respect of claims that are unrelated to insolvency. That might be the case for a claim ‘outside of the estate’, but certainly not for a claim ‘from the estate’ such as the claim submitted to the liquidator in the Netherlands. Moreover, if the claim at issue is a claim ‘outside of the estate’, it is unclear whether both claims could possibly be brought simultaneously, one in Belgium and the other in the Netherlands.
- 11 Before anything else, the court must determine whether it has jurisdiction, so that it is not clear whether the referring court may decide on the classification of the claim.
- 12 The bank guarantees which the appellant seeks to invoke by means of the court ruling to be obtained through its appeal (see paragraph 2 above) make no mention of the type of claim that may form the basis thereof. It is therefore not clear whether the required ruling regarding OWB NL is a ruling pertaining to an ordinary verifiable claim ‘from the estate’ under Article 26 in conjunction with Article 110 NFW, or whether it may be a ruling on proceedings ‘outside of the estate’ within the meaning of Article 25(2) NFW which concern the insolvent directly. However, it appears from the legal opinions filed by the parties that these guarantees would not be able to be invoked on the basis of a ruling deeming the claims to be ‘from the estate’.
- 13 At the same time, the question of whether it is possible to bring a claim ‘outside of the estate’ if an ordinary verifiable claim ‘from the estate’ has already been lodged with the liquidator, can only be answered on the basis of the rules of Dutch insolvency law and not on the basis of the rules of ordinary civil and commercial law. The ultimate purpose of the claim is, after all, to obtain payment of the unpaid invoice outside of the insolvency proceedings by invoking the bank guarantee. In that regard, the referring court also refers to recital 4 of the Insolvency Regulation. That recital states that ‘it is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping)’.
- 14 That raises the question whether Article 1(2)(b) of the Brussels I bis Regulation should be interpreted as meaning that only the Dutch court of the place where the insolvency proceedings were opened has jurisdiction to determine whether, in the

present proceedings, there is a claim ‘from the estate’ or ‘outside of the estate’ and whether both types of claim can be brought simultaneously.

- 15 In addition, the referring court raises the question whether Article 25(2) of the NFW is compatible with the Insolvency Regulation if it allows such a claim to be brought before a court other than that of the Member State where the insolvency was declared.

WORKING DOCUMENT