Case C-568/20

Request for a preliminary ruling

Date lodged:

2 November 2020

Referring court or tribunal:

Oberster Gerichtshof (Austria)

Date of the decision to refer:

23 September 2020

Party seeking enforcement:

H Limited

Obligated party

J

In the case of the party seeking enforcement, H***** Limited, *****, […] versus the obligated party J*****, […] for the amount of EUR 9 249 915.62 […], in the proceedings for the 'extraordinary' appeal on a point of law brought by the obligated party against the order of the Landesgericht Linz (Regional Court, Linz, Austria), sitting as the court ruling on appeals on the merits, of 22 June 2020, […], by which the appeal on the merits brought by the obligated party against the order of the Bezirksgericht Freistadt (District Court, Freistadt, Austria) of 9 October 2019, […], was dismissed, the Oberster Gerichtshof (Supreme Court, Austria) […] made the following

O r d e r:

A. The following questions are referred to the Court of Justice of the European Union for a preliminary ruling:

1. Are the provisions of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction **[Or. 2]** and the recognition and enforcement of judgments in civil and commercial matters ('Regulation No 1215/2012'), in particular Article 2(a) and Article 39, to be interpreted as meaning that a judgment that is to be enforced exists even if, in a Member State, the judgment debtor is obliged, after summary examination in

WORKING DOCUMENT

adversarial proceedings, albeit relating only to the binding nature of the force of *res judicata* of a judgment given against him in a third State, to pay to the party who was successful in the third State proceedings the debt that was judicially recognised in the third State, when the subject matter of the proceedings in the Member State was limited to examination of the existence of a claim derived from the judicially recognised debt against the judgment debtor?

2. If question 1 is answered in the negative:

Are the provisions of Regulation No 1215/2012, in particular Articles 1, 2(a), 39, 45, 46 and 52, to be interpreted as meaning that, irrespective of the existence of one of the grounds set out in Article 45 of Regulation No 1215/2012, enforcement must be refused if the judgment under review is not a judgment within the meaning of Article 2(a) or Article 39 of Regulation No 1215/2012 or the application in the Member State of origin on which the judgment is based does not fall within the scope of Regulation No 1215/2012?

3. If the first question is answered in the negative and the second question in the affirmative:

Are the provisions of Regulation No 1215/2012, in particular Articles 1, 2(a), 39, 42(1)(b), 46 and 53, to be interpreted as meaning that, in proceedings concerning an application for refusal of enforcement, the court of the Member State addressed is compelled to assume, on the basis solely of the **[Or. 3]** information provided by the court of origin in the certificate issued pursuant to Article 53 of Regulation No 1215/2012, that a judgment that falls within the scope of the regulation and is to be enforced exists?

B. The proceedings concerning the appeal on a point of law are stayed pending delivery of the preliminary ruling of the Court of Justice of the European Union […].

G r o u n d s:

[1] **I. Facts**

[2] Enforcement proceedings (‘*Exekution*’) are pending between the parties within the jurisdiction of the Bezirksgericht Freistadt (District Court, Freistadt, Austria, ‘the court of first instance’). The party seeking enforcement, H***** Limited (‘H*****’) is a bank having its registered office in *****. The obligated party J***** is domiciled in Austria.

[3] The enforcement order on which that enforcement is based is the decision of the High Court of Justice, Business and Property Courts of England & Wales, Commercial Court (QBD) (‘the High Court’), a court of the United Kingdom, of 20 March 2019.

WORKING DOCUMENT

[4] The English decision was based, in turn, on two Jordanian judgments of 2013, by which J***** was obliged to pay the total amount of (approximately) USD 10 300 000.

[5] J***** does not dispute the fact that he was obliged to make payment following the Jordanian judgments, but he does dispute the fact that the sums are payable to H*****. He submits that the judgment creditor was a different legal person. H***** did not have standing to enforce the judgments in Jordan or outside Jordan. Moreover, the judgments were obtained **[Or. 4]** fraudulently and were also given under a legally invalid power of attorney. It would be contrary to public policy if the English courts were to give a (corresponding) English judgment in relation to the Jordanian judgments.

[6] In the English proceedings, H***** applied for, inter alia, an order in the context of summary proceedings that the two Jordanian judgments could be enforced as if they were English judgments against J*****.

[7] By the aforementioned decision of the High Court of 20 March 2019, that application was granted and J***** was ordered to pay USD 10 392 463, plus interest and costs, to H***** in the form of an order for performance. In addition to the question of whether summary proceedings in England were admissible, the High Court, having regard to Jordanian law, considered the question of whether H***** could legitimately assert the claims arising from the Jordanian judgment; the court found that it could do so. The High Court considered that J***** had been obliged in Jordan to make payment to H*****, which had established a branch in Jordan and not a legally independent entity in the form of a subsidiary. Furthermore, the High Court also addressed the fraud in connection with a matter of procedure, as claimed by J*****, and the alleged lack of a power of attorney in the Jordanian proceedings. It was clear to the High Court that the application for enforcement of the Jordanian judgments could not be successfully challenged.

[8] On the basis of its decision of 20 March 2019, the High Court issued a certificate pursuant to Article 53 of Regulation No 1215/2012, according to which J***** was obliged to make a payment to **[Or. 5]** H***** of USD 10 392 463, together with interest of USD 5 422 031.65 and costs of GBP 125 000.

[9] By order of the court of first instance of 12 April 2019, H***** was granted, on the basis of the High Court's decision of 20 March 2019, authorisation for enforcement against J***** in respect of the recovery of a claim of (converted) EUR 9 249 915.62 together with interest and costs.

[10] J***** seeks refusal of enforcement in respect of the High Court's decision of 20 March 2019 and the termination of the enforcement granted by the court of first instance.

[11] This request for a preliminary ruling concerns questions relating to the enforceability of foreign judgments and the scope of examination in the procedure for applications for refusal of enforcement.

WORKING DOCUMENT

[12] **II. Legal basis:**

[13] Basis in EU law:

The basis in EU law of this request for a preliminary ruling is, in particular, Articles 1, 2(a), 39, 42(1)(b), 45, 46, 52 and 53 of Regulation No 1215/2012.

[15] National law:

[16] The Gesetz vom 27. Mai 1896 über das Exekutions- und Sicherungsverfahren (Law of 27 May 1896 on enforcement and attachment procedures) (Exekutionsordnung (Code on Enforcement), 'the EO') reads, in extract:

Part 1.

Enforcement

[…]

Enforcement orders

Paragraph 1 **[Or. 6]**

Enforcement orders within the meaning of the present law are the following acts and instruments drawn up within the territory to which this law applies:

[…]

Foreign enforcement orders

Paragraph 2

[…]

(2) Acts and instruments which, although drawn up outside the territory to which this law applies, are enforceable under an international-law agreement or a legal instrument of the European Union without a separate declaration of enforceability being required shall also be deemed to be equivalent to the acts and instruments referred to in Paragraph 1.

Part 3

International enforcement law

Section 1

General provisions

WORKING DOCUMENT

General

Paragraph 403 Acts and instruments drawn up abroad (foreign enforcement orders) require a declaration of enforceability in Austria in order to bring about enforcement, unless they are enforceable under an international-law agreement or a legal instrument of the European Union without a separate declaration of enforceability being required.

[…]

Section 3

Enforcement on the basis of acts and instruments of supranational organisations

[…]

Section 4 **[Or. 7]**

No declaration of enforceability

Time limit for applications for refusal

Paragraph 418 (1) If the authorisation of enforcement on the basis of foreign enforcement orders does not require a declaration of enforceability, the obligated party may invoke grounds which prevent enforcement in Austria (grounds for refusal) by filing an application for termination of enforcement.

(2) The termination pursuant to subparagraph 1 may be applied for only within eight weeks of service of the authorisation for enforcement.

(3) If grounds for refusal are based on facts which did not arise until after the authorisation for enforcement was served or of which the obligated party was unaware due to an unforeseeable or unavoidable event through no fault of his own or due to slight negligence, the period shall begin to run on the day on which the obligated party was able to become aware of those facts. The obligated party must state these circumstances in its application for termination and specify the means by which they are to be substantiated.

[…]

[17] **III. Forms of order sought and arguments of the parties**

[18] **J******* based his application for refusal (application for termination) on a violation of public policy. However, his further submission that the English **[Or.**

WORKING DOCUMENT

8] decision was adopted on the basis of, or for the purpose of enforcing, two Jordanian judgments and therefore constitutes a 'merger decision' is relevant to this request for a preliminary ruling. He submits that a judgment of a Member State which made a decision regarding performance in relation to a debt judicially recognised in a third State could not be enforced in another Member State under Regulation No 1215/2012. The fact that there was no enforceable judgment could be asserted in the refusal procedure of the Member State in which enforcement was sought. In the refusal procedure, the Member State addressed was not bound by the information provided by the court of origin in the certificate pursuant to Article 53 of Regulation No 1215/2012.

[19] **H******* takes the view that the order to be enforced was an independent judgment of an English court. Moreover, the courts in the Member State addressed were bound by the content of the certificate issued by the High Court. The foreign judgment could be examined only in the context of Article 45 of Regulation No 1215/2012. Thus, it was not possible to examine whether the judgment issued under foreign procedural law was in fact a judgment enforceable under Regulation No 1215/2012.

[20] **IV. Procedure to date**

[21] **The court of first instance** rejected the forms of order sought by J*****. It considered that Regulation No 1215/2012 was applicable here or that an English judgment to be recognised and enforced existed. The High Court created an order requiring performance after extensive adversarial proceedings, and did not merely declare the Jordanian judgments to be enforceable. In addition, the statements regarding the inapplicability of Regulation No 1215/2012 came to nothing, because this was a matter to be examined by the court of origin, **[Or. 9]** whose certificate pursuant to Article 53 of Regulation No 1215/2012 was binding on the court of first instance in the refusal procedure.

[22] The **court of appeal** dismissed the appeal brought by J***** against the decision of the court of first instance. It stated that the proceedings in England were adversarial in nature, so, for that reason alone, exequatur proceedings must be ruled out. The English judgment fell within the scope of Article 2(a) of Regulation No 1215/2012. J***** did not contest the claims of H***** before the High Court. The allegation that the High Court did not examine the claim made against him was therefore incomprehensible. With regard to the certificate pursuant to Article 53 of Regulation No 1215/2012, there were no concerns suggesting the applicability of a ground for refusal pursuant to Article 45 of Regulation No 1215/2012. An examination of the English judgment was permissible only in the context of Article 45 of Regulation No 1215/2012.

[23] **V. Questions referred**

[24] Question 1 (Scope of the prohibition on 'double exequatur'):

WORKING DOCUMENT

[25] Following the case-law of the Court of Justice of the European Union (see CJEU, C-129/92, *Owens Bank*, paragraph 25) on the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ('the 1968 Convention'), it can be assumed that Regulation No 1215/2012 also does not apply to proceedings, or issues arising in proceedings, in Member States concerning the recognition and enforcement of the judgments in civil and commercial matters of non-contracting States (*L'exequatur sur l'exequatur ne vaut*) […]. This is intended to prevent 'double exequatur' from being used to circumvent the rules **[Or. 10]** which would have to be observed in cases involving the direct enforcement of the judgment of a non-contracting State in the Member State in which enforcement is sought.

[26] Contrary to the interpretation adopted by the previous instances, the present Chamber is inclined to take the legal view that that statement is also applicable to judgments ordering performance delivered by a foreign court on the basis of an action for the enforcement of a judgment (*actio iudicati*), provided that the legal tie underlying the judicially recognised debt is not reviewed as to substance […].

[27] The present Chamber takes the view that the fact that the main proceedings were adversarial in nature also does nothing to change this. The decisive factor is the subject matter of the proceedings. In the main proceedings, the summary examination in the English proceedings was limited to the question of whether J***** is obliged to make payment to H***** on the basis of the Jordanian judgments.

[28] In view of the opposite opinion of H***** and the previous instances, which is in any event justifiable, this question with relevance to the procedure in the present case requires clarification by the Court of Justice of the European Union.

[29] Question 2 (Refusal of enforcement beyond the grounds for refusal set out in Article 45 of Regulation No 1215/2012):

[30] According to the case-law of the Court of Justice of the European Union, the grounds for refusal set out in Article 45 of Regulation No 1215/2012 are listed in an exhaustive manner and must be interpreted restrictively (CJEU, C-302/13, *flyLAL*, paragraph 46). The objective of achieving the greatest possible freedom of movement of European judgments should always be considered in this context (CJEU, C-681/13, *Diageo Brands*, paragraphs 40 and 41). The exhaustive **[Or. 11]** list and the narrowly defined grounds are an expression of the mutual trust between the Member States (see recital 26). Furthermore, Article 52 of Regulation No 1215/2012 prohibits the courts of the Member State addressed from reviewing a judgment given in another Member State as to its substance (see, for example, C-38/98, *Renault*, paragraph 29).

[31] It is questionable whether – in line with the legal view taken by the previous instances – it can be inferred from the system described above that only the

WORKING DOCUMENT

grounds for refusal under Article 45 of Regulation No 1215/2012 are therefore to be examined in proceedings for refusal of enforcement.

[32] This question is answered in the negative by most legal commentators.

They take the view that it cannot be inferred from the aforementioned provisions of Regulation No 1215/2012 that an examination of the general conditions for enforcement under Regulation No 1215/2012 is excluded. It should therefore be possible for the Member State addressed to examine the question of whether Regulation No 1215/2012 applies at all or whether the foreign judgment is a judgment (to be recognised and enforced) within the meaning of Article 2(a) of Regulation No 1215/2012 […]. **[Or. 12]**

[33] The present Chamber is also inclined to take this view expressed in the literature, particularly since it is not possible to derive from the wording of Articles 45 and 46 of Regulation No 1215/2012 a prohibition to the effect that circumstances preventing cross-border enforcement cannot also be examined in the Member State addressed, even if there is no ground for refusal within the meaning of Article 45 of Regulation No 1215/2012. In respect of refusal of enforcement, Article 41(2) of Regulation No 1215/2012 also militates against a view that the refusal could be based solely on grounds referred to Article 45 of Regulation No 1215/2012. The same applies to the first sentence of recital 30. Nor does the second sentence in recital 30, which concerns only the refusal of recognition, and states that recognition of a judgment may be refused only if one or more of the grounds for refusal provided for in the regulation are present, refute the prevailing view in the literature. The application of this rule presupposes the existence of a 'judgment', which logically has to be examined as a first step (that is to say before examining grounds for refusal within the meaning of Article 45 of Regulation No 1215/2012).

[34] Clarification by the Court of Justice of the European Union also appears to be necessary in respect of this question and is relevant to the further proceedings if Question 1 is to be answered in the negative.

[35] Question 3 (whether the information in the certificate pursuant to Article 53 of Regulation No 1215/2012 is binding):

With regard to the comparable legal situation under Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, the Court of Justice of the European Union has already clarified that the information **[Or. 13]** in the certificate provided for in Article 54 of that regulation may be verified by the court […] of the Member State in which enforcement is sought (CJEU, C-619/10, *Trade Agency*, paragraph 46).

[37] The present Chamber is inclined to apply this statement *mutatis mutandis* to the certificate pursuant to Article 53 of Regulation No 1215/2012, meaning that the debtor in the Member State addressed can dispute – irrespective of the

WORKING DOCUMENT

information in the certificate, which is not binding in this respect – that the conditions for enforcement have not been met, for instance because a judgment within the meaning of Article 2(a) of Regulation No 1215/2012 does not exist or because that regulation is not applicable […].

[38] However, the court of first instance (clearly) assumed, on the basis of a more recent decision of the Court of Justice of the European Union (see CJEU, C-361/18, *Weil*, paragraph 33), that the certificate precluded it from examining, in the context of the refusal procedure, the question of whether a judgment that falls within the scope of Regulation No 1215/2012 and is to be enforced in another Member State exists.

[39] The present Chamber does not interpret the cited decision of the Court of Justice of the European Union in this sense, even taking into account the previous case-law. However, the opposite view is in any event justifiable. The Court of Justice is requested to clarify the legal situation in this regard also. However, such clarification is required only if the first question is answered in the negative and the second question in the affirmative.

[40] **VI. Procedural matters [Or. 14]**

[41] As a court of final instance, the Supreme Court is obliged to make a reference if the correct application of EU law is not so obvious as to leave no room for any reasonable doubt. Such doubt is present in this case. […]

Supreme Court,

Vienna, 23 September 2020

[…]

WORKING DOCUMENT