

# Anonymised version

Translation

C-501/23 – 1

Case C-501/23

## Request for a preliminary ruling

**Date lodged:**

7 August 2023

**Referring court:**

Bundesgerichtshof (Germany)

**Date of the decision to refer:**

29 June 2023

**Debtor and appellant:**

DL

**Creditor and respondent:**

Land Berlin

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**BUNDESGERICHTSHOF (FEDERAL COURT OF JUSTICE, GERMANY)**

**ORDER**

[...]

of

29 June 2023

in the proceedings for the opening of insolvency proceedings  
against DL, [...] Berlin,

debtor and appellant,

[...]

intervener:

Land Berlin (German federal state of Berlin), represented by the Finanzamt Wilmersdorf (Wilmersdorf Tax Office), [...] Berlin,

creditor and respondent

The Ninth Civil Panel of the Federal Court of Justice [...]

makes, on 29 June 2023, the following

Order:

- I. The proceedings are stayed.
- II. The following questions are referred to the Court of Justice of the European Union pursuant to Article 267(1)(b) and (3) TFEU:
  1. Is the first sentence of the third subparagraph of Article 3(1) in conjunction with Article 2(10) of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings ('the European Insolvency Regulation') to be interpreted as meaning that the place of operations of an individual exercising an independent business or professional activity constitutes an establishment even if the operations are carried out without any human means or assets?
  2. If Question 1 is answered in the negative: Is the first sentence of the third subparagraph of Article 3(1) of the European Insolvency Regulation to be interpreted as meaning that, if an individual exercising an independent business or professional activity does not maintain an establishment within the meaning of Article 2(10) of the European Insolvency Regulation, the centre of main interests is presumed to be the place where the independent business or professional activity is exercised in the absence of proof to the contrary?
  3. If Question 2 is answered in the negative: Is Article 3(1) of the European Insolvency Regulation to be interpreted as meaning that, in the case of an individual exercising an independent business or professional activity who does not maintain an establishment within the meaning of Article 2(10) of the European Insolvency Regulation, the centre of main interests is presumed to be the place of the individual's habitual residence pursuant to the first sentence of the fourth subparagraph of Article 3(1) of the European Insolvency Regulation, in the absence of proof to the contrary?

Grounds:

## I.

- 1 On 18 August 2020, the intervener requested the opening of insolvency proceedings against the debtor. At the time of the lodging of the application the debtor maintained residences in Berlin, Monaco, Los Angeles and on the French Caribbean island of Saint-Barthélemy. He was the chairman of the supervisory board of Landbell AG, a public limited company incorporated under German law with its registered office in Mainz. His assets consisted of a bank balance in Monaco and holdings in companies incorporated under Monegasque law, which held assets, a securities account and shareholdings in Germany.
- 2 By order of 27 July 2021, the Amtsgericht (Local Court) seised of the case dismissed the application as inadmissible on the ground that it lacked territorial jurisdiction. On 29 June 2022, following an immediate appeal by the creditor, the Landgericht (Regional Court) set aside that order and referred the case back to the Local Court. It took the view that the centre of the debtor's main interests is located at the place where the debtor carries out his independent activity as chairman of a supervisory board. The debtor expresses doubts as to the international jurisdiction of the German courts. By his appeal on a point of law, which was admitted by the Regional Court, he seeks to have the contested order set aside and the creditor's immediate appeal dismissed.

## II.

- 3 Before ruling on the appeal on a point of law the proceedings must be stayed and a preliminary ruling must be obtained from the Court of Justice of the European Union on the questions posed in the operative part of the order (Article 267(1)(b) and (3) TFEU).
- 4 1. The international jurisdiction of the German courts must be assessed in accordance with Article 3(1) of the European Insolvency Regulation. Where cross-border elements are concerned, that provision applies regardless of whether Member States or third countries are involved (cf. Federal Court of Justice, order of 8 December 2022 – IX ZB 72/19, WM 2023, 278 paragraph 19 et seq.; CJEU, judgment of 16 January 2014 – C-328/12, ECLI:EU:C:2014:6 paragraphs 17 et seq., 29). Pursuant to the first subparagraph of Article 3(1) of the European Insolvency Regulation, the courts of the Member State within the territory of which the centre of the debtor's main interests is situated have jurisdiction to open insolvency proceedings. The centre of main interests is the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties. In the case of an individual exercising an independent business or professional activity, the centre of main interests is presumed to be that individual's principal place of business pursuant to the first sentence of the third subparagraph of Article 3(1) of the European Insolvency

Regulation, in the absence of proof to the contrary. In the case of any other individual, the centre of main interests is presumed to be the place of the individual's habitual residence pursuant to the first sentence of the fourth subparagraph of Article 3(1) of the European Insolvency Regulation, in the absence of proof to the contrary.

- 5 2. The Regional Court held that at the material time of the lodging of the application the debtor exercised an independent business or professional activity within the meaning of the first sentence of the first subparagraph of Article 3(1) of the European Insolvency Regulation. The Ninth Civil Panel bases this finding on the following statements. The concept of an independent business or professional activity must be given an autonomous interpretation in EU law. An independent activity is characterised by the fact that the persons concerned perform their activities in their own name, on their own behalf and under their own responsibility, and bear the economic risk associated with carrying out those activities. They act on their own account and under their own responsibility, are free to arrange how they perform their work and themselves receive the emoluments which make up their incomes (cf. CJEU, judgment of 13 June 2019 – C-420/18, ECLI:EU:C:2019:490 paragraph 39). As the facts and the dispute now stand, those conditions are met. The debtor was the chairman of the supervisory board of a public limited company incorporated under German law. Under German law, the supervisory board is not subject to instructions in relation to the management board of the public limited company (cf. Paragraph 111 of the Aktiengesetz (German Stock Corporation Act; 'the AktG'). According to the findings of the Regional Court, the debtor may also have borne a remuneration risk (cf., in that regard, Bundesfinanzhof (Federal Finance Court, Germany; 'the BFH'), in BFHE (Collection of Decisions of the BFH) 267, 189).
- 6 3. Pursuant to the first sentence of the third subparagraph of Article 3(1) of the European Insolvency Regulation, in the case of an individual exercising an independent business or professional activity, the centre of main interests is presumed to be that individual's principal place of business. 'Establishment' is defined in Article 2(10) of the European Insolvency Regulation as 'any place of operations where a debtor carries out [...] a non-transitory economic activity with human means and assets'.
- 7 The Regional Court found that the debtor did not use any human means or assets in the course of his independent activity as chairman of the supervisory board of a German public limited company, either in Germany or elsewhere. Therefore, it did not apply the presumption set out in the first sentence of the third subparagraph of Article 3(1) of the European Insolvency Regulation. This would not stand up to legal scrutiny if an 'establishment' within the meaning of the European Insolvency Regulation does not necessarily entail, for an individual, the use of human means and assets. The independent activity in Germany would then establish the rebuttable presumption that the centre of the debtor's main interests is located in Germany. The Ninth Civil Panel assumes that it would then only have to be examined whether the debtor has put forward and proved, to the extent

necessary, facts sufficient to rebut the presumption. The Regional Court would have to re-examine its findings in that regard.

- 8 4. If the first question referred is answered in the negative, i.e. if it must be held that the debtor does not maintain an establishment within the meaning of Article 2(10) of the European Insolvency Regulation in the course of his independent activity, the further question arises as to whether the place where the independent activity is carried out then confers, pursuant to the first sentence of the third subparagraph of Article 3(1) of the European Insolvency Regulation, a presumption of the centre of the debtor's main interests in the absence of proof to the contrary. According to recital 28 of the European Insolvency Regulation, when determining whether the centre of the debtor's main interests is ascertainable by third parties, special consideration should be given to the creditors and to their perception as to where a debtor conducts the administration of its interests. The debtor's independent activity as chairman of a supervisory board was apparent to third parties. Where private assets are managed, on the other hand, is often unclear to creditors. If the second question referred were to be answered in the affirmative, pursuant to the first sentence of the third subparagraph of Article 3(1) of the European Insolvency Regulation, there would be a rebuttable presumption that the centre of the debtor's main interests is in Germany. In that case too, the Regional Court would have to re-examine findings on the issue of the rebuttal of the presumption.
- 9 5. Finally, if the presumption set out in the first sentence of the third subparagraph of Article 3(1) of the European Insolvency Regulation were not applicable because the first and second questions referred are answered in the negative, the question arises as to whether the presumption set out in the first sentence of the fourth subparagraph of Article 3(1) of the European Insolvency Regulation is now applicable, i.e. whether an individual who does not operate an establishment within the meaning of the first sentence of the third subparagraph of Article 3(1) of the European Insolvency Regulation for the individual's independent business or professional activity is covered by the concept of 'any other individual' in that provision. The accuracy of that assumption is supported by the fact that, for reasons of legal certainty, the third and fourth subparagraphs of Article 3(1) of the European Insolvency Regulation prescribe a presumption in respect of every individual, which refers to the centre of the individual's main interests and thus to the international jurisdiction of a Member State to open insolvency proceedings. There might be a relationship of subordination between the third and fourth subparagraphs of Article 3(1) of the European Insolvency Regulation, with the result that international jurisdiction in respect of individuals has to be examined in accordance with the first subparagraph of Article 3(1) of the European Insolvency Regulation only if the conditions laid down in the other provisions are not met.
- 10 The Regional Court disregarded the presumption set out in the first sentence of the fourth subparagraph of Article 3(1) of the European Insolvency Regulation and applied the second sentence of the first subparagraph of Article 3(1) of the European Insolvency Regulation instead. If the presumption set out in the first

sentence of the fourth subparagraph of Article 3(1) of the European Insolvency Regulation were applicable, the debtor’s habitual residence at the time of the lodging of the application would first have to be determined. It would then have to be examined whether factual circumstances that have yet to be established support the conclusion that the presumption has been rebutted. In that case too, the Regional Court’s order would not stand.

[...] [...] [...]  
[...] [...]

Lower courts:

Amtsgericht Charlottenburg (Local Court, Charlottenburg), decision of 27.07.2021 – 36b IE 3743/20 –

Landgericht Berlin (Regional Court, Berlin), decision of 29.06.2022 – 84 T 183/21 –

[...]

[...]

[...]