

Case C-765/22

Request for a preliminary ruling

Date lodged:

16 December 2022

Referring court:

Juzgado de lo Mercantil de Palma de Mallorca (Spain)

Date of the decision to refer:

24 November 2022

Applicants:

Luis Carlos

Severino

Isidora

Angélica

Paula

Luis Francisco

Delfina

Defendant:

Air Berlín PLC & CO Luftverkehrs KG, Sucursal en España

Court: **Juzgado de lo Mercantil (Commercial Court)**

Sitting at: **Palma de Mallorca (Spain)**

Section: **1**

Date: **24/11/2022**

[...]

Type of decision: **Order**

[...]

[Particulars of court, proceedings and parties]

ORDER

PALMA DE MALLORCA, 24 November 2022.

[...] [procedural formalities]

FACTUAL BACKGROUND

ONE. Under Article 289(2) of Real Decreto-Ley 1/2020 por el que se aprueba el texto refundido de la Ley Concursal (Royal Legislative Decree 1/2020 approving the recast text of the Ley Concursal (Insolvency Law)) of 5 May 2020 ('the Spanish Law on insolvency'), the applicants filed an interlocutory application in insolvency proceedings, challenging the inventory of assets and the list of creditors drawn up by the insolvency administrators. The insolvency administrators responded to the application in due time and form.

The parties did not apply for a hearing and the court did not find it necessary to hold one. Under Article 540(2) of the Spanish Law on insolvency, the court is required to rule without further proceedings.

TWO. By a procedural order made under Article 39 of the Ley de Enjuiciamiento Civil (Spanish Law on civil procedure) and Article 4bis of Ley Orgánica 6/1985 del Poder Judicial (Organic Law on the judiciary) of 1 July 1985, the parties to the proceedings and the Office of the Public Prosecutor were granted a hearing to express their opinions on whether it was appropriate to refer a question to the Court of Justice of the European Union for a preliminary ruling on the issues of the interpretation of EU law set out, and on the scope of any referral.

LEGAL BASIS

ONE. *Subject matter of the main proceedings and relevant facts.*

- 1 These proceedings concern a challenge to the inventory of assets and the list of creditors submitted by the insolvency administrators in the secondary insolvency proceedings relating to AIR BERLÍN PLC & CO LUFTVERKEHRS KG.
- 2 The main insolvency proceedings relating to AIR BERLÍN PLC & CO LUFTVERKEHRS KG were opened by a decision of 1 November 2017 of the first instance court in Charlottenburg (Berlin, Germany) [...].
- 3 By order of 6 November 2020 involuntary secondary insolvency proceedings were opened in respect of AIR BERLÍN PLC & CO LUFTVERKEHRS KG, having an

establishment in Spain through AIR BERLÍN PLC & CO LUFTVERKEHRS KG, sucursal en España.

- 4 The applicants, local creditors who were employees of the branch in Spain of AIR BERLÍN PLC & CO LUFTVERKEHRS KG, which ceased trading after the main proceedings had opened in Germany, filed a number of applications with the Spanish employment courts.

In a judgment [...] of 30 April 2017, the Sala de lo Social (Social Division) of the Audiencia Nacional (National High Court, Spain) [...] held the dismissals to be void with effect from 24 November 2017. The judgment found the dismissals to be void because there was no record that the insolvency supervisor appointed by the German court, Mr [Lucas], had commenced local insolvency proceedings in Spain in order to obtain judicial authorisation from the court hearing the insolvency, and because the employees' legal representatives had not been provided with the mandatory documents.

Spanish employment courts have held that the employees' dismissals are void and, since they cannot be reinstated, have ordered AIR BERLÍN PLC & CO LUFTVERKEHRS KG to pay them certain sums by way of compensation and post-dismissal remuneration during proceedings.

- 5 Following the filing of the application to open secondary local insolvency proceedings, in accordance with Article 25(4) of Royal Decree 505/85 of 6 March 1985 the insolvency administrators in the main proceedings issued the certificates whereby the employees' claims were included on the list of creditors in respect of amounts the same as or more than those requested from the Fondo de Garantía Salarial (Wages Guarantee Fund, FOGASA). The employees were able to have part of their claims met within the statutory limits.
- 6 In the secondary local insolvency proceedings taking place in Spain, the appointed insolvency administrators submitted a provisional report containing the list of creditors in accordance with Article 290 in conjunction with Article 293[(1), second paragraph] of the Spanish Law on insolvency. The list of creditors is the document in which, once the applications have been lodged and verified, the claims are admitted and ranked in the insolvency.

The insolvency administrators took the view that the employees' claims were insolvency claims (*créditos concursales*) and ranked them as general privileged claims (*créditos con privilegio general*) and non-privileged claims (*créditos ordinarios*).
- 7 The employees have challenged the list of creditors in respect of the admission and ranking of their claims, under Article 297(1) of the Spanish Law on insolvency. They are of the view that their claims should be ranked as claims against the assets of the insolvent debtor (*créditos contra la masa*) and, therefore, payable as preferential debts according to the Spanish insolvency legislation.

TWO. Relevant legal provisions

However, the employees understand that the reference in Article 242(8) of the Spanish Law on insolvency to claims arising under employment contracts, including compensation for any dismissal or termination of an employment contract arising after the opening of insolvency proceedings, must be understood as relating to the date of the opening of the main insolvency proceedings rather than of the secondary proceedings.

As recital 22 states, Regulation (EU) 2015/848 acknowledges the fact that as a result of widely differing substantive laws in the Member States it is not practical to configure international insolvency proceedings with universal scope throughout the Union. Alongside security *in rem*, it is precisely the disparity at European Union level in regulation of the ranking of claims arising under employment contracts that justifies the establishment of a qualified universal procedure in which it is permissible to open local proceedings that apply exclusively to assets situated in the State where the proceedings are opened. Recital 22 goes so far as to state that ‘at the next review of this Regulation, it will be necessary to identify further measures in order to improve the preferential rights of employees at European level.’

In this vein, Regulation (EU) 2015/848 contains provisions clearly intended to protect employees against the application of foreign insolvency provisions different from those governing employment contracts in their own State.

As an exception to application of the *lex fori concursus*, Article 13 provides that the effects on employment contracts are to be governed solely by the law of the Member State applicable to them, and that the courts of the Member State in question rather than those of the State of the opening of proceedings are to retain jurisdiction to approve the termination or modification of employment contracts even if no local proceedings have been opened.

Nevertheless, recital 72 contains the proviso that ‘any other questions relating to the law of insolvency, such as whether the employees’ claims are protected by preferential rights and the status such preferential rights may have, should be determined by the law of the Member State in which the insolvency proceedings (main or secondary) have been opened’.

By virtue of the option available under Article 45 of Regulation (EU) 2015/848 – according to the insolvency administrator in the main proceedings –, the claims arising under employment contracts at issue here have been admitted in the main proceedings as preferential claims because they have been found to be claims against the assets of the insolvent debtor under the German legislation, which is the applicable law because Germany is the State of the opening of the main proceedings.

In the secondary insolvency proceedings the decision adopted by the insolvency administrators is being challenged in so far as, in the list of creditors in their

report, they treat the employees' claims as insolvency claims and, therefore, not as preferential claims. They have made that decision because in their view the reference in Article 242(8) of the Spanish Law on insolvency to claims arising from employment contracts that come into being or are upheld by a court decision following the opening of insolvency proceedings relates to the opening of the secondary rather than of the main insolvency proceedings.

The insolvency administrator's interpretation is in fact compatible with a literal interpretation of Article 24[2](8) of the Spanish Law on insolvency which, ultimately, as emerges from Article 35 in conjunction with Article 7(1) [and] (2)(g) and (h) of Regulation (EU) 2015/848, is the law applicable when determining which claims are to be lodged against the debtor's insolvency estate and the treatment of claims arising after the opening of insolvency proceedings.

However, that interpretation may conflict with the contextual interpretation that should be given to Article 35 and Article 7(1) [and] (2)(g) and (h) in conjunction with recital 72 of Regulation (EU) 2015/848 as part of the qualified universal proceedings outlined by the regulation. That is especially so since, according to recital 40 in conjunction with recital 23, one of the reasons for allowing secondary insolvency proceedings to be opened is precisely the protection of local interests. It would also appear contradictory that the regulation should provide, in the interests of protecting employees, that the ranking of claims and the preferential rights attaching to them are determined in accordance with the law governing insolvency proceedings in the State of opening but that the application of that law nevertheless produces an outcome that is detrimental to the interests it is sought to protect.

By reason of the foregoing the following request for a preliminary ruling should be made to the Court of Justice of the European Union as guarantor of the uniform interpretation and application of EU law.

1. Article 35 of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings ('Regulation (EU) 2015/848') provides that:

'save as otherwise provided for in this Regulation, the law applicable to secondary insolvency proceedings shall be that of the Member State within the territory of which the secondary insolvency proceedings are opened.'

2. Article 7 of Regulation (EU) 2015/848 provides that:

1. 'Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened (the "State of the opening of proceedings").'

2. The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. In particular, it shall determine the following:

...

(g) the claims which are to be lodged against the debtor's insolvency estate and the treatment of claims arising after the opening of insolvency proceedings;

(h) the rules governing the lodging, verification and admission of claims'.

3. Royal Legislative Decree 1/2020 approving the recast text of the Ley Concursal (Insolvency Law), of 5 May 2020, provides as follows in respect of claims to be admitted against the debtor's insolvency estate:

Article 280(1): 'The following are general privileged claims:

Claims in respect of wages that do not have the status of special privileged claims, calculated by multiplying three times the statutory minimum wage (*salario mínimo interprofesional*) by the number of days for which wages are outstanding; compensation arising from the termination of contracts, corresponding to the legal minimum calculated on the basis of an amount not exceeding three times the statutory minimum wage; compensation arising from accidents at work and occupational diseases that have accrued before the opening of insolvency proceedings; the social security contributions for which the insolvent debtor is legally liable, and supplementary benefits payable on the grounds of failure to comply with occupational health obligations and accruing before the opening of insolvency proceedings.'

Article 269(3)

'Claims that do not have the status of privileged or subordinate claims under this Law shall be ranked as non-privileged claims.'

4. Royal Legislative Decree 1/2020 approving the recast text of the Ley Concursal (Insolvency Law), of 5 May 2020, provides as follows in respect of the treatment of claims arising after the opening of insolvency proceedings:

Article 242

'The following shall be claims against the assets of the insolvent debtor:

...

(8) Claims generated by the exercise of the debtor's professional or business activity after the opening of insolvency proceedings. This paragraph shall include claims arising from employment contracts corresponding to that period, including compensation for dismissal or termination of an employment contract occurring after the opening of insolvency proceedings'.

Article 429. ‘Deduction for the payment of claims against the assets of the insolvent debtor’.

‘Before paying the insolvency claims, the insolvency administrators shall deduct from the total assets of the insolvent debtor the assets and rights required to pay the claims against those assets.’

THREE: *Grounds of the decision.*

As can be seen, the parties’ opposing positions and the national court’s questions of interpretation centre on which date of the opening of insolvency proceedings should be taken into consideration for the purpose of ranking the employees’ claims as claims against the assets of the insolvent debtor or as insolvency claims, and specifically whether regard should be had to the date of the opening of the main insolvency proceedings or of the secondary proceedings.

The insolvency administrators take the view that it should be the date of the decision opening the secondary insolvency proceedings. Since the judgments of the Spanish employment courts were delivered after the date on which the main insolvency proceedings were opened but before that on which the secondary proceedings were opened, the claims are accordingly, in their view, insolvency claims.

OPERATIVE PART

By reason of the foregoing, this court hereby makes the following request for a preliminary ruling to the Court of Justice of the European Union:

(1) In the qualified universal proceedings outlined by Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, in which it is permissible to open secondary proceedings that apply exclusively to assets situated in the State where the proceedings are opened, can Article 35 and Article 7(1) [and] (2)(g) and (h) in conjunction with recital 72 be interpreted as meaning that application of the law of the State of the opening of the secondary proceedings ‘to the treatment of claims arising after the opening of insolvency proceedings’ relates to claims arising after the opening of the main proceedings rather than of the secondary proceedings?

The proceedings are stayed until the Court of Justice of the European Union rules on the request for a preliminary ruling.

[...]

[Final procedural formalities and signature by the court]