Case C-590/21

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:

23 September 2021

Referring court:

Areios Pagos (Greece)

Date of the decision to refer:

25 June 2021

Appellants:

Charles Taylor Adjusting Limited

FD

Respondents:

Starlight Shipping Company

Overseas Marine Enterprises INC

Subject matter of the main proceedings

Request for the recognition and a declaration of enforceability of a foreign judgment and foreign court orders impeding and preventing judicial protection by the court of another Member State or the continuation of proceedings already commenced in that State – Definition of public policy within the meaning of point 1 of Article 34 and Article 45(1) of Regulation No 44/2001

Subject matter and legal basis of the request

Article 267 TFEU, interpretation of Regulation No 44/2001

Questions referred for a preliminary ruling

(I) Is the expression 'manifestly contrary to public policy' in the EU and, by extension, to domestic public policy, which constitutes a ground for non-recognition and non-enforcement pursuant to point 1 of Article 34 and Article 45(1) of Regulation No 44/2001, to be understood as meaning that it extends beyond explicit anti-suit injunctions prohibiting the commencement and continuation of proceedings before a court of another Member State to judgments or orders delivered by courts of Member States where: (i) they impede or prevent the claimant in obtaining judicial protection by the court of another Member State or from continuing proceedings already commenced before it; and (ii) is that form of interference in the jurisdiction of a court of another Member State to adjudicate a dispute of which it has already been seised, and which it has admitted, compatible with public policy in the EU? In particular, is it contrary to public policy in the EU within the meaning of point 1 of Article 34 and Article 45(1) of Regulation No 44/2001, to recognise and/or declare enforceable a judgment or order of a court of a Member State awarding provisional damages to claimants seeking recognition and a declaration of enforceability in respect of the costs and expenses incurred by them in bringing an action or continuing proceedings before the court of another Member State, where the reasons given are that: (a) it follows from an examination of that action that the case is covered by a settlement duly established and ratified by the court of the Member State delivering the judgment (or order); and (b) the court of the other Member State seised in a fresh action by the party against which the judgment or order was delivered lacks jurisdiction by virtue of a clause conferring exclusive jurisdiction?

(II) If the first question is answered in the negative, is point 1 of Article 34 of Regulation No 44/2001, as interpreted by the Court of Justice of the European Union, to be understood as constituting a ground for non-recognition and non-enforcement in Greece of the judgment and orders delivered by a court of another Member State (the United Kingdom), as described under (I) above, where they are directly and manifestly contrary to national public policy in accordance with fundamental social and legal perceptions which prevail in Greece and the fundamental provisions of Greek law that lie at the very heart of the right to judicial protection (Articles 8 and 20 of the Greek Constitution, Article 33 of the Greek Civil Code and the principle of protection of that right that underpins the entire system of Greek procedural law, as laid down in Articles 176, 173(1) to (3), 185, 205 and 191 of the Greek Code of Civil Procedure cited in paragraph 6 of the statement of reasons) and Article 6(1) of the [European Convention on Human Rights], such that, in that case, it is permissible to disapply the principle of EU law on the free movement of judgments, and is the non-recognition resulting therefrom compatible with the views that assimilate and promote the European perspective?

Provisions of EU law and case-law relied on

Charter of Fundamental Rights of the European Union ('the Charter'), Article 47

Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1), in particular point 1 of Article 34 and Article 45

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 (OJ 2012 L 351, p. 1), Articles 66, 80 and 81

Judgments of the Court of 13 October 2011, *Prism Investments*, C-139/10, EU:C:2011:653; of 28 March 2000, *Krombach*, C-7/98, EU:C:2000:164; of 11 May 2000, *Renault*, C-38/98, EU:C:2000:225; of 23 October 2014, *flyLAL-Lithuanian Airlines*, C-302/13, EU:C:2014:2319, paragraph 45; of 28 April 2009, *Apostolides*, C-420/07, EU:C:2009:271, paragraph 55; of 9 December 2003, *Gasser*, C-116/02, EU:C:2003:657, paragraphs 48 and 72; of 27 April 2004, *Turner*, C-159/02, EU:C:2004:228; of 27 June 1991, *Overseas Union Insurance and Others*, C-351/89, EU:C:1991:279, paragraphs 23 and 24; and of 10 February 2009, *Allianz and Generali Assicurazioni Generali*, C-185/07, EU:C:2009:69

Provisions of international law relied on

European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Article 6(1)

Provisions of national law relied on

Greek Constitution, Articles 8 and 20

Greek Civil Code ('the CC'), Article 33

Greek Code of Civil Procedure ('the CCP'), Article 176, Article 173(1) to (3) and Articles 185, 205 and 191

Brief presentation of the facts and proceedings

1 The first respondent, the Starlight Shipping Company ('Starlight'), was, *inter alia*, the owner, and the second respondent, Overseas Marine Enterprises ('OME'), was the managing agent of a ship which sank and was lost, together with its cargo, as the result of an accident at sea on 3 May 2006.

2 At the time of its loss, that ship was insured by three underwriters. Following the underwriters' initial refusal to pay the insurance indemnity, Starlight brought an

action before the English courts against the first two underwriters and initiated arbitration against the third underwriter seeking payment of the insurance indemnity.

3 While the proceedings in question were pending, settlement agreements were executed between the respondents and the three underwriters of the ship. Those agreements put an end to the proceedings initiated between them, and the underwriters agreed to pay the insurance indemnity provided for in the insurance policies in full and final settlement of all claims in connection with the loss of the ship. The settlement agreements were submitted to an English court and were ratified by it on 14 December 2007 and 7 January 2008.

4 Subsequently, the respondents and the other owners of the ship lodged actions, including against the appellants, before the Polymeles Protodikio Peiraios (Court of First Instance, Piraeus, Greece). Those actions, which were actions in tort, sought damages for direct losses and financial satisfaction for the non-material damage which they claimed to have suffered as a result of that tort.

5 In particular, the respondents argued that, while the action was pending before the English courts and the underwriters were refusing to pay the insurance indemnity, the underwriters' employees and agents, including the appellants Charles Taylor Adjusting Limited (acting as a legal and technical consultancy) and FD (the private individual acting as its manager at the material time), who were handling the underwriters' defence of the first respondent's claims on the instructions of the ship's underwriters, had spread false and defamatory rumours among third parties which had damaged the respondents' reputation and credibility.

6 In the wake of that, the underwriters and their employees or agents (including the appellants) – who were the defendants in the actions before the Court of First Instance, Piraeus – lodged actions before the English courts seeking a declaration , that the actions brought in Greece infringe the settlement agreements, and the award of damages.

7 Those actions and appeals gave rise, inter alia, to the judgment of 26 September 2014 and two orders delivered by Justice Flaux of the High Court of Justice (England and Wales), Queen's Bench Division, Commercial Court.

8 In the first place, the aforementioned judgment found, inter alia, that, according to the settlement agreements, 'employees and agents' included the appellants, and that Starlight and OME had also settled their claims against the appellants. It also found that the actions brought in Greece, including against the appellants, infringed all the settlement agreements without exception. According to that judgment, the settlement agreements have the effect of settling all potential claims against those employees or their agents as the persons jointly responsible for tortious acts (which allegation forms the basis for the actions brought against them in Greece). Lastly, on the damages sought by the appellants, Justice Flaux held

that they were entitled to an interim payment of GBP 100 000 on account of damages.

9 Second, the two orders find that the settlement agreements relieve the appellants (and others) of liability in respect of any claims which Starlight and OME may have in connection with the loss of the ship, including all liability in connection with the claims made in the actions brought in Greece, and that the commencement and continuation of the proceedings in Greece by Starlight and OME against the appellants infringes the terms of the settlement agreements concerning full and final settlement and exclusive jurisdiction.

10 By the first order, the respondents were ordered to pay the appellants: (a) an interim payment of GBP 100 000 to cover losses incurred up to 9 September 2014; and (b) costs of the second appellant fixed at GBP 120 000.

11 By the second order, the respondents were ordered to pay the appellants the costs of the second appellant fixed at GBP 30 000.

12 Both orders also include terms warning Starlight and OME and the natural persons representing them that, if they fail to comply with the order, they may be held in contempt of court, their assets may be confiscated, or they may be fined or the natural persons imprisoned.

13 By their application of 7 January 2015 to the Monomeles Protodikeio Peiraios (Court of First Instance (single judge), Piraeus, Greece), the appellants requested recognition and a declaration of enforceability in Greece of the aforementioned judgment and the two orders under Regulation No 44/2001. The Court of First Instance (single judge), Piraeus, upheld their application.

14 On 11 September 2015, the respondents lodged an appeal with the Monomeles Efetio Peiraios (Court of Appeal (single judge), Piraeus, Greece) under Article 43 of Regulation No 44/2001. The Court of Appeal (single judge), Piraeus, upheld the appeal, set aside the judgment of the court of first instance and dismissed the appellants' application.

15 In particular, the Court of Appeal (single judge), Piraeus, found, *inter alia*, that the appellants had sought judicial protection from the English courts and held that the settlement agreements deprive the Greek courts seised of the actions of the necessary jurisdiction. Next, the court held that the judgment and the two orders do not include an anti-suit injunction, but that both the judgment and the orders contain findings that prevent the proceedings commenced in Greece from progressing, order damages to be paid and warn of the obligation to pay damages to the persons seeking satisfaction of their claims in proceedings before the Greek courts. Consequently, those texts include 'quasi' anti-suit injunctions which impede the action before the Greek courts, in breach of the provisions of Article 6(1) of the ECHR and Article 8(1) and Article 20 of the Greek Constitution, articles which go to the very heart of the notion of public policy.

16 On 7 October 2019, the appellants brought an appeal on a point of law before the referring court against the judgment of the Court of Appeal (single judge), Piraeus.

Principal arguments of the parties to the main proceedings

17 By their appeal before the Court of Appeal (single judge), Piraeus, the respondents in these proceedings argued that the form of order sought (recognition and a declaration of enforceability of the aforementioned judgment and orders) is manifestly contrary to EU and national substantive and procedural public policy, as it impedes their fundamental right to judicial protection and constitutes an unacceptable interference in the jurisdictional powers of the courts of another Member State, namely of the Greek courts.

18 The appellants claim that the judgment under appeal is vitiated, inter alia, by an erroneous interpretation and a misapplication of the provisions of point 1 of Article 34 of Regulation No 44/2001 (which must be applied restrictively), of Article 33 of the CC, of Articles 8 and 20 of the Greek Constitution and of Article 6(1) of the ECHR. In particular, they submit that, on a proper interpretation of those provisions, it should have been held that the judgment and orders are not manifestly contrary to national and EU public policy and do not infringe fundamental principles thereof,, in that the award of provisional damages to the appellants for proceedings commenced in Greece before the related claims were brought before the English courts does not prevent continued access to the Greek courts and to judicial protection by them, and that the judgment and orders were wrongly treated in the same way as anti-suit injunctions.

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

19 First, the referring court finds that, in a case such as this, in which recognition and a declaration of enforceability are sought for judgments or orders delivered before 10 January 2015 in respect of actions or applications lodged prior to that date, it is the provisions of Regulation No 44/2001 that apply, and not the provisions of Regulation (EU) No 1215/2012.

20 In Greece, public policy, as regards the recognition of foreign judgments, is understood within the meaning of Article 33 of the CC, which also reflects international public policy. To that effect, a judgment cannot be recognised or declared enforceable in Greece where, by reason of its content, its enforcement would run counter to cultural, moral, social, legal or economic perceptions which prevail in the country and govern its way of life. Thus, a judgment cannot be recognised or declared enforceable where the content and operative parts of the foreign judgment conflict with fundamental cultural or legal principles and with the fundamental rights of individuals recognised by the rule of law.

21 Furthermore, the first paragraph of Article 8 of the Greek Constitution states that 'no person shall be deprived of the judge assigned to him by law against his will' and Article 20(1) of the Greek Constitution states that 'every person shall be entitled to receive legal protection by the courts and may plead before them his views concerning his rights or interests, as specified by law'. Those provisions of the Constitution, read in conjunction, fully guarantee that everyone has the right of access to and the full legal protection of the Greek courts. That is a fundamental right which goes to the very heart of public policy in the Greek legal order, underpins all Greek substantive and procedural law, and is given concrete expression in various forms. Thus, under Greek law, it is inconceivable and unacceptable to preclude judicial protection a priori or to put obstacles or barriers in its way. An order requiring a claimant in court proceedings to make an interim payment on account of damages, made against him precisely because he has sought judicial protection, is one such obstacle.

22 In paragraph 6 of its reasoning, the referring court states that the Greek legal system also provides, in a number of procedural provisions, for penalties for abusive procedural conduct. In particular, the costs are imposed on the unsuccessful party (Article 176 of the CCP), but this is done by the court when it delivers its final decision on the dispute, in which case it has now been decided, whereas at the earlier stages each party pays in advance the costs for each procedural step taken (Article 173 (1) to (3) of the CCP), except in specific cases expressly provided for. It also provides for the imposition of court costs (by issuing the final judgment) even against the successful claimant, if he has failed to fulfil the duty of truth or is responsible for other abusive procedural conduct (Article 185 of the CCP), the imposition by the final judgment of the court of a penalty payment on the party who has acted in bad faith, brought a manifestly unfounded action or appeal, employed dilatory tactics in the proceedings, failed to comply with the rules of public morality, and so on (Article 205 of the CCP), and for ordering the applicant to pay the costs of staying the proceedings (Article 241(1) of the CCP). Lastly, Greek procedural law provides that an order, even a final judgment of a court of first instance, which may be challenged by ordinary appeal (Article 909(2) of the Greek Code of Civil Procedure), i.e. by means of an objection to judgment in default or an appeal, cannot be declared provisionally enforceable. Thus, without exception, the order for costs cannot be enforced before the judgment has become final, in order not to prevent the unsuccessful party from bringing an ordinary appeal. It follows from the case-law of the Greek courts that a claimant who makes false allegations and is thus guilty of abuse of process is automatically ordered to pay damages in tort (Articles 914 and 919 of the Greek Civil Code) to the other party (defendant), but only where the force of *res judicata* established by the final judgment delivered on the claimant's action is not contradicted. It is also apparent from Greek case-law when dealing with this issue that the courts are under an obligation to safeguard, in principle, the fundamental right of the claimant to bring an action before the courts, even if his conduct may be regarded as abusive, without any possibility of preventive action, prejudging the outcome of the proceedings on his claim, or awarding costs by way of compensation before the outcome of the proceedings is

known, with a view to deterring the claimant from obtaining the judicial protection sought. At the same time, the possibility of awarding damages *ex post facto* is safeguarded if it appears compatible with the outcome of the proceedings on the action brought. Furthermore, under domestic law, the only court which is granted the power to award court costs for proceedings brought before it is the court which will give final judgment on it (Article 191 of the CCP).

23 Moreover, Article 6(1) of the ECHR protects every person's right to judicial protection. That fundamental right is also enshrined in Article 47 of the Charter, which establishes a right of appeal to the courts. That right also forms part of the constitutional traditions common to the Member States of the European Union and of international treaties on the protection of human rights. Its protection therefore extends, even for the purposes of the interpretation and application of point 1 of Article 34 of Regulation No 44/2001, to substantive and procedural European public policy, and thus also to domestic public policy.

24 It is from that perspective that the question arises as to whether a judgment and orders delivered by a court of a Member State taxing and awarding in advance court costs in the form of provisional damages in a case pending before the courts of another Member State (thereby in essence imposing a penalty on the pretext of awarding damages) are compatible with EU public policy. While such an award is not prohibited, it necessarily makes it difficult to obtain judicial protection, since the applicant before the courts of another Member State is obliged (even if the judgment of the State of origin is declared enforceable in his principal place of residence or principal place of business, where most of his assets are located) to pay, in addition to his own costs of commencing proceedings, such costs also to the other party before a final decision is given by the court seised. The nature of that award, as a means of deterring him from pursuing the proceedings, is all the more evident if the judgment provides that further compensation is possible if his costs are increased, that is to say, if the proceedings are continued. This question does not only concern economic interests, but has a clear impact on the exercise of the fundamental right to unhindered judicial protection.

25 Moreover, an anti-suit injunction, which is primarily a feature of English law, is a court order prohibiting a person from commencing or continuing court proceedings or arbitration before a foreign court or arbitral tribunal. Originally, an anti-suit injunction had the effect of prohibiting proceedings from being instituted or pursued before the English courts. Later, however, a cross-border form of anti-suit injunction emerged and was used in cases in which proceedings were pending abroad. Such injunctions are issued mainly on the ground that bringing an action or pursuing proceedings before a court of another State, which is contrary to good faith or abusive, would adversely affect the applicant. In essence, the purpose of that legal remedy is to request that the court of one State intervene in proceedings in another State. Thus, the court therefore rules not only on its own jurisdiction but also on the jurisdiction of a foreign national court.

26 The referring court next cites the judgment of 27 April 2004, *Turner* (C-159/02, EU:C:2004:228), by which the Court held that the Brussels Convention, which was replaced by Regulation No 44/2001, 'is to be interpreted as precluding the grant of an injunction whereby a court of a Contracting State prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court of another Contracting State, even where that party is acting in bad faith with a view to frustrating the existing proceedings'.

27 An injunction by which a court prohibits a party, on pain of penalties, from commencing or continuing proceedings before a foreign court undermines the jurisdiction of the foreign court to adjudicate the dispute. In fact, any injunction prohibiting a claimant from bringing such an action must be seen as constituting interference with the jurisdiction of the foreign court which, as such, is incompatible with the system of the Brussels Convention (judgment of 27 April 2004, *Turner*, C-159/02, EU:C:2004:228).

28 Under Article 35(3) of Regulation No 44/2001, the international jurisdiction of the courts of the Member State of origin is not to be reviewed for the purposes of recognition and a declaration of enforceability, and the test of public policy referred to in point 1 of Article 34 is not to be applied to the rules relating to jurisdiction; therefore, failure to apply those rules cannot be given as a reason for refusing the request in question.

29 However, interference on the part of a court of one Member State in the jurisdiction of a court of another Member State is a different matter entirely. In addition to purely anti-suit injunctions, a similar issue also arises where court costs are taxed in advance and are awarded in advance in the form of provisional damages (which are, in essence, a penalty imposed on the pretext of awarding damages) for a case pending before the courts of another Member State. That is true irrespective of the outcome of the proceedings before those courts, which may also go against the claimants; it may ultimately be found that those courts do not have jurisdiction to adjudicate the matter. However, in that case, they are the only courts with the jurisdiction to tax and award the costs incurred in the proceedings before them. Although such judgments and orders do not expressly prevent actions being brought or proceedings being continued before the court of another Member State, the fact remains that a penalty is imposed in advance in respect thereof.

30 From that perspective, the further question arises as to whether judgments and orders to that effect, which in essence prejudge the outcome of the proceedings before a court of another Member State, by finding that that court does not have the jurisdiction to adjudicate a dispute, interfere in its jurisdiction, in breach of EU, and by extension, national public policy.

31 In the present case, the Chamber hearing the case has doubts concerning the following points of law with regard to the interpretation of provisions of EU law.

32 First, is the term ‘manifestly contrary to public policy’ in the EU and, by extension, to domestic public policy, which is one of the reasons listed for refusing recognition and a declaration of enforceability pursuant to point 1 of Article 34 and Article 45(1) of Regulation No 44/2001, to be understood, in its true sense, as meaning that it extends beyond explicit anti-suit injunctions prohibiting the commencement and continuation of proceedings before a court of another Member State to judgments or orders delivered by courts of other Member States which impede or obstruct the claimant in obtaining judicial protection by a court of another Member State or from continuing proceedings already commenced before that court, and is that form of interference in the jurisdiction of a court of another Member State to adjudicate a particular dispute of which it has already been seised compatible with EU public policy (first question referred, point (i))?

33 In particular, the question arises as to whether it is contrary to EU public policy, within the meaning of point 1 of Article 34 and Article 45(1) of Regulation No 44/2001, to award provisional damages to claimants seeking recognition and a declaration of enforceability of a judgment or order delivered by a court of one Member State in respect of the costs and expenses incurred by them in bringing an action or continuing proceedings before the court of another Member State, where the reasons given are that: (a) it follows from examination of that action that the case is covered by a settlement duly established and ratified by the court of the Member State delivering the judgment (or order); and (b) the court of the other Member State seised in a fresh action by the party against which the judgment or order was delivered lacks jurisdiction by virtue of a clause conferring exclusive jurisdiction (first question referred, point (ii))?

34 Second, in the light of the provisions of Greek law cited and of Article 6(1) of the ECHR, where judgments and orders which conflict with the fundamental rules that lie at the very heart of the right to judicial protection in the Member State of recognition (Greece) are delivered to that effect, does point 1 of Article 34 of Regulation No 44/2001 constitute a ground for the non-recognition and non-enforcement of such judgments and orders, such that the principle of the free movement of judgments is disapplied, and is the non-recognition resulting therefrom compatible with the views that assimilate and promote the European perspective (second question referred)?