

Anonymised version

Translation

C-77/24 – 1

Case C-77/24 [Wunner]ⁱ

Request for a preliminary ruling

Date lodged:

1 February 2024

Referring court:

Oberster Gerichtshof (Austria)

Date of the decision to refer:

11 January 2024

Appellants on a point of law:

NM

OU

Respondent in the appeal on a point of law:

TE

The Oberster Gerichtshof (Supreme Court, Austria), in the matter of the applicant at first instance (respondent in the appeal on a point of law; ‘the respondent’), TE, 1100 Vienna [...] versus the first defendant at first instance, NM, Malta, M-XXB 1120 Ta’Xbiex, [...] and the second defendant at first instance (appellants on a point of law; ‘the appellants’), OU, Cyprus, CY-2108 Nicosia, [...] concerning EUR 18 547.67 plus interest and costs, further to the appeal on a point of law lodged by the appellants against the order of the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria) of 4 September 2023, GZ 15 R 96/23g-46, which set aside in part the order of the Landesgericht für Zivilrechtssachen Wien (Regional Court for Civil Matters, Vienna, Austria) of 27 April 2023, GZ 11 Cg 61/22d-29, has [...] made the following

ⁱ The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

O r d e r:

I. The proceedings stayed by order of 9 November 2023, AZ 5 Ob 181/23p, will be continued.

II. The following questions are referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU:

1. Must Article 1(2)(d) of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ('the Rome II Regulation') be interpreted as meaning that it also applies to claims for damages against an officer of a company which a creditor of the company bases on tortious liability for infringement of protective provisions (such as provisions of legislation on games of chance) by that officer?

2. If Question 1 is answered in the negative:

Must Article 4(1) of the abovementioned regulation be interpreted as meaning that, in the event of an action for damages based on tortious liability in respect of gaming losses suffered which is brought against an officer of a company offering online games of chance in Austria without a licence, the place where the damage occurred is determined by

(a) the place from which the player effects credit transfers from his or her bank account to the player account maintained by the company,

(b) the place where the company maintains the player account in which deposits from the player, winnings, losses and bonuses are entered,

(c) the place from which the player places bets via that player account which ultimately result in a loss,

(d) the player's place of residence as the location of his or her claim to payment of the credit balance in his or her player account,

(e) the location of the player's main assets?

III. [...] [stay of proceedings]

G r o u n d s

In respect of I.:

1 By order of 9 November 2023, the adjudicating Chamber stayed the proceedings pending the decision of the Court of Justice of the European Union on the request for a preliminary ruling made to the Court by the Supreme Court on 19 October 2023 in respect of 5 Ob 110/23i.

- 2 The respondent in the proceedings giving rise to the present request for a preliminary ruling then withdrew his action, renouncing his claims, which the adjudicating Chamber acknowledged by its order of 23 November 2023, consequently withdrawing the request for a preliminary ruling. The stayed proceedings therefore had to be continued in order to clarify the issue of EU law in those proceedings.

In respect of II.:

A: Facts of the case

- 3 Titanium Brace Marketing Limited ('Limited') ran an online casino via the website www.drueckglueck.com from its registered office in Malta. It marketed its services to the European market as a whole. It holds a valid Maltese gaming licence, but no licence under the Austrian Glücksspielgesetz (Law on Gambling), and is currently in liquidation.
- 4 The respondent, who is domiciled within the area of jurisdiction of the court of first instance, played online games of chance via Limited's website during the period from 14 November 2019 to 3 April 2020 and paid, in total, the amount claimed without gaining any winnings. The appellants were 'directors' of Limited during that period.
- 5 In order to be able to play on Limited's website, the respondent had to open a customer account in Malta. He made payments from his Austrian bank account into an account in a Maltese bank in order to top up his player account (his customer account). Limited booked those deposits as credit. The account opened for the respondent in Malta was a Limited real-money account for him as a player which was not commingled with Limited's company assets. If the respondent decided to participate in a game of chance, the stake for the game was debited from the player account. In the event of a win, that would also have been credited to the player account. The respondent suffered a total gambling loss of EUR 18 547.67.

B. The arguments of the parties in the proceedings and the procedure to date

- 6 The respondent seeks repayment of his losses from the two appellants. He submits that, in the absence of an Austrian licence held by Limited, the gambling contract is null and void. He bases his claim on liability for damages, on the ground that interference with the Austrian monopoly on games of chance entails an infringement of protective provisions. He asserts that the appellants, as managing directors of Limited, were responsible for the fact that the company offered illegal games of chance in Austria. He submits that they were personally and, as joint perpetrators under Paragraph 1301 of the Allgemeines Bürgerliches Gesetzbuch (General Civil Code), jointly and severally liable to creditors for the infringement of the provisions for the protection of players laid down by the Law on Gambling.

The jurisdiction of the court of first instance was based (inter alia) on Article 7(2) of Regulation No 1215/2012.

- 7 The appellants raised an objection of lack of international jurisdiction. Article 7(2) of Regulation No 1215/2012 was not, they submitted, available to the respondent. The appellants claimed not to have had the authority to decide whether Limited should withdraw from the already established Austrian market. They asserted that they had not taken strategic business decisions and that the second appellant had been only a liaison with the Maltese gambling authority. They contended that the place where acts and events occurred was Malta. The appellants claim to be subject not to Austrian but to Maltese substantive law, which does not recognise liability on the part of a company's officers towards its creditors.
- 8 The court of first instance dismissed the action on the ground of lack of international jurisdiction.
- 9 The court of appeal set aside that decision in so far as the respondent's legal basis for his claims was compensation based on tortious liability and ordered the court of first instance to initiate proceedings, without applying the ground for dismissal used previously.
- 10 The conditions for establishing the place of the offence as the forum of jurisdiction under Article 7(2) of Regulation No 1215/2012 were held to be satisfied in view of decision 10 Ob 56/22s recently made on a similar matter by the Supreme Court. In principle, the court of appeal held, the managing directors of a limited liability company (*Gesellschaft mit beschränkter Haftung*) were liable only to the company for their own culpable behaviour, with exceptions only in the event of corresponding legislation, intentional damage to creditors, criminal acts or culpable infringement of protective provisions. In its decision 6 Ob 168/19b, the Supreme Court had ruled that the infringement of provisions intended to protect players was not only a breach of duty which made the company liable for damages to external parties through their designation as officers but also something for which the defendant managing directors could be held personally liable. The court of appeal held that the applicant relied on the same point in the present case. It found that the place where the damage occurred was in Austria because the gaming stake placed in Malta depended on success or failure in the game, and losses were offset against winnings. That court held that only the loss which ultimately remained was initial damage, which affected the player by way of the absence of a corresponding amount in his assets located in Austria. It found that the defendants' alleged infringement of overriding mandatory provisions of Austrian public law would also mean the damage had occurred in Austria.
- 11 The court of appeal declared the appeal on a point of law admissible on account of the lack of case-law established by the highest court on the question of the international jurisdiction of the Austrian courts in respect of similar actions brought against managing directors of gaming companies.

- 12 The appeal on a point of law brought by the appellants seeks the restoration of the dismissal of the action at first instance or, in the alternative, its setting aside and referral back to the lower courts.
- 13 The respondent contends that the appeal on a point of law should not be upheld.

C. Relevant legal provisions

- 14 Article 7 of Regulation No 1215/2012 reads as follows:

‘A person domiciled in a Member State may be sued in another Member State:

...

(2) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;’

- 15 Article 1 of the Rome II Regulation reads as follows:

Paragraph 1: ‘This Regulation shall apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters. ...’

Paragraph 2: ‘The following shall be excluded from the scope of this Regulation:

...

(d) non-contractual obligations arising out of the law of companies and other bodies corporate or unincorporated regarding matters such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies corporate or unincorporated, the personal liability of officers and members as such for the obligations of the company or body and the personal liability of auditors to a company or to its members in the statutory audits of accounting documents;’

- 16 Article 4(1) of the Rome II Regulation reads as follows:

‘Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.’

- 17 Paragraph 1301 of the Austrian General Civil Code reads as follows:

‘Two or more persons can be held liable for damage caused unlawfully in that they contributed to it by jointly, directly or indirectly, by inducement, threats, orders, assistance, concealment and the like, or merely by refraining from fulfilling the special obligation to prevent harm.’

18 Paragraph 1311 of the Austrian General Civil Code reads as follows:

‘Pure accident affects the person in whose assets or person it occurs. However, if someone has caused the accident by fault, he or she has breached a law intended to prevent accidental damage; or [...] he or she is liable for all harm which would not otherwise have occurred.’

Paragraph 3 of the Austrian Law on Gambling reads as follows:

‘Unless this Law specifies otherwise, the right to organise games of chance shall be reserved for the Federal State (gaming monopoly).’

D. Basis for the reference

- 19 1.1. Under Austrian case-law, the statements made in the application are decisive for assessing international jurisdiction. Express reliance on a ground for jurisdiction under Regulation No 1215/2012 is not necessary. The applicant only has to submit the necessary factual basis. As regards what are known as ‘doubly relevant facts’ – that is to say, facts from which both international jurisdiction and the merits of the claim are derived – the submissions must be sufficiently conclusive in order not to burden the determination of jurisdiction with an extensive examination of the merits. The question of international jurisdiction must therefore be decided by whether or not the statements made in the application are conclusive.
- 20 1.2. Under the existing case-law on Austrian law, an officer of a company can, in principle, have external liability for culpable infringement of protective provisions under Paragraph 1311 of the General Civil Code, with provisions in the Law on Gambling intended to protect players already characterised as protective provisions. According to the appellants’ assertions, Maltese law on compensation for damages does not recognise such liability.
- 21 1.3. Accordingly, the claim against the appellants for damages based on tortious liability, relating to tort, delict or quasi-delict within the meaning of Article 7(2) of Regulation No 1215/2012, would not – on the basis of Austrian law on compensation for damages – be inconclusive. What needs to be examined for conclusiveness, however, is the applicability of Austrian substantive law alleged by the respondent. In the view of the adjudicating Chamber, there is no ‘*acte claire*’ in that regard, with the result that reference to the Court of Justice seems necessary.
- 22 2. The Court of Justice has not yet – it appears – examined the scope of the derogation in Article 1(2)(d) of the Rome II Regulation. However, from its judgment in C-147/12, *ÖFAB* (paragraph 42), it is apparent – in respect of international civil procedural law – that the concept of ‘matters relating to tort, delict or quasi-delict’ in Article 5(3) of (the then applicable) Regulation No 44/2001 was to be interpreted as meaning that it covered actions brought by a creditor of a limited company seeking to hold liable a member of the board of

directors of that company and one of its shareholders for the debts of that company, because they had allowed that company to continue to carry on business even though it was undercapitalised and was forced to go into liquidation.

- 23 3. There is no national case-law on the scope of that derogating provision. The following views can be found in the Austrian and German literature:
- 24 3.1. **Wagner**, in *Die neue Rom II-Verordnung*, IPRax 2008, 1, takes the view that a broad interpretation of Article 1(2)(d) would indeed include the liability of officers and members as such for wrongdoing vis-à-vis the company and external creditors. However, according to **Wagner**, from a normative and functional perspective, the arguments for, in any event, connecting members' external liability vis-à-vis the company's creditors with tort/delict are more convincing.
- 25 3.2. According to **Lurger and Melcher** in *Handbuch Internationales Privatrecht*² (2021), paragraph 5/14 et seq., it is doubtful, with regard to the derogation relating to the personal liability of officers and members as such in respect of a company's obligations, whether that derogation applies solely to (the limitation of) corporate liability (that is to say, depending on the form of the company, for example derogation from the principle of limited liability for the members of a capital company) or also to liability to the company and its creditors for any other wrongdoing. They note that the case-law of the Court of Justice (Case C-147/12), at least in the field of international jurisdiction, assumes a tort- or delict-related qualification for claims based on derogation from the principle of limited liability.
- 26 3.3. According to **Neumayr** in *KBB*⁷, Art 1 Rom II-VO, paragraph 6, the derogation does not apply to claims for damages based on the tortious liability of members and officers.
- 27 3.4. In Germany, it is argued with regard to the derogating provision that it is feasible to characterise claims rooted in company law as non-contractual and, in particular, based on tortious liability where the personal legal liability of officers and members as such for a company's obligations is concerned (**Junker**, in *MiKomm*⁸, Art 1, paragraph 36). The German Bundesgerichtshof (Federal Court of Justice, Germany) (II ZR 84/05, NJW 2007, 1529) has examined the question of what law should be applied in respect of personal liability where a limited liability company (*Gesellschaft mit beschränkter Haftung*) under Netherlands law does not include in its name the suffix indicating its form, and characterised the member's personal liability with reference not to company law but to tort law, because using a suffix indicating the form of a company is not one of the specific obligations laid down in company law (see also **Junker**, *ibid*, paragraph 38).
- 28 3.5. The principle of liability for the destruction of means of subsistence (Paragraph 826 of the Bürgerliches Gesetzbuch (German Civil Code)) developed by the German Federal Court of Justice on the basis of substantive tort law, which is intended to protect an indefinite number of creditors on whom the member has

inflicted damage in a manner offending common decency, is in Germany predominantly characterised with reference to tort law (see Junker, *ibid*, paragraphs 38-39 with further reference, including references to divergent opinions).

- 29 3.6. The connection to tort/delict of claims for damages from a company's external creditors in international civil procedural law, which was advocated by the Court of Justice in C-147/12, *ÖFAB*, could, in the view of the adjudicating Chamber, also be an argument for interpreting the derogating provision in Article 1(2)(d) of the Rome II Regulation in a narrow sense, despite its broad wording, and for regarding claims from a company's creditors for damages based on tortious liability as not covered by that provision.
- 30 4. If the derogation is not applicable in the present case, a connection would have to be made, first, in accordance with a choice of law within the meaning of Article 14 of the Rome II Regulation, then in accordance with the special connecting factors set out in Articles 5 to 9 of that regulation, and finally in accordance with the basic provision established by Article 4 of the Rome II Regulation (**Neumayr**, in *KBB*⁷, Vor Art 1 Rom II-VO, paragraph 3; 6 Ob 186/21b).
- 31 4.1. A choice of law has not been asserted. The special connecting factors set out in Articles 5 to 9 of the Rome II Regulation concern product liability, unfair competition, environmental damage, infringement of intellectual property rights and industrial action; they are not relevant.
- 32 4.2. Reference must therefore be made to Article 4 of the Rome II Regulation. The situation governed by Article 4(2), where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, does not apply according to the statements made in the application. The basic provision of Article 4(1) of the Rome II Regulation is therefore decisive.
- 33 4.3. Under that provision, the law applicable to a non-contractual obligation arising out of a tort/delict is the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur. The term 'damage' refers to the initial damage, and reference is made to the place where the event giving rise to liability inflicted immediate damage on the directly affected party (**Neumayr**, in *KBB*⁷, Art 4 Rom II-VO, paragraph 3 with further references).
- 34 4.4. Where damage is purely pecuniary, without infringement of absolute rights – like that at issue in the present case – it is difficult, according to the literature, to determine the place where it occurred within the meaning of Article 4(1) of the Rome II Regulation (**Melcher**, *Reine Vermögensschäden im internationalen Zuständigkeits- und Privatrecht*, VbR 2017, 126; **Lurger and**

Melcher, *Handbuch Internationales Privatrecht*², paragraph 5/37 et seq. with further references, in particular those in footnote 81). For the sake of the consistency also provided for in recital 7 of the Rome II Regulation, reference must also be made to law on jurisdiction in accordance with Article 7(2) of Regulation No 1215/2012.

- 35 4.5. For the purposes of determining the place where the harmful event occurred under Article 7(2) of Regulation No 1215/2012, it is necessary to take as a basis the place where the damage occurred (Case C-709/19, *Vereniging van Effectenbezitters*, paragraph 26 et seq.), whereby special criteria for the attribution of jurisdiction may plead from the outset in favour of determining the place where the harmful event occurred to be in the Member State of the applicant's domicile, giving rise to a *forum actoris* (Case C-12/15, *Universal Music*, Case C-304/17, *Löber*, paragraph 34). According to the case-law of the Court of Justice, a breach of legal obligations in respect of a prospectus or the breach of legal information obligations in the Member State of the applicant's domicile (Case C-709/19, *Vereniging van Effectenbezitters*) or the management of accounts through which investments are typically made and where damage may typically occur (bank and securities accounts) with banks in the Member State where the applicant is domiciled may be considered to be such criteria (Case C-304/17, *Löber*). The place where purely pecuniary damage has occurred directly in a bank account can be established as the forum of jurisdiction under Article 7(2) of Regulation No 1215/2012 only if the other specific elements of the facts of the case also support such jurisdiction (see **Lurger/Melcher**, *Handbuch Internationales Privatrecht*², paragraph 5/37).
- 36 4.6. In its recent decisions 10 Ob 56/22s and 8 Ob 172/22k, in gaming cases brought against a Maltese company, the Supreme Court held that the place where the company maintained the player accounts was not decisive. It found that the deposit made by the player did not yet damage his assets, because he had a claim against the company for the same amount which he could request to have paid back at any time. Only a loss exceeding his winnings in the prohibited game of chance damaged the player's assets, by reducing his claim for payment by the amount of the loss, it held. In those rulings, the fact that the unlawfulness on which the claim for damages was based resulted from the infringement of Austrian legislation on games of chance – that is to say, the infringement of overriding mandatory provisions of Austrian public law – was considered to point to Austria. Similarly, decisions 3 Ob 164/23y and 6 Ob 168/23h, both of which concerned actions for damages brought against the gaming companies themselves, held that the breach of duty relevant to the damage had occurred in Austria.
- 37 4.7. If that view, advocated in respect of the place where the harmful event occurred under Article 7(2) of Regulation No 1215/2012, is also applied – in the light of the necessary consistency between international law on jurisdiction and private international law – in respect of the place where the damage occurred under Article 4(1) of the Rome II Regulation, the applicant's habitual residence

should presumably be used as the location of his claim for payment of the credit in his player account.

- 38 4.8. That was the direction taken by the Supreme Court in its decision 6 Ob 233/18k in a matter concerning an applicant who had made his financial arrangements and effected the credit transfer from Austria. The application of Austrian substantive law was affirmed in that case. The sixth Chamber – in the proceedings brought before it against a notary established in Switzerland who issued incorrect audit reports on stocks of precious metals – did not object to the decisive place where the damage occurred under Article 4 of the Rome II Regulation being defined as Austria in the light of factors specifically relating to that situation.
- 39 4.9. The adjudicating Chamber takes the view that the decisive factors in determining the place where the initial damage occurred are, first, what the damage consists of and, second, where it first occurred, in the sense of an initial reduction in the relevant part of the respondent's assets. That may be considered to be the place from which the respondent effects credit transfers from his bank account to his player account – if one assumes that the respondent's claim to bank money from his bank is more valuable than his claim to payment of a notional amount of credit in his player account from the gaming company, which would mean that those transfers already caused a detrimental change in his assets. It would be equally conceivable, in line with the appellants' objections, to recognise a definitive reduction in assets only once the loss occurred in the player account and – given that the account is maintained in Malta – to regard that as initial damage occurring in Malta. However, as such a loss depends on the respondent playing again (and losing), only that (additional) game resulting in the loss could be regarded as having triggered the initial damage and the place of that game considered relevant. If one considers the (definitive) loss of his claim to payment of a credit balance in the player account as the initial damage, the question arises as to where that claim is located – in Malta, where the account is maintained, in the respondent's place of residence, in the location of his main assets, or elsewhere.
- 40 4.10. However, if the place where the initial damage occurred is in Austria, the adjudicating Chamber takes the view that – in line with the abovementioned case-law of the Court of Justice concerning Article 7(2) of Regulation No 1215/2012 – it would need to be assumed, also with regard to the question of applicable law, that factors specifically relating to the situation plead in favour of applying the national substantive law of the place where the damage occurred. In the view of the adjudicating Chamber, no manifestly closer connection with another country within the meaning of Article 4(3) of the Rome II Regulation would be discernible in that event.

In respect of III.:

[...] [national procedural law]

Supreme Court
Vienna, 11 January 2024
[...]

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