Case C-186/24

Request for a preliminary ruling

Date lodged:

8 March 2024

Referring court:

Oberster Gerichtshof (Austria)

Date of the decision to refer:

22 February 2024

Appellant:

Dr Matthäus Metzler as insolvency practitioner

Respondent:

Auto1 European Cars B.V.

REPUBLIC OF AUSTRIA 17 Ob 23/23s

OBERSTER GERICHTSHOF (SUPREME COURT, AUSTRIA)

The Supreme Court, in the case of the appellant, Dr Matthäus Metzler, LL.M., acting as insolvency practitioner in the insolvency proceedings concerning the assets of *debtor* […], against the respondent, Auto1 European Cars B.V., NL-1101BA Amsterdam, […] concerning EUR 62 261.00 plus interest and costs, ruling on the appellant's appeal (*Rekurs*) against the order of the Oberlandesgericht Linz (Higher Regional Court, Linz, Austria), sitting as the court ruling on appeals on the merits (*Berufung*), of 21 September 2023, GZ 1 R 110/23m-20, which set aside the judgment of the Landesgericht Linz (Regional Court, Linz, Austria) of 12 May 2023, GZ 4 Cg 70/22i-10, has […] made the following

O r d e r:

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

1. Is Article 31(1) of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (‘the 2015 Insolvency Regulation’) to be interpreted as meaning that obligations honoured for the benefit of the debtor which should have been honoured for the benefit of the practitioner in the insolvency proceedings also include, within the meaning of that provision, such obligations arising from a legal transaction which the debtor did not conclude until after the opening of insolvency proceedings and the transfer of powers to the insolvency practitioner?

If the above question is answered in the affirmative:

2. Is Article 31(1) of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (‘the 2015 Insolvency Regulation’) to be interpreted as meaning that the place in which an obligation is honoured within the meaning of that provision is the place from which the third party’s payment is made by credit transfer from a bank account there, even if the third party is established not in that Member State but in another Member State, while the conclusion of the legal transaction and the honouring of the debtor’s obligation took place not there but through a branch of the third party in yet another Member State, namely in the Member State in which the insolvency proceedings have been opened?

II. […] [stay of proceedings]

G r o u n d s

Regarding I.

A: Facts of the case:

[1] By order of 25 May 2022 concerning AZ 17 S 56/22t, the Regional Court, Linz, opened insolvency proceedings in respect of the debtor’s assets. The appellant was appointed as insolvency practitioner. The opening of insolvency proceedings and the appointment of the insolvency practitioner were made public that same day, on 25 May 2022.

[2] The respondent is a company incorporated under Netherlands law and established in the Netherlands. It is one of the foremost second-hand vehicle dealerships in Europe and a member of a group of companies operating throughout Europe which maintains a branch in Austria. By the contract of sale concluded in the respondent’s branch, in the respondent’s own name, on 2 June 2022 – that is to say, after the insolvency proceedings had been opened – the debtor sold the respondent a car for EUR 48 870. After the vehicle had been handed over in Austria, the respondent transferred the purchasing price from an account in Germany to the account in Austria specified by the debtor.

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

[3] The appellant sought payment of EUR 48 870 to the insolvency estate because the debtor had concluded the contract of sale after the insolvency proceedings had been opened. He asserted that the vehicle had been in the debtor's possession at the time when the insolvency proceedings were opened. The respondent, he submitted, had transferred the purchasing price of EUR 48 870 to the account of a third party (the debtor's ex-partner). The appellant sought compensation for value to be paid to the insolvency estate with the argument that the respondent had in the meantime resold the vehicle to a third party.

[4] At the hearing of 16 March 2023, the appellant expanded the action to seek the commercial value of the vehicle of EUR 62 261.

[5] The respondent disputed the claim and argued, in essence, that the vehicle had not been in the debtor's possession at the time when the insolvency proceedings were opened and had therefore not been part of the insolvency estate. It contended that it maintained only a branch in Austria but was established in the Netherlands. The respondent argued that it – and not the Austrian branch – had made the credit transfer in Germany from a German bank. The only domestic connection of the contract of sale at issue was, the respondent contended, that it had been signed in Austria and the vehicle had been handed over there. It argued that the claim asserted by the appellant did not exist, because the foreign connection entailed the applicability of Article 31 of the 2015 Insolvency Regulation. It claimed that it could only be held liable if it had known about the opening of insolvency proceedings, which had not been the case.

[6] In the judgment under appeal, the court of first instance upheld the action in its original scope. It dismissed the remainder of the (expanded) application concerning EUR 13 391 on substantive grounds (that dismissal having now acquired the force of *res judicata*). It concluded that the situation at issue was not covered by Article 31 of the 2015 Insolvency Regulation and that the respondent could therefore not claim the protection of good faith under that provision.

[7] The court ruling on the appeal on the merits upheld the respondent's appeal (*Berufung*), set aside the judgment of the court of first instance and referred the case back to the court of first instance for a fresh decision after further proceedings. It took the legal view that Article 31 of the 2015 Insolvency Regulation, owing to the primacy of the application of EU law, superseded not only Paragraph 3(2) of the Insolvenzverordnung (Austrian Insolvency Code; 'the IO') but also Paragraph 3(1) of the IO. It held that the payment to the insolvent party had been checked in Germany and made from a German account. For that reason, it found, Article 31 of the 2015 Insolvency Regulation should be applied. There being no findings as to the respondent's knowledge of the opening of the insolvency proceedings, it held that a final assessment was not yet possible.

[8] The appellant's appeal (*Rekurs*) to the Supreme Court seeks to have the first-instance judgment restored; in the alternative, he brings an action for annulment. He argues, first, that Article 31 of the 2015 Insolvency Regulation is not applicable, because the provision governs only the debt-discharging effect of the payment and is contingent on a valid contract, which, he asserts, is not in place in the present case under Paragraph 3(1) of the IO. Second, he submits that the provision protects only the legitimate expectation of the party to a contract that legal responsibility will remain unchanged but does not cover situations where (as in the present case) a party enters into a contract with the debtor only after insolvency proceedings have been opened. He also asserts that the respondent honoured the relevant obligation in Austria such that there is no foreign connection within the meaning of Article 31 of the 2015 Insolvency Regulation.

[9] In its response to the appeal, the respondent claims that the appeal should be dismissed on grounds of inadmissibility or, in the alternative, should not be upheld on the merits.

C: Relevant legal provisions:

Article 7 of the 2015 Insolvency Regulation reads as follows:

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:

…

(c) the respective powers of the debtor and the insolvency practitioner;

…

(m) the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors. …

Article 31 of the 2015 Insolvency Regulation reads as follows:

1. Where an obligation has been honoured in a Member State for the benefit of a debtor who is subject to insolvency proceedings opened in another Member State, when it should have been honoured for the benefit of the insolvency practitioner in those proceedings, the person honouring the obligation shall be deemed to have discharged it if he was unaware of the opening of the proceedings.

2. Where such an obligation is honoured before the publication provided for in Article 28 has been effected, the person honouring the obligation shall be presumed, in the absence of proof to the contrary, to have been unaware of the opening of insolvency proceedings. Where the obligation is honoured after such publication has been effected, the person honouring the obligation shall be presumed, in the absence of proof to the contrary, to have been aware of the opening of proceedings.

Recital 81 of the 2015 Insolvency Regulation states as follows:

It may be the case that some of the persons concerned are not aware that insolvency proceedings have been opened, and act in good faith in a way that conflicts with the new circumstances. In order to protect such persons who, unaware that foreign proceedings have been opened, make a payment to the debtor instead of to the foreign insolvency practitioner, provision should be made for such a payment to have a debt-discharging effect.

Paragraph 2 of the Austrian IO reads as follows:

(1) The legal effects of insolvency proceedings shall commence at the start of the day following the publication of the content of the insolvency edict.

(2) At the opening of insolvency proceedings, all of the assets subject to judicial enforcement which belong to the debtor at that time or which he or she acquires during the insolvency proceedings (insolvency estate) shall be withdrawn from the debtor's free disposal.

Paragraph 3 of the Austrian IO reads as follows:

(1) Legal acts undertaken by the debtor after the opening of insolvency proceedings which relate to the insolvency estate shall be unenforceable against the insolvency creditors. The third party shall be repaid the consideration to the extent that the insolvency estate would be unjustifiably enriched by such consideration.

(2) An obligated party shall not be deemed to have discharged his or her obligation by payment of a debt to the debtor after the opening of insolvency proceedings, except to the extent that the benefit has been received by the insolvency estate or the obligated party was not aware of the opening of insolvency proceedings at the time of payment and such lack of knowledge was not caused by a failure to exercise due diligence (should have been known).

<u>D: Grounds for the referral:</u>

[10] 1.1. Under the cross-references to Article 7(2)(c) and (m) of the 2015 Insolvency Regulation, the respective powers of the debtor and the insolvency practitioner and the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors must be assessed in

accordance with the law of the State of the opening of proceedings. Consequently, the effects of the legal acts and of the extent of the restrictions on the debtor's ability to dispose of assets, as well as the lawfulness of a purchase in good faith from the debtor, are determined in accordance with the *lex fori concursus*, although Article 31 of the 2015 Insolvency Regulation, in particular, must also be taken into consideration (Trenker on Article 7 of the 2015 Insolvency Regulation in Koller, Lovrek and Spitzer, *IO – Insolvenzordnung*, 2nd edition [2022], paragraph 16; Maderbacher on Article 7 of the 2015 Insolvency Regulation in Konecny, *Insolvenzgesetze* [last updated on 1 September 2018, rdb.at], paragraph 38; Knof on Article 7 of the 2015 Insolvency Regulation in Uhlenbruck, *InsO – Insolvenzordnung*, 16th edition [2023], paragraphs 49 and 102; Duursma-Kepplinger on Article 4 of the 2015 Insolvency Regulation in Duursma-Kepplinger, Duursma and Chalupsky, *Europäische Insolvenzverordnung* [2002], paragraph 15).

[11] 2.1. Under Austrian law, at the opening of insolvency proceedings, all of the assets subject to judicial enforcement which belong to the debtor at that time or which he or she acquires during the insolvency proceedings (insolvency estate) are withdrawn from the debtor's free disposal (Paragraph 2(2) of the IO). Under Paragraph 3(1) of the IO, legal acts undertaken by the debtor after the opening of insolvency proceedings which relate to the insolvency estate are unenforceable against the insolvency creditors.

[12] 2.2. The opening of insolvency proceedings entails a twofold restriction on the debtor's right to dispose of assets, namely a de facto restriction when the administration is taken over by the insolvency practitioner and a de jure restriction, taking effect immediately when the insolvency proceedings are opened, which is expressed in the unenforceability of the debtor's legal acts. It does not lead to a general limitation of the debtor's legal capacity. On the contrary, the debtor remains capable of entering into obligations. However, legal acts undertaken by the debtor which relate to the estate are unenforceable against the insolvency creditors (RS0063784, 17 Ob 6/21p). This means that the debtor may enter into contractual obligations even after the opening of the insolvency proceedings, but the resultant claims cannot be asserted to the detriment of the estate until the insolvency proceedings have been closed (Kodek on Paragraph 3 of the IO in Koller, Lovrek and Spitzer, *IO – Insolvenzordnung*, 2nd edition, paragraph 6).

[13] 2.3. If the estate loses an asset as a result of a legal act undertaken by the debtor which is unenforceable within the meaning of Paragraph 3(1) of the IO, that asset can be recovered (17 Ob 12/21w). If the purchaser can no longer return the asset purchased from the debtor because it is no longer in the debtor's possession, as a result, for example, of having been resold, it is necessary under civil law to assess the extent to which the purchaser is subject to a claim for compensation or alleging unjust enrichment (Schubert

on Paragraph 3 of the Konkursordnung (Bankruptcy Code, 'the KO') in Konecny, *Insolvenzgesetze*, paragraph 21).

[14] 2.4. Unlike Paragraph 3(2) of the IO, Paragraph 3(1) of the IO, which enshrines the unenforceability of legal acts undertaken by the debtor which relate to the insolvency estate, provides for no limitation of that principle in favour of third parties acting in good faith who purchase something from the debtor but are unaware – through no fault of their own – that insolvency proceedings have been opened.

[15] 2.5. Paragraph 3(2) of the IO provides that third-party debtors are not released from their obligations by payment of their debts to the debtor. That is an expression of the principle enshrined in Paragraph 3(1) of the IO, since accepting a payment constitutes a legal act within the meaning of Paragraph 3(1) of the IO. Since debtors have their power to dispose of the insolvency estate withdrawn, they do not have the power to take receipt of the performance of an obligation forming part of the insolvency estate. An exception applies where the benefit has been received by the insolvency estate or the third-party debtor was unaware, through no fault of his or her own, of insolvency proceedings having been opened.

[16] 3.1. On the other hand, Article 31(1) of the 2015 Insolvency Regulation is intended to protect the good faith of a third party who, in a Member State other than the State of the opening of proceedings, after proceedings have been opened and unaware of that circumstance, honours an obligation for the benefit of the debtor even though he or she should have done so for the benefit of the practitioner. Such payments are declared to be debt-discharging (Klauser and Weber on Article 31 of the 2015 Insolvency Regulation in Konecny, *Insolvenzgesetze* [last updated on 1 September 2018, rdb.at], paragraph 1; Scholz-Berger on Article 31 of the 2015 Insolvency Regulation in Koller, Lovrek and Spitzer, 2nd edition, paragraph 1; Müller on Article 31 of the 2015 Insolvency Regulation in Mankowski, Müller and J.Schmidt, *EuInsVO 2015*, paragraph 2).

[17] 3.2. It is therefore argued that Article 31 of the 2015 Insolvency Regulation presupposes that the third-party debtor was supposed to honour an obligation for the benefit of the insolvency practitioner, which requires there to be an obligation owed to the debtor. In that argument, only obligations owed to the insolvency estate are covered (see Klauser and Weber, op. cit, paragraph 7; Scholz-Berger, op. cit., paragraph 4; Müller, op. cit., paragraph 10). That would mean that Article 31(1) of the 2015 Insolvency Regulation would not apply in respect of obligations honoured by the third party for the benefit of the debtor which result from an unenforceable legal transaction undertaken by the debtor after the opening of insolvency proceedings, because these are not obligations owed to the insolvency estate and therefore not supposed to be honoured for the benefit of the insolvency practitioner.

[18] However, an argument could also be made that it cannot be inferred from the wording of Article 31(1) of the 2015 Insolvency Regulation alone, which refers only to honouring obligations in general terms, that the provision is not intended to encompass obligations honoured by the third-party debtor in ignorance of the opening of insolvency proceedings and therefore on the basis of an unenforceable legal transaction.

[19] The judgment of the Court of Justice of the European Union in Case C-251/12 on the predecessor provision, Article 24(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, is not relevant and consequently provides no further insight. That is because its subject matter concerned not an obligation honoured by the third party for the benefit of the debtor but a payment made at the direction of the debtor to one of its creditors after insolvency proceedings had been opened.

[20] 3.3. If Article 31(1) of the 2015 Insolvency Regulation were accordingly to be interpreted as meaning that its scope of application included the honouring of such obligations, the question of the place of performance would arise. The place of performance is deemed to be the place where the third-party debtor actually honoured the obligation. Initiating a money transfer in another Member State is deemed sufficient to meet that definition (Klauser and Weber, op. cit., paragraph 12; Scholz-Berger, op. cit., paragraph 7; Müller, op. cit., paragraph 8).

[21] The respondent maintains a branch in Austria. That is to be understood as an economically independent business operation which is physically separate from the registered office and has its own organisational function. The branch has no legal capacity; the bearer of rights and responsibilities is the foreign company (6 Ob 40/19d).

[22] The question arises whether the place of the money transfer is also considered to be the place where an obligation is honoured if the third-party debtor established in one Member State nevertheless maintains a branch as described above in the Member State in which the insolvency proceedings have been opened, concludes the legal transaction through that branch and only has the money transferred via an account in another Member State to which there is no particular proximity.

[23] III. […] [national procedural law]

Supreme Court

Vienna, 22 February 2024

[…]