

German Reference for a Preliminary Ruling - Delimitation between Brussels I Regulation and Insolvency Regulation

The German Federal Supreme Court (*Bundesgerichtshof*) has referred with decision of 21 June 2007 (IX ZR 39/06) the following questions to the European Court of Justice for a preliminary ruling:

On interpreting Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings and Article 1(2)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, do the courts of the Member State within the territory of which insolvency proceedings regarding the debtor's assets have been opened have international jurisdiction under Regulation (EC) No 1346/2000 in respect of an action in the context of the insolvency to set a transaction aside that is brought against a person whose registered office is in another Member State?

If the first question is to be answered in the negative:

Does an action in the context of the insolvency to set a transaction aside fall within Article 1(2)(b) of Regulation (EC) No 44/2001?

Jurisdiction with regard to proceedings which are closely connected with the insolvency proceedings themselves is highly contentious.

Since the Insolvency Regulation does not contain an explicit provision on this matter – even though referring to “judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings” in Recital No. 6 – there are, briefly summarised, three different approaches: According to the first opinion jurisdiction has to be based on the

Brussels I Regulation, according to a second approach it has to be referred to national law, while a third position suggests an analogous application of Art. 3 (1) Insolvency Regulation.

In the present case the Court of Appeal (*Oberlandesgericht Frankfurt*) favoured the first approach and held that Art. 1 (2) lit. b Brussels I Regulation had to be – in view of the Regulation’s goal to establish uniform rules in civil and commercial matters – interpreted narrowly and did therefore, as Art. 3 (1) Insolvency Regulation, only include collective insolvency proceedings, not however actions to set aside transactions in insolvency (*Insolvenzanfechtungsklagen*). Consequently the application of the Brussels I Regulation was not excluded, which led in the present case to the result that German courts lacked international jurisdiction.

This point of view is supported by some German legal writers who argue that Art. 1 (2) lit. b Brussels I Regulation had to be, at least since the entry into force of the Insolvency Regulation, construed more strictly. This, however, can be regarded as a departure from the previous case law of the ECJ (*Gourdain v. Nadler*) as well as the *Bundesgerichtshof*. In *Gourdain v. Nadler*, the ECJ held that Art. 1 (2) No. 2 Brussels Convention (which is identical with Art. 1 (2) lit. b Brussels Regulation) includes all proceedings which “derive directly from the bankruptcy or winding-up and [are] closely connected with the proceedings [...]”. The same view was taken by the *Bundesgerichtshof* in 1990 (judgment of 11 January 1990 – IX ZR 27/89, ZIP 1990, 246) by holding that avoidance proceedings by a trustee in bankruptcy are included by Art. 1 (2) No. 2 Brussels Convention and therefore excluded from the scope of the Convention.

Contrary to the Court of Appeal, the *Bundesgerichtshof* tends in the present case, in accordance with a widely held opinion in German literature, to apply Art. 3 (1) Insolvency Regulation and assumes therefore international jurisdiction of German courts in the present case. However, since the *Bundesgerichtshof* regards the question not to be unambiguous, it decided to refer the aforementioned questions to the ECJ.

The referring decision can be found at the website of the Bundesgerichtshof as well as in the following legal journals:

ZIP 2007, 1415 et seq.; DB 2007, 1693 et seq.; ZInsO 2007, 770 et seq.

An annotation by *Lars Klöhn* and *Olaf Berner* (both Göttingen) arguing in favour

of an application of Regulation 44/2001 – and not 1346/2000 – can be found in ZIP 2007, 1418 et seq.

The case is pending at the ECJ as *Rechtsanwalt Christopher Seagon als Insolvenzverwalter über das Vermögen der Frick Teppichboden Supermärkte GmbH v. Deko Marty Belgium N.V.* (C-339/07).