

CJEU on the law applicable to detrimental acts under the Insolvency Regulation in Oeltrans Befrachtungsgesellschaft, C-73/20

This Thursday, the Court of Justice delivered its judgment in the case Oeltrans Befrachtungsgesellschaft, C-73/20, on the interpretation of the Insolvency Regulation and the law applicable to detrimental acts. This judgment, pertaining to Articles 4(2)(m) and 13 of the Regulation No 1346/2000, completes therefore the case law constituted most notably by the judgment in the case *Vinyls Italia*, C-54/16.

Despite the fact that the recent judgment concerns the Regulation No 1346/2000, which has been repealed by Regulation 2015/848, it is and will remain of relevance: the latter Regulation contains provisions that are equivalent to the aforementioned Articles 4(2)(m) and 13.

Legal and factual context

Oeltrans Befrachtungsgesellschaft and Tankfracht GmbH are both established in Germany and belong to the same group of companies.

An inland waterway contract exists between Tankfracht and E.A. Frerichs, established in the Netherlands. Under this contract, Tankfracht owes a payment of a fixed amount to E.A. Frerichs.

By the end of 2010, Oeltrans Befrachtungsgesellschaft pays to E.A. Frerichs, 'on the order of Tankfracht', the sum owed by this company under the inland waterway contract.

Following the opening in Germany of the insolvency proceedings in relation to Oeltrans Befrachtungsgesellschaft, its liquidator brings an application for repayment on that amount with interests, on the ground that the transaction

should be set aside by virtue of insolvency.

After a lapse of a certain amount of time, the regional court finds against E.A. Frerichs under German law, in accordance with the form of order sought by the liquidator. Next, deciding on appeal brought by E.A. Frerichs, the second instance court, also on the basis of German law, varies the decision of the regional court and dismisses the application on the basis of the plea that it was timebarred. Finally, by its appeal on a point of law (Revision), Oeltrans Befrachtungsgesellschaft seeks to have the decision of the regional court reinstated by the referring court.

Questions/issues raised by the request for a preliminary ruling

At the outset, the referring court explains that, under German insolvency law, the payment made by Oeltrans Befrachtungsgesellschaft is voidable.

However, under Article 13 of the Regulation No 1346/2000, its Article 4(2)(m) does not apply where the person who benefited from an act detrimental to all the creditors provides proof that the said act is subject to the law of a Member State other than that of the State of the opening of proceedings and that law does not allow any means of challenging that act in the relevant case.

Invoking that provision, E.A. Frerichs contends that the contested payment is to be assessed under Netherlands law. Under this law, the payment is said not to be voidable.

Faced with this contention, the referring court indicates that, under the Rome I Regulation, the inland waterway contract is governed by Netherlands law. For the referring court, the issue to be determined is thus whether the law applicable to a contract under this Regulation also governs, in the context of Article 13 of the Regulation No 1346/2000, the payment made by a third party in performance of a contracting party's contractual payment obligation.

The referring court considers that it is facing a question on the scope of the *lex contractus* in the context of insolvency proceedings: under Article 12(1)(b) of the Rome I, the law applicable to the contract also governs the performance of the

obligations laid down in that contract. The question remains whether this is still the case in the context of insolvency proceedings. If the creditor's claim is satisfied not by the other party to the contract but, as in the present case, by a third party, the question arises all the more as to whether the *lex contractus* applies.

Additionally, the referring court recognizes the existence of a doctrinal debate as to whether the law applicable to the performance of a contractual obligation is determined by reference to the contract or separately to the act of performance.

Ultimately, the referring court addresses a following question to the Court of Justice: are Article 13 the Regulation No 1346/2000 and Article 12(1)(b) of the Rome I Regulation to be interpreted as meaning that the law applicable to a contract under the latter Regulation also governs the payment made by a third party in performance of a contracting party's contractual payment obligation?

The judgment and the reasoning of the Court

In this case, decided without an Opinion from the Advocate General, the Court answered in affirmative the question of the referring court.

To reach that answer, the Court referenced its case law according to which Articles 4 and 13 of the Regulation No 1346/2000 constitute a *lex specialis* in relation to the Rome I Regulation and must be interpreted in the light of the objectives pursued by the former Regulation (paragraphs 25, 26 and 30).

Having set such starting point for its reasoning, the Court proceeded to interpret the Regulation No 1346/2000 in order to address the question whether a payment made in performance of a contractual obligation is governed by the law applicable to that contract. At paragraphs 31 to 34, it based its finding according to which a payment made (also by a third party) in performance of a contracting party's contractual obligations is governed by the *lex contractus* by the considerations on the (legitimate) expectations of the party to the contract having received the payment.

At paragraphs 35 to 38, the Court explained that this finding is corroborated by Article 12(1)(b) of the Rome I Regulation.

Ultimately, the Court ruled that the answer to the preliminary question is that **Article 13 of the Regulation No 1346/2000 and Article 12(1)(b) of the Rome I Regulation must be interpreted to the effect that the law applicable to the contract on the basis of the latter Regulation governs also the payment made by a third party in performance of a contracting party's contractual obligations where, in the context of insolvency proceedings, this payment is contested as an act detrimental to all the creditors.**

A cursory first reading of the judgment might lead some to conclude that the Court drew a finding of a general nature from Article 12(1)(b) of the Rome I Regulation, according to which the performance of a contractual obligation is generally (and in EU private international law in particular) governed by the law applicable to the contract that constitutes the base of this obligation. Thus, the reference to Article 12(1)(b) of the Rome I Regulation in the Court's answer would simply mirror the preliminary question, as formulated by the referring court (both Article 13 of the Regulation No 1346/2000 and Article 12(1)(b) of the Rome I Regulation being invoked in this question). Others may see this reference as implying that the conflict of laws rules of the latter Regulation are still of relevance in the context of insolvency proceedings. It is yet to be seen which alternative will be supported by a more refined lecture of the judgment.

The judgment can be consulted [here](#).