

CONTRACTUAL PERFORMANCE BY A THIRD PARTY  
GOVERNED BY LEX CONTRACTUS  
AND THE EFFECTIVENESS OF AVOIDANCE ACTION  
IN INSOLVENCY PROCEEDINGS: NOTE TO THE JUDGEMENT  
OF THE COURT OF JUSTICE OF EUROPEAN UNION,  
APRIL 22 2021, C-73/20

ESECUZIONE CONTRATTUALE DA PARTE DI UN TERZO  
REGOLATA DALLA LEX CONTRACTUS ED EFFICACIA  
DELL'AZIONE DI ANNULLAMENTO NELLE PROCEDURE  
DI INSOLVENZA: NOTA ALLA SENTENZA DELLA CORTE  
DI GIUSTIZIA DELL'UNIONE EUROPEA,  
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**Abstract:** Upon a request for a preliminary ruling on the articulation between Article 13 of the European Insolvency Regulation n° 1346/2000 and Article 12(1)(b) of Rome I Regulation, the Court of Justice of European Union has confirmed in a decision on April 22, 2021 that a payment made in performance of a contract by a third party is subjected to the law applicable to that contract and not to the law of the Member State opening the insolvency proceedings where the payment is challenged by an avoidance action. The decision raises some reflections on the correlation between the European Insolvency and Rome I Regulations as well as the effectiveness of avoidance action in insolvency proceedings.

**Keywords:** insolvency proceedings, acts detrimental to all the creditors, act subject to the law of a member state other than the state of the opening of proceedings, conflict of laws, law applicable to contractual obligations, performance of the obligations arising from the contract, payment made in performance of a contract subject to the law of a Member State other than the State of the opening of proceedings, performance by a third party, action for repayment of that payment in insolvency proceedings, law applicable to that payment.

**Riassunto:** Su una domanda di pronuncia pregiudiziale sull'articolazione tra l'articolo 13 del Regolamento Europeo d'Insolvenza n° 1346/2000 e l'articolo 12(1)(b) del Regolamento Roma I, la Corte di Giustizia dell'Unione Europea ha confermato in una decisione del 22 aprile 2021 che un pagamento effettuato in esecuzione di un contratto da un terzo è soggetto alla legge applicabile a tale contratto e non alla legge dello Stato membro che apre la procedura d'insolvenza quando il pagamento è impugnato con un'azione di annullamento. La decisione solleva alcune riflessioni sulla correlazione tra il regolamento europeo d'insolvenza e il regolamento Roma I, nonché sull'efficacia dell'azione di annullamento nelle procedure d'insolvenza.

**Parole chiave:** I procedure di insolvenza, atti pregiudizievoli per la massa dei creditori, atto soggetto alla legge di uno Stato membro diverso dallo Stato di apertura della procedura di insolvenza, conflitto di leggi, legge applicabile agli obblighi contrattuali, esecuzione delle obbligazioni che discendono da quest'ultimo, pagamento effettuato in esecuzione di un contratto soggetto alla legge di uno Stato membro diverso dallo Stato di apertura della procedura di insolvenza, esecuzione da parte di un terzo, azione di restituzione del pagamento nell'ambito di una procedura di insolvenza, legge applicabile al pagamento medesimo.

**Summary:** I. Facts. II. Issue. III. Ruling. IV. Reflections on the commented decision. 1. Uniform interpretation of Article 13 EIR N°1346/2000. 2. Clarification on the scope of *lex contractus*. 3. Existence of fraudulent manipulations and the effectiveness of avoidance action in insolvency proceedings

## I. Facts

1. The facts of the commented decision ruled by the First Chamber of the Court of Justice of the European Union (“CJEU”) on 22 April 2021 are summarized as follows:

A German company (“Tankfracht”) concluded a contract with a Dutch company (“E.A. Frerichs”). It was agreed that the contract is governed by Dutch law. On 9 November 2010, Oeltrans, a German company that belonged to the same group as Tankfracht, made a payment to the Dutch company in performance of the above-mentioned contract. On 29 April 2011, insolvency proceedings were opened against Oeltrans. The liquidator of Oeltrans (“Zm”) sought to challenge the payment to the Dutch company as voidable under German law of detrimental acts. The Regional Court in Germany granted the liquidator’s application. The Dutch company filed an objection, on the basis of German law, that the application was time-barred. The appeal court followed this reasoning and dismissed the application of the liquidator.

Finally, an appeal on a point of law (*Revision*) to reinstate the decision of the regional court was brought before the Federal Court of Justice.

## II. Issue

2. In general, *lex fori concursus*, the law of the State where the insolvency proceeding was opened, determines the rules relating to the voidness, voidability or unenforceability of detrimental acts to all the creditors (Article 4(2)(m) of European Insolvency Regulation (“EIR”) N° 1346/2000<sup>1</sup> becoming Article 7(2)(m) of EIR N° 2015/848<sup>2</sup>). Since the insolvency proceedings against Oeltrans were opened in Germany, to the liquidator’s action should be examined under the law of this state. Therefore, the payment made by Oeltrans is voidable.

However, the principle of Article 4 does not apply to the situation where the party benefited from the detrimental act can prove that the act is subject to the law of another Member State (1), and it cannot be challenged under that Member State’s law (Article 13 of the EIR N°1346/2000 - today Article 16 of the EIR N° 2015/848). E.A. Frerichs relied on Article 13 and submitted the proof to argue that the payment in challenge must be assessed under Dutch law and consequently, it is not voidable. Under the

<sup>1</sup> Council Regulation (EC) N° 1346/2000 of 29 May 2000 on insolvency proceedings, OJ L 160, 30.6.2000, p.9, ELI: <http://data.europa.eu/eli/reg/2000/1346/oj>.

<sup>2</sup> Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L 141, 5.6.2015, p.33, ELI: <http://data.europa.eu/eli/reg/2015/848/oj>.

Rome I Regulation<sup>3</sup>, the contract between Tankfracht and E.A. Frerichs is governed by Dutch law. The law applicable to a contract shall govern the performance of the contractual obligations made by parties (Article 12(1)(b) of the Rome I Regulation).

The question arose in this case is whether the payment made by a third party in performance of a contractual obligation is governed by the law applicable to the contract (*lex contractus*) or by the law governing the insolvency proceedings where that payment is challenged by an avoidance action.

### III. Ruling

3. The Court first recalled the principle of Article 4(1) EIR N°1346/2000 and its exception provided in Article 13 of the same Regulation. The interpretation of this exception has been clarified in the judgment of 16 April 2015, *Lutz*<sup>4</sup>. As an important exception to the universal scope of the main insolvency proceedings, Article 13 can only be used as a final defense if the person profiting from a detrimental act presents the proof that meets its two conditions as mentioned previously.

4. The Court also confirmed that Articles 4 and 13 of Regulation N°1346/2000 constitute a *lex specialis* in relation to the Rome I Regulation and did highlight that they must be interpreted strictly in accordance with the objectives pursued by their originating Regulation by referring to the recital 24 in its preamble. One of which is to protect legitimate expectations and the certainty of transactions in the Member States other than the States in which proceedings are opened. The same guideline for the interpretation of Article 13 is confirmed in other judgments of the Court of Justice (see the judgment of 15 October 2015, *Nike European Operations Netherlands*<sup>5</sup>).

5. In the case *Vinyls Italia*, it is stated that parties have the freedom to choose an applicable law to their contract at the moment of its conclusion. It is legitimate for them to have expectations that the contract and its performance will continue to be governed by that particular law, namely the *lex causae*, even in an event of insolvency<sup>6</sup>.

6. If a third party to the contract is asked to perform an obligation on behalf of a contracting party, then the Court accepted that this third party should profit the same protection for legitimate expectations on applicable law as the contracting ones, without going searching further the good faith or bad faith of the third party who is involved with the contractual relationship.

7. The Court opted to stand by the party who has benefited from a performance of the contract as this party cannot be reasonably required to foresee that an obligation of this contract will be executed by a third person and lately its contracting partner or the third person could become insolvent and anticipate the State where such proceedings could be opened<sup>7</sup>. *A contrario*, it seems more certain for them to foresee that the contract and its performance will continue to be governed by the same law chosen at the moment of conclusion.

8. In conclusion, the Court decided that the payment made by a third party in execution of a contractual obligation is governed by the law applicable to the contract (*lex contractus*) and not by the law governing the insolvency proceedings where that payment is challenged by an avoidance action.

<sup>3</sup> Regulation (EC) N° 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p.10, ELI: <http://data.europa.eu/eli/reg/2008/593/oj>.

<sup>4</sup> CJEU 16 April 2015, *Hermann Lutz v Elke Bäuerle*, C-557/13, EU:C:2015:227, §34.

<sup>5</sup> CJEU 15 October 2015, *Nike European Operations Netherlands*, C-310/14, EU:C:2015:690, §18.

<sup>6</sup> CJEU 8 June 2017, *Vinyls Italia SpA, in liquidation v Mediterranea di Navigazione SpA*, C-54/16, EU:C:2017:433, §30.

<sup>7</sup> CJEU 22 April 2021, *ZM v E.A. Frerichs*, C-73/20, §33.

## IV. Reflections on the commented decision

### 1. Uniform interpretation of Article 13 EIR N°1346/2000

9. The fact that the judges have given the ruling without asking for the opinion of the Advocate General could imply that, in this case, the preliminary question contains no new point of the law.<sup>8</sup> The answer of the Court to this question could be “foreseen” by analyzing the case-law of the Court.

10. The Court of Justice has adopted a uniform interpretation of Article 13 since the case *Lutz*, to protect those who have benefited from acts detrimental to all the creditors, from the risk of insolvency proceedings being opened in a State other than the one in which the rules applicable to their claims originate.

11. As submitted by the Portuguese Government and the European Commission in their written observations, “a contrary interpretation of Article 13 would undermine the effectiveness of that provision and would run counter to its purpose”<sup>9</sup>.

However, it is still questionable whether Article 13 should be applied in the case *Vinyls* where such risk does not exist because the contractual parties are domiciled in the same state. The only foreign element that could explain the application of the EIR is the choice of a foreign law (English law) governing the contract between the parties<sup>10</sup>. The exit of the United Kingdom from the European Union has a direct impact on similar situations where English law is chosen as governing law because the EIR will no longer apply and then Article 13 could not be used as a shield for beneficiary parties<sup>11</sup>.

### 2. Clarification on the scope of *lex contractus*

12. The commented decision has clarified the scope of the law applicable to a contract according to Article 12(1) of the Rome I Regulation.

The Court considered that an effective contractual performance by a third party is part of the concept of ‘performance’ of the contract and therefore falls within the scope of the *lex contractus*. Indeed, as noted in the Giuliano-Lagarde report, the word ‘performance’ at the point b of this article also covers the extent to which the obligation can be performed by a person other than the party liable<sup>12</sup>. In principle, contracts establish rights and obligations with effect between contractual parties, unless otherwise agreed in the contract (e.g., contract for the benefit of a third party). However, obligations can be performed by a third party if there is no contractual clause in place demanding the performance of obligations by a contractor alone. In the present case, it is admitted that the payment of an amount of money to a party is not necessarily performed by the other one. The decision of the Court illustrates once more an exception to the principle of relativity of the contract’s effects.

Although the case does not specify whether a contract existed between the two companies in the same group, Oeltrans and Tankfracht, to justify the payment on behalf of the latter to E.A. Frerichs, the avoidance action of the liquidator of Oeltrans to challenge a payment during the twilight zone period could raise the question about the existence of fraudulent elements.

<sup>8</sup> Article 20(5) of the CJEU Statute provides that ‘When it considers that the case raises no new point of law, the Court may decide, after hearing the Advocate General, that the case shall be determined without a submission from the Advocate General’.

<sup>9</sup> Note 7, §34.

<sup>10</sup> F. JAULT-SESEKE, *Mise en œuvre de l’article 13 du Règlement Insolvabilité*, Revue critique de droit international privé, 2017/4 N°4, Dalloz, pages 594 to 602.

<sup>11</sup> G. DE FALCO, *Brexit impact on insolvency avoidance actions under Italian law*, Insolvency and Restructuring International, Vol 14. N° 2, September 2020.

<sup>12</sup> M. GIULIANO/P.LAGARDE, *Report on the Convention on the law applicable to contractual obligations*, OJ C 282, 31/10/1980, p. 32.

### 3. Existence of fraudulent manipulations and the effectiveness of avoidance action in insolvency proceedings

13. One of the other issues raised in this case is whether such interpretation of Article 13 could encourage fraudulent manipulations by contractual parties in detriment to their creditors. For example, the parties could choose in their favor a law governing the contract which does not allow the creditor to challenge the contract late. It seems unfair to let a *mala fide* third party profit the same protection for a *bona fide* contractual party.

14. In conclusion, Article 13 was reported as necessary to protect legitimate expectations of the parties regarding the regime applicable to their legal relationship<sup>13</sup>. However, its application shows that a broad interpretation of this article would reduce the chances of successful avoidance actions in insolvency proceedings because “the legal system which least favors avoidance rights will take precedence”<sup>14</sup>. The combination of Articles 4(2)(m) and 13 in Regulation N°1346/2000<sup>15</sup> could be interpreted as a double avoidance rule as a transaction detrimental to the general body of creditors can only be challenged in a cross-border insolvency proceeding if this act is deemed as void, voidable or unenforceable by both the *lex concursus* and the *lex causae*<sup>16</sup>.

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<sup>13</sup> B. HESS/P. OBERHAMMER/T.PFEIFFER, , *European Insolvency Law: the Heidelberg-Luxembourg-Vienna report on the application of Regulation No. 1346/2000/EC on Insolvency Proceedings* (external evaluation JUST/2011/JCIV/PR/0049/A4), 2014, p. 213.

<sup>14</sup> D. F. FRITZ, Harmonization of insolvency law at EU level: Avoidance actions and rules on contracts, retrievable as document No. PE 432.767 under [https://www.europarl.europa.eu/RegData/etudes/note/join/2011/432767/IPOL-JURI\\_NT%282011%29432767\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/note/join/2011/432767/IPOL-JURI_NT%282011%29432767_EN.pdf), 2011.

<sup>15</sup> Articles 7(m)(2) and 16 in Regulation N°2015/848.

<sup>16</sup> G. MCCORMACK, *The European Restructuring Directive, Elgar Corporate and Insolvency Law and Practice series*, , 2021, p. 144.