# International Corporate Rescue




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# Court of Justice of the European Union (CJEU) in *Vinyls Italia SpA v Mediterranea di Navigazione SpA* C-54/16

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The CJEU gave a preliminary ruling on Article 13 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1) (IR).

The request for the preliminary ruling was made by the Tribunale Ordinario di Venezia, Italy, in the course of proceedings aimed at the setting aside of transactions between Mediterranea di Navigazione SpA ('Mediterranea') and Vinyls Italia SpA ('Vinyls'), following the latter company's insolvency, and the repayment of funds by Mediterranea paid to it by Vinyls in the six months prior to its declaration of insolvency.

Vinyls and Mediterranea were both Italian companies. The contested payments by Vinyls to Mediterranea were made pursuant to a ship charter contract (the 'Contract') concluded on 11 March 2008, the term of which was extended by an addendum of 9 December 2009. The Contract had an English governing law clause. Vinyls was in special administration in Italy.

The special administrator sought to have the payments to be set aside under Italian insolvency law. Mediterranea opposed this on the grounds that the payments were made in accordance with a contract governed by English law and, it said, under English insolvency law, the payments could not be challenged. It should be noted that the referring court pointed out that the sworn statement from an English lawyer on which Mediterranea relied for the latter proposition made clear that English law does not exclude in general or in the abstract, any possibility of challenging the contested payments, but requires the challenge to meet certain substantive requirements which differ from those laid down by the *lex fori concursus*.

Each party adduced an argument regarding the proper law under which the question of whether the transactions were to be set aside should be determined.

The administrator of Vinyls simply sought to have the transaction set aside under a provision of the Italian Law of Insolvency.

Mediterranea relied on Articles 4 and 13 of the IR to resist the application of the Italian Law of Insolvency to the set aside action.

Article 4 provides 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, hereafter referred to as 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. It shall determine in particular:
>
> ...
>
> (m) the rules relating to the voidness, nullity, voidability or unenforceability of legal acts detrimental to all the creditors.'

Article 13 provides as follows:

> 'Article 4(2)(m) shall 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,
>
> – that law does not allow any means of challenging that act in the relevant case.'

Mediterranea stated that the effect of Art. 13 was to disapply the application of Art. 4(1)(m), so that the avoidance action was governed by English not Italian insolvency law.

The question for the Italian court was complicated by Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177, p. 6; 'the Rome I Regulation'). Article 1(1) of the Rome I Regulation provides:

> 'This Regulation shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters.'

Article 3 of the Rome I Regulation, entitled 'Freedom of choice', which provides in paragraphs (1) and (3):

> '1. A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.

...

3. Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.'

Article 3(3) of the Rome I Regulation appears to raise the possibility that despite the governing law clause, because 'all other elements relevant to the situation at the time of the choice' were in Italy, the choice of English law could not prejudice the application of Italian insolvency law.

Further, the administrator of Vinyls submitted that Art. 13 of IR makes provision for a procedural objection, and that this cannot be raised by the court of its own motion, but must be raised by the party concerned within the time-limit laid down by the procedural law of the Member State of the court hearing the action to set aside. In the present case, the objection was raised out of time.

The referring court asked five questions:

'(1) Does the "proof" which Article 13 of Regulation No 1346/2000 requires of the person who benefited from an act detrimental to all the creditors, in order to prevent that act from being challenged in accordance with the rules of the lex fori concursus, include a requirement to raise a procedural objection in the strict sense of that term within the periods laid down by the procedural rules of the lex fori, when seeking to rely on the derogation provided in the regulation and to prove that the two conditions laid down by that provision have been met? Or does Article 13 of Regulation No 1346/2000 apply when the party concerned has requested its application during the proceedings, even when the time-limits laid down by the procedural rules of the lex fori for lodging procedural objections have expired, or even where that provision is applied by the court of its own motion, provided that the party concerned has provided proof that the detrimental act is subject to the lex causae of another Member State whose law does not permit the act to be challenged by any means in the specific circumstances of the case?

(2) Must the reference to the rules of the lex causae in Article 13 of Regulation No 1346/2000, for establishing whether 'that law does not allow any means of challenging that act in the relevant case', be interpreted as meaning that the party bearing the burden of proof must show that, in the specific circumstances of the case, the lex causae does not provide, in general or in the abstract, any means to challenge an act such as that which, in the present case, was considered detrimental — namely the payment of a contractual debt — or as meaning that the party bearing the burden of proof must show that, where the lex causae allows an act of that type to be challenged, the conditions to be met in order for such a challenge to be upheld in the relevant case, which differ from those of the lex fori concursus, have not actually been fulfilled?

(3) Is the derogation provided for in Article 13 of Regulation 1346/2000 — bearing in mind its objective of protecting the legitimate expectations of the parties concerning the stability of the act in accordance with the lex causae — applicable even when the parties to a contract have their head offices in a single Member State, whose law can therefore be expected to be intended to become the lex fori concursus in the event of insolvency on the part of one of those parties, and the parties, via a contractual clause designating the law of another Member State as the law applicable, exclude the setting aside of acts performed under the contract from the application of the mandatory rules of the lex fori concursus imposed in order to protect the principle that all creditors should be treated equally, to the detriment of all the creditors in the event of insolvency?

(4) Must Article 1(1) of the Rome I Regulation be interpreted as meaning that 'situations involving a conflict of laws' for the purposes of the application of that regulation also include a situation involving a charter contract concluded in a Member State between companies with their head offices in the same Member State, with a clause designating the law of another Member State as the law applicable?

(5) If the answer to Question 4 is in the affirmative, must Article 3(3) of the Rome I Regulation, read in conjunction with Article 13 of Regulation No 1346/2000, be interpreted as meaning that, where the parties choose to subject a contract to the law of a Member State other than that in which 'all the other elements relevant to the situation' are located, that does not affect the application of mandatory rules under the law of the latter Member State, which apply as the lex fori concursus, for the purpose of challenging acts performed before the insolvency to the detriment of all the creditors, thereby prevailing over the derogation provided for in Article 13 of Regulation No 1346/2000?'

### *Question 1*

In the first question the referring court asked whether At. 13 of the IR requires a person benefitting from the act that is detrimental to all creditors in order to challenge an action to have that act set aside in accordance with the *lex fori concursus*, to raise a procedural objection in the form and within the time-limits laid down by the procedural law of the Member State on whose territory the dispute is pending

The Court had previously ruled that Art. 13 expressly governs the allocation of the burden of proof. However, the court pointed out, it does not contain any provisions on more specific procedural aspects. Thus, it is silent on the questions of the form and time-limit for relying on that article in the context of proceedings: [25].

Accordingly, the form and time-limits for relying on Article 13 of Regulation 1346/2000 in the context of proceedings relating to the setting aside, in accordance with the rules laid down by the *lex fori concursus*, of an act that is detrimental to all the creditors, and the issue whether the court hearing those proceedings may apply that article of its own motion, come under the procedural law of the Member State on whose territory those proceedings are pending: [25].

This is so despite the fact that the exception in Art. 13 may be relied on where the act sought to be invalidated under Art. 4(1)(m) cannot be invalidated under the law of the other member state due to a limitation period or other time-bar in that other state, following judgment of 16 April 2015, *Lutz* (C 557/13, EU:C:2015:227, paragraph 49): [28].

The Court also noted that the objective pursued by Art. 13 is to protect the legitimate expectations of a person who has benefited from an act detrimental to all the creditors by providing that the act will continue to be governed, even after insolvency proceedings have been opened, by the law that was applicable at the date on which it was concluded. This objective does not require all time limits to be governed by the *lex causae*: Article 13 does not aim to protect a litigant from the usual risks of defending proceedings, under which the procedural rules of the court seized of a matter must be obeyed: [30].

Thus, the expiry of the Italian time-limit for the objection to transaction avoidance precluded a jurisdictional objection being raised under Art. 13 before the Italian court (notwithstanding that the substantive law of the objection does not impose such a time limit). This is subject to the general point that any time limit for the raising of an objection may not be stricter in the case of an objection raised under the law of another member state than it would be for an objection raised in similar domestic situations: this is the principle of equivalence. It is also subject to the principle of effectiveness: the time limit must not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law. It was for the referring court to decide whether the principles of equivalence and effectiveness were upheld: [33].

### *The second question*

By its second question the Venetian court asked whether what a party who wishes to rely on Art. 13 must show is that the in the specific circumstances of the case, the *lex causae* does not provide, in general or in the abstract, any means to challenge an act which was considered detrimental, or that where the *lex causae* allows an act of that type to be challenged, the conditions to be met in order for that challenge to be upheld, and which differ from those of the *lex fori concursus*, have not actually been fulfilled: [34].

The court ruled that following judgment of 15 October 2015, Nike European Operations Netherlands, C 310/14, EU:C:2015:690, paragraph 20, the objective of Art 13, that is to satisfy the legitimate expectations of creditors that an act will continue to be determined by the law which applied to it when it was committed, requires that all the circumstances of the case be taken into account: [35]. There cannot be legitimate expectations where, after insolvency proceedings have been opened, the validity of an act is to be assessed without regard being had to those circumstances whereas, where such proceedings are not opened, such circumstances would need to be taken into account.

The Court has an obligation to interpret Art. 13 strictly: [36]. A broad interpretation would allow a person who has benefited from an act detrimental to all the creditors to avoid the application of the *lex fori concursus* solely by relying on a provision of the *lex causae* as, in the abstract, rendering acts of a certain sort unchallengeable. Nike European Operations Netherlands, C 310/14, EU:C:2015:690, paragraph 31is authority for the proposition that where a defendant in an action relating to the voidness, voidability or unenforceability of an act relies on a provision of the *lex causae* limiting the circumstances in which the act can be challenged, it is for the defendant to plead that the circumstances necessary for reliance on that provision of the *lex causae* have in fact arisen.

### *The third to fifth questions*

The Court treated the third to fifth questions, on the interaction of Art. 13 of the IR and its interaction with Art. 3(3) of the Rome I Regulation, together. It noted that in fact, in this case, Rome I Regulation does not apply to the main proceedings – the contract was concluded before the period to which Rome I Regulation applies: [41]. The third to fifth questions all hinge on whether Art. 13 of the IR applied in relation to a contract with a governing law clause designating a different Member State's law than that of the Member State in which all the other elements relevant to the situation are located.

Governing law clauses are often used in commerce and were common when the IR came into force: [45]-[46]. Article 13 of that Regulation does not contain any express limitation on its effect where there is a governing law clause, and nor does any other part of the IR: [46]. Accordingly, Art. 13 must be taken to apply even where a governing law clause makes a contract subject

to the law of a Member State other than the Member State in which those parties are both established.

The Court further noted at [47] that recital 23 of the IR states that that the Regulation 'should set out, for the matters covered by it, uniform rules on conflict of laws which replace, within their scope of application, national rules of private international law.' This indicates that Art. 3(3) of the Rome I Regulation does not prevail as against Art. 13 of the IR, and that the latter article still applies when all the other elements of a situation, apart from the choice by the parties of the applicable law, are located in a Member State other than the one whose law is chosen.

The exception to this is where the governing law clause was introduced specifically to avoid the transaction avoidance provisions that would otherwise apply, for abusive or fraudulent ends. EU law cannot be relied on to further such ends. The Court noted that it will make a finding of abuse if it finds a combination of objective and subjective elements: [52]. Objectively, it must be found that despite formal observance of the conditions laid down by Community rules, the purpose of those rules has not been achieved. Subjectively, it must be found that the transactions made in formal observance of the rules were aimed at obtaining an undue advantage, and the economic activity carried out may not have some explanation other than the mere attainment of an advantage (judgment of 28 July 2016, Kratzer, C 423/15, EU:C:2016:604, paragraphs 38 to 40 and the case-law cited).

It concluded at [54]:

> 'Thus as regards the application of Article 13 of Regulation No 1346/2000 in a situation such as that at issue in the main proceedings, that application may be disregarded only in a situation where it would appear objectively that the objective pursued by that application, in this context, of ensuring the legitimate expectation of the parties in the applicability of specific legislation, has not been achieved, and that the contract was made subject to the law of a specific Member State artificially, that is to say, with the primary aim, not of actually making that contract subject to the legislation of the chosen Member State, but of relying on the law of that Member State in order to exempt the contract, or the acts which took place in the performance of the contract, from the application of the lex fori concursus.'

Simply introducing a governing law clause does not indicate abuse of this nature.

The Court concluded on questions three to five at [56] that Art. 13 of the IR may validly be relied on where there is a governing law clause even where the parties concerned have their head offices in single Member State on whose territory all the other elements relevant to the situation in question are located, and this Member State is not the Member State whose law has been designated in the governing law clause, provided that those parties did not choose that law for abusive or fraudulent ends, that being a matter for the referring court to determine.

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