

The Law Applicable to a Payment Made by a Third Party in Performance of a Contractual Payment Obligation Contested in Insolvency Proceedings as an Act Detrimental to All Creditors

Judgment of the Court of Justice of 22 April 2020 in Case C-73/20, ZM, as receiver in bankruptcy of Oeltrans Befrachtungsgesellschaft mbH, against E.A. Frerichs

Article 13 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings and art. 12 sec. 1 (b) of 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) should be interpreted as meaning that the law applicable to a contract pursuant to the latter regulation is applicable also to a payment made by a third party in performance of a contractual obligation to pay that is incumbent on one of the parties to the contract, where, in the course of bankruptcy proceedings, this payment is contested as an act detrimental to all creditors.

Arkadiusz Wowerka

Uniwersytet Gdański

arkadiusz.wowerka@prawo.ug.edu.pl

ORCID: 0000-0001-5000-0373

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Commentary

Introductory remarks

In the judgment under discussion,¹ the Court of Justice interpreted art. 13 of Council Regulation (EC) No 1346/2000 of May 29, 2000 on insolvency proceedings,² and, in connection with this provision, art. 12 sec. 1 (b) of the Regulation of the European Par-

¹ Judgment of the Court of Justice of 22 April 2020 in Case C-73/20, ZM, as receiver in bankruptcy of Oeltrans Befrachtungsgesellschaft mbH, against E.A. Frerichs, ECLI:EU:C:2021:315.

² Official Journal of the EU 2000, L 160, p. 1 and ff., called hereafter Regulation No 1346/2000.

liament and of the Council (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I).³ The Court's ruling is a further ruling on challenging a bankrupt's actions that are detrimental to bankruptcy creditors, in the context of art. 13 of Regulation No 1346/2000.⁴ This time, the background to the judgment is a payment made by a third party in performance of a contractual obligation to pay that is incumbent on one of the parties to the contract, which is questioned in bankruptcy proceedings as an act detrimental to all creditors. The Court clarified doubts as to the law applicable to the assessment of the challenge to this action in connection with bankruptcy. In this regard, it explained what constitutes the *lex causae* for the disputed payment within the meaning of the said art. 13. In this context, it further made a distinction between the scope of application of the bankruptcy statute and that of the statute of contract. The ruling is important for bankruptcy practice, where cases are not uncommon in which the actions of companies operating on a cross-border basis that have been declared bankrupt, are questioned as being detrimental to all creditors. The considerations of the Court also remain valid with regard to Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings,⁵ which replaced Regulation 1346/2000. This regulation merely recasts Regulation No 1346/2000.⁶ Article 13 of Regulation No 1346/2000 was adopted by the current art. 16 of Regulation 1215/848, which has the same content. This commentary approves of both the thesis and the justification of the judgment.

The facts of the case and the question referred for a preliminary ruling

The companies Oeltrans Befrachtungsgesellschaft and Tankfracht GmbH are based in Germany and both belong to the Oeltrans group. E.A. Frerichs, the headquarters of which are in the Netherlands, and Tankfracht entered into a contract for an inland waterway vessel under which the latter was required to pay E.A. Frerichs a salary of EUR 8,259.30. On 9 November 2010, Oeltrans Befrachtungsgesellschaft made to E.A. Frerichs the payment of the amount due from Tankfracht in performance of this contract. On 29 April 2011, the Amtsgericht Hamburg opened bankruptcy proceedings against Oeltrans Befrachtungsgesellschaft. On 21 December 2014, the receiver initially appointed in these proceedings filed a claim with the competent court for the return of EUR 8,259.30 together with interest, demanding that the bankrupt's actions

³ Official Journal of the EU 2008, L 177, p. 6 and ff., called hereafter Regulation Rome I.

⁴ See, *inter alia*, judgments: 8 June 2017, *Vinyls Italia*, C-54/16, EU:C:2017:433; 15 October 2015, *Nike European Operations Netherlands*, C-310/14, EU:C:2015:690; 16 April 2015, *Lutz*, C-557/13, EU:C:2015:227, point 34. On this judgment, see: A. Wowerka, *Prawo właściwe dla zaskarżenia czynności prawnych w związku z upadłością w świetle rozporządzenia Rady (WE) nr 1346/2000 w sprawie postępowania upadłościowego*, GSP-PO 2016, no 1, p. 120 and ff.

⁵ Official Journal of the EU, L 141, p. 19 and ff., hereafter Regulation No 1215/848. Current consolidated version: ELI: <http://data.europa.eu/eli/reg/2015/848/oj>.

⁶ Cf. recital 1 of Regulation No 1215/848.

be declared ineffective. Since 25 March 2016, ZM has been the receiver in bankruptcy in these proceedings. Considering that the action brought in the main proceedings was governed by German law, the Landgericht granted the application of the receiver. On appeal, in connection with E.A. Frerichs's claim on the grounds of limitation, the appellate court changed the decision issued by the court of first instance, and dismissed the claim of the receiver, also on the basis of German law. ZM lodged a further appeal with the Bundesgerichtshof against that judgment, demanding that the first-instance judgment be upheld. The Bundesgerichtshof considered that whether the review appeal should be granted depends on the interpretation of art. 13 of Regulation No 1346/2000 and of art. 12 sec. 1 (b) of the Rome I Regulation. According to the Bundesgerichtshof, since the bankruptcy proceedings against Oeltrans Befrachtungsgesellschaft were initiated in Germany, the question of the ineffectiveness of the payment of the disputed amount of EUR 8259.30 should be assessed under German law pursuant to art. 4 sec. 2, second sentence, 1346/2000, according to which the claim pursued by the trustee is not subject to time limitation and, therefore, an appeal for review should be upheld. The Bundesgerichtshof points out, however, that, according to E.A. Frerichs, this issue should be assessed in the light of Dutch law under art. 13 of Regulation No 1346/2000, which law does not allow any challenge to the payment at issue. In that context, the Bundesgerichtshof considers that the contract concluded between Tankfracht and E.A. Frerichs is governed by Dutch law. In the opinion of this court, the question whether the condition set out in art. 13 of Regulation No 1346/2000, according to which a given act detrimental to creditors is governed by the law of a Member State other than that in which insolvency proceedings were opened, depends on whether, pursuant to art. 12 sec. 1 (b) of the Rome I Regulation, a payment made by a third party, in this case by Oeltrans Befrachtungsgesellschaft, to satisfy E.A. Frerichs's claim under that contract against Tankfracht, is also subject to Dutch law. In those circumstances, the Bundesgerichtshof decided to stay the proceedings and refer the question to the Court for a preliminary ruling: Is art. 13 of Regulation No 1346/2000 and art. 12 sec. 1 (b) Rome I to be interpreted as meaning that the law applicable to the contract pursuant to the latter regulation is also applicable to a payment made by a third party in performance of a contractual pecuniary obligation on one of the contracting parties?

Conclusions and ruling of the Court

At the outset, the Court recalled that art. 13 of Regulation No 1346/2000 provides for an exception to the general rule laid down in art. 4 sec. 1⁷ of this regulation, according to which the law applicable to insolvency proceedings and their consequences (*lex concursus*) is the law of the Member State in which the proceedings were opened.⁸

⁷ Currently art. 7 sect. 1, Regulation No 1215/848.

⁸ Cf. point 22 of the judgment and the jurisprudence cited there.

Pursuant to art. 4 sec. 2 (m)⁹ of the said regulation, the *lex concursus* regulates, in particular, the rules concerning the nullity of, challenge to, or relative ineffectiveness of legal acts detrimental to all creditors, and concerning the nullity, possibility of annulment, or relative ineffectiveness of acts detrimental to all creditors. Pursuant to the wording of art. 13 of Regulation No 1346/2000, the provision of art. 4 sec. 2 (m) of this Regulation shall not apply where the person who has benefited from an act detrimental to all creditors proves that the act is governed by the law of a Member State other than the law of the State where the proceedings were opened and that, in this case, under the law of that other Member State the legal act is in no way subject to appeal. Referring to recital 24 of Regulation No 1346/2000, it then stated that the purpose of that exception was to protect legitimate expectations and the certainty of trade in Member States other than that in which the procedure was opened.¹⁰ As the Court states, it seeks to protect the legitimate expectations of the person who benefited from an act detrimental to all creditors by providing that that act will continue to be subject, even after the opening of insolvency proceedings, to the law applicable to it at the time when it was performed.¹¹ The provision of art. 13 setting out an exception must be interpreted strictly and its scope must not go beyond what is necessary to achieve that objective.¹² The Court also recalled that art. 4 and 13 of 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 Regulation No 1346/2000.¹³

The above considerations lead the Court to the conclusion that, since the bankruptcy proceedings were initiated in Germany, the law applicable to these proceedings and their effects, pursuant to art. 4 sec. 1 of Regulation No 1346/2000, is German law, which in turn means that pursuant to art. 4 sec. 2, second sentence (m) of that regulation, the question of the relative ineffectiveness of the payment of EUR 8259.30 by Oeltrans Befrachtungsgesellschaft to E.A. Frerichs should, in principle, be assessed in the light of German law.¹⁴ Next, with regard to the referring court's doubts as to the application of Netherlands law to the payment at issue under art. 13 of Regulation No 1346/2000, as the payment was made in performance of a contractual obligation incumbent on Tankfracht under the contract concluded with E.A. Frerichs, which was governed by Dutch law, the Court emphasized that in line with the objectives pursued by the above mentioned art. 13, a party to a contract that has received a payment in performance of that contract should be able to expect that the law applicable to that contract will also govern that payment, also after the opening of bankruptcy proceedings.¹⁵ In the Court's view, this also applies where the payment was not made by that party's counterparty, but by a third party, and therefore that party to the contract

⁹ Currently art. 7 sect. 2 (m), Regulation No 1215/848.

¹⁰ Cf. point 24 of the judgment.

¹¹ Cf. point 25 of the judgment and the jurisprudence cited there.

¹² Cf. point 24 of the judgment and the jurisprudence cited there.

¹³ Cf. point 26 of the judgment and the jurisprudence cited there.

¹⁴ Cf. 27–28 of the judgment.

¹⁵ Cf. point 31 of the judgment.

should also be able to expect that, even after the opening of bankruptcy proceedings, the payment in question will continue to be governed by the law applicable to the contract which constitutes its legal basis, since it cannot reasonably be expected that that party would foresee that insolvency proceedings would possibly be opened against its counterparty or a third party, and in which Member State this would be done.¹⁶ In the opinion of the Court, a different interpretation would jeopardize the effectiveness of art. 13 and would run counter to its purpose, since it would mean that contractual payments made by third parties would always be governed by the law of the Member State where the insolvency proceedings were opened.¹⁷ The Court maintains that an interpretation according to which, for the purposes of applying art. 13 of Regulation No 1346/2000, the law applicable to the performance of a contractual obligation by a contractor or a third party is the law applicable to the contract from which this obligation arises, is also confirmed in the wording of art. 12 sec. 1 (b) the Rome I Regulation, which covers the application of the law applicable to a contract under that Regulation, in particular the performance of obligations under that contract, including payment obligations.¹⁸

In the light of all the above considerations, when answering the question presented by the Bundesgerichtshof, the Court reaches a final conclusion formulated in the thesis of the judgment commented on. It is worth noting that the Court did not ask the Advocate General for an opinion on the present case. Apparently, in the opinion of the Court, such an opinion was not necessary. It is possible that the reason for not requesting the Advocate General's opinion was a conviction that the issue presented does not raise any particular controversies, and that the answer does not raise any more serious doubts.

Assessment of the Court's decision

The Court's decision is fair and correct. Protection of the trust and legitimate expectations of a party to an agreement concluded with a contractor is the primary objective pursued by art. 13 of Regulation No 1346/2000. The initiation of bankruptcy proceedings and the application of the bankruptcy statute broadly defined by the said regulation (*lex concursus*)¹⁹ should *per se* not lead to a change of the law applicable to the assessment of the performance of the contract concluded by the bankrupt with entities other than bankruptcy creditors, all the more so as these entities do not have any influence on the declaration of bankruptcy and its consequences. In any case, this

¹⁶ Cf. 32-33 of the judgment.

¹⁷ Cf. 34 of the judgment.

¹⁸ Cf. point 35-39 of the judgment.

¹⁹ Cf. P. Kindler, "EulnsVO Art. 7. Anwendbares Recht" [in:] *Münchener Kommentar zum Bürgerlichen Gesetzbuch BGB. Band 13. Internationales Privatrecht II. Internationales Wirtschaftsrecht. Einführungsgesetz zum Bürgerlichen Gesetzbuche (Art. 50-253)*, ed. J. v. Hein, 8. Auflage 2021, Verlag C.H. Beck München 2020 (beck-online), margin no. 6, 7.

protection should be guaranteed not only when the contract is performed by the contractor him/herself, making the payment due under the contract, but also when it is performed by a third party.²⁰ In this context, considerations of legal certainty do not allow the legal position of that party to be differentiated according to who performs the contractual cash payment. In both cases, that party should be able to expect equally that, even after the opening of bankruptcy proceedings, the payment in question will continue to be governed by the law applicable to the underlying contract which it has entered into with its contractual partner. Thus, the Court rightly held that the performance of a pecuniary obligation under a contract is governed by a contractual statute, irrespective of who performs it.²¹ In this context, it is, in principle, uncontested that the performance of the contract, including performance by making a payment, falls within the scope of the *lex contractus*. The arguments of the Court, which confirm the only possible solution in this respect, to which there is, in principle, no other rational alternative,²² seem somewhat obvious.²³ The Court has rightly pointed out that it is confirmed by art. 12 sec. 1 (b) of the Rome I Regulation, which specifies the scope of the *lex contractus*. Pursuant to that provision, the law applicable to a contract under that regulation applies, in particular, to the performance of the obligations arising from it. Therefore, the contractual statute also covers the effect of the performance of the contractual performance, including by a third party, in the form of the remission of the contractual obligation. The contractual statute is, therefore, relevant both for the assessment of whether such an effect is definitive or not. Therefore, if the subject of a challenge in bankruptcy proceedings is such a result, the *lex causae* also constitutes a contractual statute in this respect. It can be added in this context that the mentioned art. 13 does not contain a conflict rule determining the *lex causae*. Designation of the *lex causae* within the meaning of that provision must, therefore, be made in

²⁰ Cf. M. Dahl, R. Taras, *Anfechtung – vertragserfüllender Drittzahlung anwendbares Recht*, NJW-Spezial 2021, p. 438; M. Finkelmeier, *Anwendbares Recht bei Anfechtung der Zahlung im Rahmen eines Insolvenzverfahrens*, NZI 2021, p. 504.

²¹ Cf. M. Finkelmeier, *Anwendbares...*, p. 504.

²² Cf. *ibidem*; P. Mankowski, *Insolvenzrecht: Anwendbares Recht bei Anfechtung der Zahlung im Rahmen eines Insolvenzverfahrens*, EuZW 2021, p. 511; Ch. Thole, *Anmerkung zu BGH*, Beschl. v. 23. 1.2020 – IX ZR 94/19, NZI 2020, p. 537.

²³ The contractual statute, of course, means here the statute of the bond agreement. Nevertheless, it is argued in German legal doctrine that – in the light of the principle of abstractness of disposable acts applicable under German law and because of the specificity of German bankruptcy law – it would be possible to subject the disputed payment – as an independent enforcement act – to a separate *lex causae*, one that is differently defined; see, in this respect: P. Kindler, “EulnsVO Art. 16. Anwendbares Recht” [in:] *Münchener Kommentar zum Bürgerlichen Gesetzbuch BGB. Band 13. Internationales Privatrecht II. Internationales Wirtschaftsrecht. Einführungsgesetz zum Bürgerlichen Gesetzbuche (Art. 50–253)*, ed. J. v. Hein, 8. Auflage 2021, Verlag C.H. Beck München 2020 (beck-online), margin no. 9a; P. Mankowski, *Insolvenzrecht...*, p. 509; M. Finkelmeier, *Anwendbares...*, p. 504, 505. The judgment discussed here rightly excludes such a possibility and renders any considerations in this respect pointless, which is also emphasized in that doctrine (see *ibidem* above).

accordance with the relevant conflict-of-law rules.²⁴ For contracts, these are currently determined by the Rome I Regulation.

Making subject the immunity to challenge of a payment to a party to a contract by third parties, made in performance of an obligation incumbent on the basis of this contract on the contractor, to the contract statute as *lex causae* within the meaning of art. 13 of Regulation No 1346/2000 means that the recipient of this payment may, in any case, also invoke the law chosen for the contract concluded with the contracting party, which in turn may lead to abuses by deliberately subjecting the contract to a law which makes it impossible to challenge actions consciously performed in this respect, to the detriment of all bankruptcy creditors. In this context, however, it should be recalled that the Court has already held that the application of art. 13 of Regulation No 1346/2000 can be excluded where the contract has been artificially submitted to the law of a given Member State, i.e. so as in principle not to subject the contract to the law of the selected Member State, but to invoke the law of that Member State to exclude the contract or acts performed under it from the scope of application of *lex fori concursus*.²⁵

It should be emphasized that art. 4 sec. 2 (m) of Regulation No 1346/2000 makes subject to the bankruptcy statute (*lex concursus*) only challenges to actions to the detriment of creditors, while art. 13 of that regulation raises the question whether this act is not open to challenge under *lex causae*.²⁶ Therefore, if a given activity is not subject to challenge in the light of the bankruptcy statute, the application of the *lex causae* in this respect is excluded. Application of art. 13 of Regulation No 1346/2000 comes into question only if the transaction in question is open to challenge under the *lex concursus*, pursuant to art. 4 sec. 2 (m) of this regulation.²⁷ Article 4 (2) 2 (m) is the basic norm defining the scope of application of the bankruptcy statute in the scope under discussion here, and art. 13 has only a veto function over the application of the bankruptcy statute and applies only when the *lex concursus* permits challenging or questioning the effectiveness or validity of a given act.²⁸ Contrary to what appears to be apparent from the judgment commented on here,²⁹ art. 4 sec. 2 (m) of Regulation No 1346/2000, therefore, applies first, and, where appropriate, only then does art. 13 of this regulation apply, and not the other way around.³⁰ The result of the application of art. 13 is the replacement of *lex concursus* by *lex causae*, and this does not change the applicable law, but only restricts the application of *lex concursus*.³¹

The obligation to make payments may also result from other reasons than the contract. The application of the *lex causae* adopted by the Court in the judgment com-

²⁴ P. Kindler, "EulnsVO. Art. 16...", margin no. 9.

²⁵ Cf. The judgment mentioned above in note 4 in the case of *Vinyls Italia SpA*, pkt 54.

²⁶ Cf. P. Kindler, "EulnsVO Art. 16...", margin no. 2, 7.

²⁷ Cf. M. Dahl, R. Taras, *Anfechtung...*, p. 438.

²⁸ Cf. P. Mankowski, *Insolvenzrecht...*, p. 511.

²⁹ Point 23 of the judgment.

³⁰ P. Mankowski, *Insolvenzrecht...*, p. 511.

³¹ Cf. P. Kindler, "EulnsVO Art. 16...", margin no. 23.

mented on here, in this case, the application of the law applicable to the contract, makes possible the conclusion that the *lex causae* also applies to payments made by third parties in the performance of payment obligations arising from titles other than the contract. The judgment commented on here can be read in such a way that, in the light of art. 13 of Regulation No 1346/2000, in general, for payments made by third parties in performance of an obligation incumbent on one of the parties, the applicable law is the law of the obligation from which the payment arises.

In the case, the subject of the dispute is the payment of a sum of money, but the Court's decision can equally be applied to the performance of contractual obligations other than pecuniary ones. Pursuant to Article 13 of Regulation No 1346/2000, it is irrelevant in this respect whether the performance of the contract by a third party consists in the payment of a sum in money or the performance of a non-pecuniary service. However, in the event that the performance of the contract involves the transfer of ownership of property and this property is transferred by a third party, which is conceivable (for example on the basis of a contract for the provision of services by a third party), the law applicable to this activity is always a priori the material statute (*lex rei*) as the law applicable to property and other rights *in rem*, including transfer of ownership. Nevertheless, the same result will occur when referring to the *lex causae*. The *lex causae* for the transfer of property is *lex rei*.

It is also worth noting that the aforementioned provisions of Regulation No 1346/2000 and the judgment relating to them that are commented on here concern only challenging legal acts of the bankrupt that are performed to the detriment of all creditors in bankruptcy proceedings, and do not apply to an *actio Pauliana*.³² The question of designating the law that is applicable to an *actio Pauliana* is open.³³

Finally, mention should be made of international jurisdiction in matters relating to challenging a bankrupt's actions that are detrimental to all creditors, such as in the present case.³⁴ Jurisdiction is currently determined by art. 6 of Regulation No 1215/848. Pursuant to the basic provision of art. 6 sec. 1 of this Regulation, in matters arising directly from and closely related to bankruptcy proceedings, such as a case concerning declaring a legal act ineffective, the courts of the Member State in whose territory the insolvency proceedings have been opened shall have jurisdiction.

³² Cf. P. Kindler, "EulnsVO Art. 16...", margin no. 2; *idem*, "EulnsVO Art. 7...", margin no. 51.

³³ With reference to international jurisdiction for *actio Pauliana*, see Court verdict: 4 October 2018, Feniks sp. z o.o., C-337/17, ECLI:EU:C:2018:805; 10 July 2019, Norbert Reitbauer *et al.*, C-722/17, ECLI:EU:C:2019:577. On the verdict in the case of Feniks sp. z o.o., see: S. Majkowska-Szulc, A. Wowerka, "Special jurisdiction for *actio pauliana* – commentary on the verdict of the Court of Justice of 4.10.2018, C-337/17, Feniks sp. z o.o. against Azteca Products & Services SL", EPS 2019, no. 3, p. 31 and ff.

³⁴ For more on this topic, see: A. Wowerka, "Jurysdykcja sądów państwa wszczęcia postępowania upadłościowego dla opartego na upadłości powództwa o stwierdzenie bezskuteczności czynności prawnej upadłego dłużnika – commentary on the verdict of the Court of Justice of 14.11.2018 r., C-296/17, Wiemer & Trachte GmbH in liquidation against Zhan Oved Tadzher", EPS 2020, no. 2, p. 47 and ff.

Literature

- Dahl M., Taras R., *Anfechtung – vertragserfüllender Drittzahlung anwendbares Recht*, NJW-Spezial 2021.
- Finkelmeier M., *Anwendbares Recht bei Anfechtung der Zahlung im Rahmen eines Insolvenzverfahrens*, NZI 2021.
- Kindler P., "EulnsVO Art. 7. Anwendbares Recht" [w:] *Münchener Kommentar zum Bürgerlichen Gesetzbuch BGB. Band 13. Internationales Privatrecht II. Internationales Wirtschaftsrecht. Einführungsgesetz zum Bürgerlichen Gesetzbuche (Art. 50–253)*, ed. J. v. Hein, 8. Auflage 2021, Verlag C.H. Beck München 2020 (beck-online).
- Kindler P., "EulnsVO Art. 16. Benachteiligende Handlungen" [w:] *Münchener Kommentar zum Bürgerlichen Gesetzbuch BGB. Band 13. Internationales Privatrecht II. Internationales Wirtschaftsrecht. Einführungsgesetz zum Bürgerlichen Gesetzbuche (Art. 50–253)*, ed. J. v. Hein, 8. Auflage 2021, Verlag C.H. Beck München 2020 (beck-online).
- Majkowska-Szulc S., Wowerka A., „Jurysdykcja szczególna dla skargi pauliańskiej – glosa do wyroku Trybunału Sprawiedliwości z 4.10.2018 r., C-337/17, Feniks sp. z o.o. przeciwko Azteca Products & Services SL”, EPS 2019, nr 3.
- Mankowski P., *Insolvenzrecht: Anwendbares Recht bei Anfechtung der Zahlung im Rahmen eines Insolvenzverfahrens*, EuZW 2021.
- Thole Ch., *Anmerkung zu BGH, Beschl. v. 23. 1.2020 – IX ZR 94/19*, NZI 2020.
- Wowerka A., „Jurysdykcja sądów państwa wszczęcia postępowania upadłościowego dla opartego na upadłości powództwa o stwierdzenie bezskuteczności czynności prawnej upadłego dłużnika – glosa do wyroku Trybunału Sprawiedliwości z 14.11.2018 r., C-296/17, Wiemer & Trachte GmbH w upadłości likwidacyjnej przeciwko Zhanowi Ovedowi Tadzherowi”, EPS 2020, nr 2.
- Wowerka A., „Prawo właściwe dla zaskarżania czynności prawnych w związku z upadłością w świetle rozporządzenia Rady (WE) nr 1346/2000 w sprawie postępowania upadłościowego”, GSP-PO 2016, nr 1.

Streszczenie

Arkadiusz Wowerka

Prawo właściwe dla płatności dokonanej przez osobę trzecią w wykonaniu umownego zobowiązania do zapłaty podważanej w ramach postępowania upadłościowego jako czynność dokonana z pokrzywdzeniem ogółu wierzycieli

W niniejszej glosie autor omawia wyrok Trybunału Sprawiedliwości z dnia 22 kwietnia 2020 r. w sprawie C-73/20, ZM, jako syndyk masy upadłości spółki Oeltrans Befrachtungsgesellschaft mbH, przeciwko E.A. Frerichsowi. Orzeczenie to dotyczy płatności dokonanej przez osobę trzecią w wykonaniu zobowiązania umownego i kwestionowanej w ramach postępowania upadłościowego jako czynność dokonana z pokrzywdzeniem wierzycieli upadłościowych. W wyroku tym Trybunał słusznie stwierdził, że art. 13 rozporządzenia nr 1346/2000 należy interpretować w ten sposób, że prawo właściwe dla umowy ma zastosowanie również do płatności dokonanej przez osobę trzecią w wykonaniu umownego zobowiązania do zapłaty ciążącego na jednej ze stron umowy, gdy w ramach postępowania upadłościowego zapłata ta jest podważana jako

czynność dokonana z pokrzywdzeniem ogółu wierzycieli. Autor aprobuje rozstrzygnięcie Trybunału zarówno co do tezy, jak i uzasadnienia.

Słowa kluczowe: upadłość; międzynarodowe prawo upadłościowe; zaskarżanie czynności upadłego dokonanych z pokrzywdzeniem wierzycieli; płatność dokonana przez osobę trzecią w wykonaniu zobowiązania umownego; prawo właściwe; *lex concursus*; *lex contractus*.

Summary

Arkadiusz Wowerka

Law Applicable to a Payment Made by a Third Party in Performance of a Contractual Payment Obligation Contested in Insolvency Proceedings as an Act Detrimental to All Creditors

In the commentary, the author discusses the judgment of the Court of Justice of 22 April 2020 in Case C-73/20, ZM, as receiver in the bankruptcy of Oeltrans Befrachtungsgesellschaft mbH, v. E. A. Frerichs. This judgment concerns a payment made by a third party in performance of a contractual obligation and challenged in bankruptcy proceedings as an act done to the detriment of the bankruptcy creditors. The Court rightly held that art. 13 of Regulation No 1346/2000 must be interpreted as meaning that the law applicable to the contract also applies to a payment made by a third party in performance of a contractual obligation to pay incumbent on one of the parties to the contract, where, in the context of insolvency proceedings, that payment is challenged as an act done to the detriment of all creditors. The author approves of the Court's decision both as to the thesis and reasoning.

Keywords: bankruptcy; international bankruptcy law; appealing against a bankrupt's actions detrimental to creditors; payment made by a third party in performance of a contractual obligation; applicable law; *lex concursus*; *lex contractus*.