STRENGTH OF THE INSOLVENCY JURISDICTION: MAIN PROCEDURE AND SECONDARY PROCEDURE (II)

Judgment of 11 June 2015, C-649/13, Nortel Networks SA

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1. Introduction and facts

The relationship between the main procedure and secondary and territorial procedures is one of the most salient aspects of the Insolvency Regulation[1]. Not surprisingly, the ECJ has been called to dealt with the matter directly or indirectly in several of its rulings concerning the Insolvency Regulation.[2] The new Insolvency Regulation (848/2015, of 20 May 2015), which will be applicable as from 26 June 2017[3], devotes more rules and more language than the Insolvency Regulation currently in force to establish the dividing line between main and secondary procedures, and to grant the coordination between the several procedures. Few days after the publication of the new Insolvency Regulation in the Official Journal of the EU, the Judgment of 11 June 2015, C-649/13, Nortel Networks SA comes as a proof of the need of more detailed set of rules to govern the coexistence of insolvency procedures in different Member States concerning the same debtor. The issue of the place of the assets of the insolvent debtor plays the main role in this interesting case.

The facts that form the basis of this judgment are the following[4]: "The Nortel group was a provider of technical solutions for telecommunications networks. Nortel Networks Limited ('NNL'), established in Mississauga (Canada), held the majority of the Nortel group's worldwide subsidiaries, including NNSA, established in Yvelines (France). Almost all the intellectual property resulting from the research and development

[1] See in this webpage section, Regulation n. 1346/2000 on Insolvency Proceedings. General presentation.
[2] See in this webpage section, for instance: 'Strength of the insolvency jurisdiction: effects in other Member States', examining Judgment of 2 May 2006, C-341/04, Eurofood IFSC Ltd, Judgment of 21 January 2010, C-444/07, MG Probud Gdynia sp. z o.o., Judgment of 22 November 2012, C-116/11, Bank Handlowy w Warszawie SA, PPHU 'ADAX', /Ryszard Adamiak, v Christianapol sp. z o.o., Judgment of 5 July 2012, C-527/10, ERSTE Bank Hungary Nyrt v Magyar Állam, BCL Trading GmbH, ERSTE Befektetési Zrt; also 'Jurisdiction to start territorial insolvency proceedings', examining Judgment of 20 October 2011, C-396/09, Interedil Srl, in liquidation v Fallimento Interedil Srl, Intesa Gestione Crediti SpA; Judgment of 17 November 2011, C-112/10, Procureur-generaal bij het hof van beroep te Antwerpen v Zaza Retail BV; 'Groups of companies and Jurisdiction to start territorial insolvency proceedings', examining Judgment of 4 September 2014, C-327/13, Burgo Group SpA, Illochroma SA in liquidation and Jérôme Theetten, acting in his capacity as liquidator of Illochroma SA.
[3] OJ L141, 5 June 2015.
[4] Paras 9-20 *Nortel Networks SA.*

activities of the Nortel group's specialist subsidiaries was registered, mainly in North America, in the name of NNL, which granted those subsidiaries, including NNSA, free exclusive licences to exploit the group's intellectual property. Those subsidiaries were also to retain beneficial ownership of that intellectual property, in a proportion based on their respective contributions. An intra-group agreement, known as the 'Master R&D Agreement' ('the MRDA'), organised the legal relationships between NNL and those subsidiaries. Since the Nortel group was experiencing serious financial difficulties in 2008, its executives decided to arrange for the opening of insolvency proceedings simultaneously in Canada, the United States and the European Union. By order of 14 January 2009, the High Court of Justice of England and Wales, Chancery Division, opened main insolvency proceedings under English law in respect of all the companies in the Nortel group established in the European Union, including NNSA, pursuant to Article 3(1) of Regulation No 1346/2000. Following a joint application lodged by NNSA and the joint administrators, by judgment of 28 May 2009 the referring court opened the secondary proceedings in respect of NNSA and appointed Mr Rogeau as liquidator in those proceedings. On 21 July 2009, industrial action at NNSA was brought to an end by a memorandum of agreement settling the action ('the memorandum settling the action'). That agreement provided for the making of a severance payment, of which one part was payable immediately and another part, known as the 'deferred severance payment' ('the deferred SP'), was to be paid, once operations had ceased, out of the available funds arising from the sale of assets, after payment of the costs resulting from continuance of NNSA's activities during the main and secondary proceedings and of the administration expenses. On 1 July 2009, a protocol coordinating the main and secondary proceedings was signed by the persons responsible for the two sets of proceedings ('the coordinating protocol'), under which, in particular, the administration expenses had to be paid in full, in priority, wherever the assets sold were situated. By judgment of 24 September 2009, the referring court approved inter alia the coordinating protocol and the memorandum settling the action. In order to secure a better price for the Nortel group's assets, the administrators and liquidators in the various insolvency proceedings throughout the world agreed to sell those assets on a global basis, by branch of activity. Under an agreement entitled 'Interim Funding and Settlement Agreement' ('the IFSA'), concluded on 9 June 2009 between NNL and a number of subsidiaries in the Nortel group, those subsidiaries would at the appropriate time waive their industrial and intellectual property rights covered by the MRDA. On the other hand, the rights which the subsidiaries enjoyed under licences would be preserved until the liquidation and disposal operations were completed, and their rights as beneficial owners of the intellectual property concerned would be preserved. Pursuant to the IFSA, the proceeds from sale of the Nortel group's assets would be placed in escrow accounts ('the lockbox') with credit institutions established in the United States and none of the sums paid into the lockbox could be distributed without an agreement concluded by all the relevant entities in the group. NNSA became a party to the IFSA by means of an accession agreement concluded on 11 September 2009. The sale proceeds have been blocked as was provided for by the IFSA, but no agreement has yet been reached concerning their allocation. On 23 November 2010, a report drawn up by Mr Rogeau in the context of the secondary proceedings showed a credit balance of EUR 38 980 313 in the bank accounts of NNSA as at 30 September

2010, and it was accordingly possible to consider making a first disbursement of the deferred SP from May 2011. However, after being given notice to proceed by the works council of NNSA, Mr Rogeau informed it, by letter of 18 May 2011, that he was unable to give effect to the terms of the memorandum settling the action as a cash-flow forecast showed a deficit of nearly EUR 6 million, in particular because of several requests for payment from the joint administrators in respect, inter alia, of the costs resulting from continuance of the activities of the Nortel group during the proceedings and from the sale of certain assets. Contesting that state of affairs, the works council of NNSA and former NNSA employees brought an action before the tribunal de commerce de Versailles (Commercial Court, Versailles, France), seeking, first, a declaration that the secondary proceedings give them an exclusive and direct right over the share of the overall proceeds from the sale of the Nortel group's assets that falls to NNSA and, second, an order requiring Mr Rogeau, as court-appointed liquidator, to make immediate disbursement, in particular, of the deferred SP, to the extent of the funds available to NNSA. Subsequently, Mr Rogeau summoned the joint administrators as third parties before the referring court. However, they requested the referring court, in particular, to decline international jurisdiction, in favour of the High Court of Justice of England and Wales, Chancery Division. In the alternative, the joint administrators requested the referring court, in particular, to decline jurisdiction to rule on the assets and rights which were not situated in France for the purposes of Article 2(g) of Regulation No 1346/2000 when the judgment opening the secondary proceedings was delivered. The referring court states that, in order to rule on the claims before it, it will have to rule first on its jurisdiction to determine the scope of the effects of the secondary proceedings. It also considers that it will be required to determine whether the effects of secondary proceedings may extend to the debtor's assets situated outside the European Union."

2. *Distribution of jurisdiction: main proceedings and secondary proceedings*

Have courts of the secondary proceedings concurrent or rather exclusive jurisdiction to declare which assets form part of the secondary proceedings? The answer to this question starts with a summary of ECJ's doctrine concerning the boundaries between the Insolvency Regulation and the Brussels I Regulation (Regulation 44/2001) which is a topic already dealt with on several occasions[5]: "In that regard, the Court has already held that Regulations No 44/2001 and No 1346/2000 must be interpreted in such a way as to avoid any overlap between the rules of law that those instruments lay down and any legal vacuum. Accordingly, actions excluded, under Article 1(2)(b) of Regulation

[5] See in this webpage section: 'Insolvency regulation and Regulation 44/2001 (Brussels I)', examining Judgment of 12 February 2009, C-339/07, Christopher Seagon, in his capacity as liquidator in respect of the assets of Frick Teppichboden Supermärkte GmbH v Deko Marty Belgium NV, Judgment of 10 September 2009, C-292/08, German Graphics Graphische Maschinen GmbH v Alice van der Schee, acting as liquidator of Holland Binding BV and Judgment of 19 April 2012, C-213/10, F-Tex SIA v Lietuvos-Anglijos UAB Jadecloud-Vilma; also 'Insolvency regulation and Regulation 44/2001 (Brussels I) And 2007 Lugano Convention', examining Judgment of 4 September 2014, C-157/13, Nickel & Goeldner Spedition GmbH v "Kintra" UAB and Judgment of 4 December 2014, C-295/13, H v HK.

No 44/2001, from the scope of that regulation in so far as they come under 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings' fall within the scope of Regulation No 1346/2000. Correspondingly, actions which fall outside the scope of Article 3(1) of Regulation No 1346/2000 fall within the scope of Regulation No 44/2001 (judgment in *Nickel & Goeldner Spedition*, C-157/13, paragraph 21 and the case-law cited). The Court has also held that the scope of Regulation No 1346/2000 must not be interpreted broadly, and that only actions which derive directly from insolvency proceedings and are closely connected with them ('related actions') are excluded from the scope of Regulation No 44/2001. Consequently, only those actions fall within the scope of Regulation No 1346/2000 (see judgment in *Nickel & Goeldner Spedition*, C-157/13, paragraphs 22 and 23 and the case-law cited). Finally, the Court has adopted as the decisive criterion for identifying the area within which an action falls not the procedural context of that action, but its legal basis. According to that approach, it must be determined whether the right or the obligation which forms the basis of the action has its source in the ordinary rules of civil and commercial law or in derogating rules specific to insolvency proceedings (judgment in *Nickel & Goeldner Spedition*, C-157/13, paragraph 27)."[6]

The ECJ concluded that "In the present instance, while it is for the referring court to assess the content of the various agreements concluded by the parties to the proceedings before it, it is nevertheless apparent that the rights or obligations on which the actions before the referring court are founded derive directly from insolvency proceedings, are closely connected with them and have their source in rules specific to insolvency proceedings. The outcome of the disputes before the referring court depends, in particular, on how the proceeds from the sale of NNSA's assets are allocated between the main proceedings and the secondary proceedings. As appears to follow from the coordinating protocol, and as the parties to the proceedings before the referring court confirmed at the hearing, those proceeds will in essence have to be allocated by applying Regulation No 1346/2000, without that protocol or the other agreements at issue before the referring court being intended to modify its content. The rights or obligations on which the actions before the referring court are founded therefore have their source in Articles 3(2) and 27 of Regulation No 1346/2000, so that that regulation is applicable."[7]

Having thus cleared the field to the Insolvency Regulation, the ECJ then goes on to examine the characteristics of the rules of jurisdiction of the Insolvency Regulation, that do not have explicit language concerning exclusivity or concurrence. The outcome of the analysis is that courts of a secondary proceedings have concurrent jurisdiction according to Articles 3.2 and 27 to declare which are the assets affected by the corresponding secondary proceedings[8].

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[6] Paras 26-28 *Nortel Networks SA.*
[7] Paras 29-30 *Nortel Networks SA.*
[8] Para 46 *Nortel Networks SA.*

The reasons given by the ECJ are the following[9]: "As regards the jurisdiction of the court which has opened secondary insolvency proceedings to rule on the determination of the debtor's assets falling within the scope of the effects of those proceedings, it is settled case-law that Article 3(1) of Regulation No 1346/2000 must be interpreted as conferring international jurisdiction to hear and determine related actions on the Member State within the territory of which the insolvency proceedings have been opened (see, in particular, judgment in *F-Tex*, C-213/10, paragraph 27 and the case-law cited). Whilst the Court, until now, has acknowledged only that international jurisdiction to rule on a related action is enjoyed by the Member State whose courts have jurisdiction under Article 3(1) of Regulation No 1346/2000, Article 3(2) of that regulation must be interpreted analogously. In the light of the scheme and practical effect of Regulation No 1346/2000, Article 3(2) thereof must be regarded as conferring international jurisdiction to hear and determine related actions on the courts of the Member State within the territory of which secondary insolvency proceedings have been opened, in so far as those actions relate to the debtor's assets that are situated within the territory of that State. First, as the Advocate General has observed in point 32 of his Opinion, the first subparagraph of Article 25(1) of Regulation No 1346/2000 imposes an obligation on the Member States to recognise and enforce judgments concerning the course and closure of insolvency proceedings that are handed down both by courts which have jurisdiction under Article 3(1) of that regulation and by those whose jurisdiction is founded on Article 3(2), whilst the second subparagraph of Article 25(1) states that its first subparagraph applies also to 'judgments deriving directly from the insolvency proceedings and which are closely linked with them', that is to say, judgments ruling, in particular, on related actions. In imposing an obligation to recognise 'related' judgments delivered by courts which have jurisdiction under Article 3(2) of Regulation No 1346/2000, that regulation appears to confer at least implicitly on those courts jurisdiction to deliver such judgments. Second, one of the fundamental objectives of the possibility, provided for in Article 27 of Regulation No 1346/2000, of opening secondary insolvency proceedings consists, in particular, in the protection of local interests, notwithstanding the fact that those proceedings may also pursue other objectives (see, to that effect, judgment in *Burgo Group*, C-327/13, paragraph 36). A related action, such as that before the referring court, seeking a declaration that specified assets fall within secondary insolvency proceedings is designed specifically to protect those interests. That protection and, therefore, the practical effect, in particular, of Article 27 of Regulation No 1346/2000 would be appreciably weakened if that related action could not be brought before the courts of the Member State within the territory of which the secondary proceedings have been opened. It must therefore be concluded that the courts of the Member State in which secondary insolvency proceedings have been opened have jurisdiction, on the basis of Article 3(2) of Regulation No 1346/2000, to rule on the determination of the debtor's assets falling within the scope of the effects of those proceedings. Exclusive or concurrent international jurisdiction to rule on the determination of the debtor's assets falling within the scope of the effects of secondary insolvency proceedings. As regards, finally, the issue whether the courts of the Member State in which secondary

[9] Paras 31-45 *Nortel Networks SA.*

insolvency proceedings have been opened have exclusive, or concurrent, jurisdiction to rule on the determination of the debtor's assets falling within the scope of the effects of those proceedings, it should be noted that the Court's case-law acknowledging the jurisdiction of courts, under Article 3(1) of Regulation No 1346/2000, to rule on related actions is founded principally on the practical effect of that regulation (see, to this effect, judgments in *Seagon*, C-339/07, paragraph 21, and *F-Tex*, C-213/10, paragraph 27). As is apparent from paragraph 37 of the present judgment, the same applies to the analogous jurisdiction of courts possessing jurisdiction under Article 3(2) of the regulation. Consequently, for the purpose of determining whether international jurisdiction to rule on related actions is exclusive or concurrent, and therefore of establishing the scope of both Article 3(1) and Article 3(2) of Regulation No 1346/2000, the practical effect of those provisions should likewise be ensured. Thus, as regards an action seeking a declaration that certain assets of the debtor fall within the scope of the effects of the secondary insolvency proceedings, such as the actions before the referring court, it must be stated that the action quite obviously has a direct effect on the interests administered in the main insolvency proceedings, since the declaration sought would necessarily mean that the assets at issue do not fall within those proceedings. However, as the Advocate General has observed, in essence, in point 57 of his Opinion, the courts of the Member State in which the main proceedings have been opened also have jurisdiction to rule on related actions and therefore to determine the scope of the effects of the latter proceedings. Accordingly, exclusive jurisdiction of the courts of the Member State in which secondary insolvency proceedings have been opened to rule on the determination of the debtor's assets falling within the scope of the effects of those proceedings would deprive Article 3(1) of Regulation No 1346/2000 of its practical effect in so far as that provision confers international jurisdiction to rule on related actions and, therefore, cannot be upheld. Furthermore, the provisions of Regulation No 1346/2000 do not show that the regulation confers jurisdiction to rule on a related action on the court first seised. Nor, contrary to the submissions of the works council of NNSA, does such conferral follow from the judgment in *Staubitz-Schreiber* (C□1/04, EU:C:2006:39), which relates to a different case, namely that of the conferral of jurisdiction to open main insolvency proceedings, and therefore to the conferral of jurisdiction which, under that regulation, is exclusive. It is true that, as several interested parties have submitted, the recognition, in this context, of concurrent jurisdiction entails the risk of concurrent and, potentially, irreconcilable judgments. However, as the Advocate General has observed in point 60 of his Opinion, Article 25(1) of Regulation No 1346/2000 will enable the risk of concurrent judgments to be avoided, by requiring any court before which a related action, such as those before the referring court, has been brought to recognise an earlier judgment delivered by another court with jurisdiction under Article 3(1) or, as the case may be, Article 3(2) of that regulation."

3. *Applicable substantive rules to declare which assets form part of the secondary proceedings*

Concurring jurisdiction carries the risk of diverging decisions depending on which court decides in the particular case. The risk is reduced if the several courts are bound to apply the same uniform rules. The ECJ declares that "the debtor's assets that fall within the scope of the effects of secondary insolvency proceedings must be determined in accordance with Article 2(g) of Regulation No 1346/2000."[10]

The reasons given by the ECJ are the following[11]: "It should be noted that the effects of secondary insolvency proceedings are restricted, as follows from Articles 3(2) and 27 of Regulation No 1346/2000, to the assets of the debtor which, on the date of the opening of the insolvency proceedings, were situated within the territory of the Member State in which the secondary proceedings were opened. It should also be noted that it is apparent from recitals 6 and 23 in the preamble to Regulation No 1346/2000, first, that that regulation sets out uniform rules on conflict of laws which replace national rules of private international law and, second, that that replacement is limited, in accordance with the principle of proportionality, to the field of application of the rules laid down by that regulation. Thus, the regulation does not preclude, in principle, all application, in the context of a related action, such as those before the referring court, of the legislation of the Member State of the court before which that action is pending, relating to the private international law of that State, in so far as Regulation No 1346/2000 does not contain a uniform rule governing the situation at issue. However, in relation to whether, for the purposes of applying Regulation No 1346/2000, assets must be regarded as situated within the territory of a Member State on the date of the opening of the insolvency proceedings, that regulation does lay down uniform rules, excluding, to that extent, any recourse to national law. It is apparent from Article 2(g) of Regulation No 1346/2000 that, for the purposes of that regulation, the 'Member State in which assets are situated' is, in the case of tangible property, the Member State within the territory of which the property is situated, in the case of property and rights ownership of or entitlement to which must be entered in a public register, the Member State under the authority of which the register is kept and, finally, in the case of claims, the Member State within the territory of which the third party required to meet them has the centre of his main interests, as determined in Article 3(1) of that regulation. Despite the complexity of the legal situation at issue before the referring court, that rule must enable the referring court to determine the location of the property, rights or claims concerned. It should be added in this connection that, although Article 2(g) of Regulation No 1346/2000 refers expressly only to property, rights and claims situated in a Member State, that provides no ground for inferring that that provision is not applicable if the property, right or claim in question must be regarded as situated in a third State. In order to identify the assets falling within secondary insolvency proceedings, it is sufficient to establish whether, on the date of the opening of the insolvency proceedings, the assets were situated, within the meaning of Article 2(g) of Regulation No 1346/2000, within the territory of the Member State in which those proceedings were opened, and it is not relevant in that regard to determine, as the case may be, in what other State those assets were situated at a

[10] Para 55 *Nortel Networks SA.*
[11] Paras 48-54 *Nortel Networks SA.*

subsequent stage. Consequently, as regards the disputes before it, the referring court will have the task of establishing, first, whether the assets at issue, which do not appear capable of being regarded as tangible property, are property or rights ownership of or entitlement to which must be entered in a public register, or whether they must be regarded as being claims. Next, that court will have the task of determining, respectively, whether the Member State under the authority of which the register is kept is the Member State in which the secondary insolvency proceedings have been opened, namely the French Republic, or whether, as the case may be, the Member State within the territory of which the third party required to meet the claims has the centre of his main interests is the French Republic. It is only if one of those checks has a positive outcome that the assets at issue will fall within the secondary insolvency proceedings opened in France.”

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