Forcing a Square Peg into a Round Hole – The Actio Pauliana and the Brussels Ia Regulation

Earlier today, the Court of Justice held that, under certain circumstances, special jurisdiction for an *actio pauliana* can be based on Art. 7(1) Brussels Ia (Case C-337/17 *Feniks*).

The *actio pauliana* is an instrument provided by the national laws of several EU member states that allows the creditor to challenge fraudulent acts by their debtor that have been committed to the creditor's detriment. The ECJ already had several opportunities to decide on the availability of individual grounds of special jurisdiction for such an action, but has reliably denied their availability. In today's decision however, the Court confirmed the availability of special jurisdiction for matters relating to contract, contrary to the proposition of AG Bobek (Opinion delivered on 21 June 2018).

Previous Decisions

Many readers of this blog will be aware of the Court of Justice's earlier decisions on the availability of special or exclusive jurisdiction for a creditor's *actio pauliana*.

In Case C-115/88 *Reichert I*, the question was referred to the Court in the context of a transfer of immovable property from Mr and Mrs Reichert to their son, which had been challenged in the French courts by their creditor, a German bank. The Court held that the *actio pauliana* did not fall under the head of exclusive jurisdiction for actions concerning *rights in rem*; accordingly, the French courts did not have jurisdiction based on what is now Art 24(1) Brussels Ia.

Still in the context of this transfer of property, the ECJ held in Case C-261/90 *Reichert II* that the heads of jurisdiction in what are now Art 7(2) (matters relating to tort, delict or quasi-delict), Art 24(5) (proceedings concerned with the enforcement of judgments) and Art 35 (provisional, including protective, measures) Brussels Ia would be equally unavailable.

The Court has never explicitly excluded the availability of the ground of jurisdiction for matters relating to contract in what is now Art 7(1) Brussels Ia. In his Opinion on Case C-339/07 *Deko Marty Belgium*, AG Ruiz-Jarabo Colombo still appears to understand the decisions in *Reichert I* and *II* as leading to the conclusion that within the framework of the Brussels Ia Regulation, jurisdiction for an *actio pauliana* 'lies [only] with the courts in the defendant's State of domicile.' (ibid, [32]).

The Decision in *Feniks*

The case underlying today's decision involved two Polish companies, Feniks and Coliseum, who were in a contractual relationship relating to a development project. When Coliseum was unable to pay some of its subcontractors, Feniks had to pay them instead (pursuant to Polish law), thus becoming the creditor of Coliseum. Coliseum subsequently sold some immovable property to a Spanish company, a transaction which Feniks now challenges in the Polish courts, relying on the provisions of the Polish Civil Code that provide for the *actio pauliana*.

While the Court considered the action to be ultimately based on the contract between Feniks and Coliseum (see below), it is not immediately clear to what extent the situation differs from the one in *Reichert*. Still, it is true that the question of whether such an action could be based on the head of special jurisdiction for contract was raised in neither of the two orders for reference. AG Bobek had nonetheless offered several important arguments for why this head of jurisdiction should not be available. In particular, he had argued that there was no 'obligation freely assumed' by the defendant towards the claimant (Opinion, [68]) and the contractual relationships between the claimant and their debtor and between the debtor and the defendant were 'too tenuous and remote' or too 'detached', respectively, to be considered for the purpose of establishing jurisdiction (Opinion, [65], [67]). More fundamentally, the Advocate General considered the 'chameleon-like nature' of the *actio pauliana*, which allows a creditor to challenge a wide range of legal acts, to prevent it from falling within the scope of any head of special jurisdiction (Opinion, [76]–[87]).

In today's decision, the Court very much rejects these arguments. After having established the applicability of the Brussels Ia Regulation – the action not falling into the scope of Regulation No 1346/2000, which would exclude them from the Brussels Ia Regulation (see Art 1(2)(b) Brussels Ia; Case C-339/07 *Deko Marty*

Belgium, [19]) – the ECJ reiterates that the decisive criterion for jurisdiction to be based on Art 7(1) Brussels Ia is the existence of a legal obligation freely entered into by one person towards another on which the claimant's action is based (*Feniks*, [39]; see also Joined Cases C-359/14 and C-475/14, *ERGO Insurance*, [44]); the claimant does not necessarily have to be party to the contract, though (*Feniks*, [48]; see also Joined Cases C-274/16, C-447/16 and C-448/16 *flightright*, [61]). According to the Court,

> *[42] … both the security that Feniks has over the debtor's estate and the present action regarding the ineffectiveness of the sale concluded by the debtor with a third party* ***originate in the obligations freely consented to by Coliseum with regard to Feniks upon the conclusion of their contract relating to those construction works.*** *[own emphasis]*

In such a case, the creditor's action is based on the breach of a contractual obligation (ibid, [43]).

> *[44] It follows that the actio pauliana, once it is brought on the basis of the creditor's rights created upon the conclusion of a contract, falls within 'matters relating to a contract' … .*

Accordingly, the contract between Feniks and Coliseum being for construction works to be carried out in Poland, the Polish courts would have jurisdiction under Art 7(1)(b) Brussels Ia (ibid, [46]).

Special Jurisdiction under the Brussels Ia Regulation

One of several interesting details of today's decision is the degree to which the Court's approach to the grounds for special jurisdiction differs from the Advocate General's opinion. According to AG Bobek, the *actio pauliana* might be

> *[97] … one of the rare examples that only allows for the applicability of the general rule and an equally rare confirmation of the fact that '… there is no obvious foundation for the idea that there should always or even often be an alternative to the courts of the defendant's domicile'.*

Importantly, for AG Bobek, requiring the claimant to rely on the general ground

of jurisdiction provided in Art. 4(1) Brussels Ia would not be a problem because

> *[93] … the defendant's domicile is precisely the key connecting factor for the purpose of application of Regulation No 1215/2012.*

– an argument that seems to echo the Court of Justice's considerations in Case C-256/00 *Besix*, [50]–[54].

Besides, allowing for special jurisdiction to be based on Art 7(1) Brussels Ia because the defendant must be aware of the fraudulent nature of the transaction for the action to succeed would amount to

> *[94] … effectively presuming the existence of the awareness of the fraud on the part of the transferee.*

Put differently, if the Court could justify the unavailability of special jurisdiction for matters relating to contract for claims brought by a sub-buyer against the manufacturer in Case C-26/91 *Jakob Handte* by the fact that such jurisdiction would be unforeseeable and 'therefore incompatible with the principle of legal certainty' (ibid, [19]), does the mere allegation that the buyer of a plot of land has been aware of the fraudulent character of the transaction really justify its application?

The Court of Justice seems to believe it does. Indeed, it appears to have remained rather unimpressed by the above considerations when arguing that if the claim could not be based on Art 7(1) Brussels Ia, then

> *[45] … the creditor would be forced to bring proceedings before the court of the place where the defendant is domiciled, that forum, as prescribed by [Art 4(1) Brussels Ia], possibly having no link to the place of performance of the obligations of the debtor with regard to his creditor.*