

AG Opinion in Case “Deko Marty Belgium”

Yesterday, the opinion by *Advocate General Ruiz-Jarabo Colomer* in case C-339/07 (*Rechtsanwalt Christopher Seagon als Insolvenzverwalter über das Vermögen der Frick Teppichboden Supermärkte GmbH v Deko Marty Belgium N.V.*) has been released.

The case concerns the delimitation of Regulation (EC) No. 1346/2000 (Insolvency Regulation) and Regulation (EC) No. 44/2001 (Brussels I Regulation) or – more precisely – the question of whether Art. 3 (1) Insolvency Regulation covers actions to set a transaction aside in the context of insolvency, although they are not mentioned explicitly.

The background of the case is as follows: The debtor, a German private limited company, paid an amount of 50.000 EUR to a Belgian company (defendant). Even though it was a Belgian company having its registered office in Belgium, the money was paid into an account in Germany. The day after, the debtor applied successfully for the opening of the insolvency proceedings at a German local court. In the following, the insolvency administrator (claimant) reclaimed the 50.000 EUR from the defendant by means of an action to set a transaction aside.

The Regional Court (LG Marburg, 2 August 2005 – 2 O 209/04) as well as the Higher Regional Court (OLG Frankfurt, 26 January 2006 – 15 U 200/05) held that the Brussels I Regulation had to be applied and consequently stated that German courts lacked international jurisdiction since the defendant’s registered office was in Belgium.

In the following, the German *Bundesgerichtshof*, regarding the interpretation of Art. 3 (1) Insolvency Regulation and Art. 1 (2) lit. b) Brussels I Regulation as being ambiguous, referred – with decision of 21 June 2007 (IX ZR 39/06) – the **following questions** to the ECJ for a preliminary ruling:

On interpreting Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings and Article 1(2)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, do the courts of the

Member State within the territory of which insolvency proceedings regarding the debtor's assets have been opened have international jurisdiction under Regulation (EC) No 1346/2000 in respect of an action in the context of the insolvency to set a transaction aside that is brought against a person whose registered office is in another Member State?

If the first question is to be answered in the negative:

Does an action in the context of the insolvency to set a transaction aside fall within Article 1(2)(b) of Regulation (EC) No 44/2001?

Now, Advocate General Ruiz-Jarabo Colomer **suggests** in his **opinion** to answer these questions as follows:

Art. 3 (1) Regulation (EC) No. 1346/2000 has to be interpreted as meaning that the court of a Member State before which insolvency proceedings are pending has jurisdiction with regard to an action in the context of insolvency to set a transaction aside against an addressee of avoidance having its registered office in another Member State.

(Approximate translation from the German version of the opinion.)

In his opinion, the Advocate General first gives an overview of the historical development of the *actio pauliana* before outlining the Court's previous judgments in the present context – *Reichert* and *Gourdain*. Here, the Advocate General summarises that the Court has held so far that actions to set aside are considered as bankruptcy or analogous proceedings – and are therefore excluded from the scope of the Brussels I Convention/Regulation – if they are closely connected with those proceedings. The question whether a close connection in this terms exists, is answered in view of the action's structure in the respective national legal system (para. 39).

In the following, the Advocate General examines whether the entry into force of the Insolvency Regulation has led to any changes in this respect. He argues that the judgment in *Gourdain* is still valuable since it shows that – due to the fact that Community law does not provide for a uniform action to set a transaction aside – the legal nature of the action is of high significance with regard to the question whether it is covered either by the Brussels I or the Insolvency Regulation (para. 55). The fact that the (German) action to set a transaction aside in the context of insolvency is so closely connected with insolvency leads – in the light of *Gourdain* – to the result that it is not covered by the general Community rules on jurisdiction, i.e. the Brussels I Regulation (para. 58). Since, however, an

examination of Regulation (EC) No. 1346/2000 shows the Council's intention to regulate the proceeding with regard to the action to set a transaction aside in the context of insolvency (para. 50), the Advocate General supports the view that Art. 3 (1) Insolvency Regulation establishes the jurisdiction of the insolvency court (para. 51). Due to the particularities of actions to set a transaction aside in the context of insolvency, the insolvency court's jurisdiction should be, according to the Advocate General, a relative exclusive jurisdiction, i.e. it is for the insolvency administrator to choose the court which appears to be – in view of the insolvency asset – the most suitable one (para. 69).

The full text of the opinion can be found, inter alia, in Italian, French and Spanish at the ECJ's website.

See with regard to the reference and the background of the case also our previous post which can be found [here](#) and our previous post on a related article which can be found [here](#).