Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 21 June 2018 [1]

Case C-337/17

Feniks Sp. z o.o.
v
Azteca Products & Services SL

(Request for a preliminary ruling from the Sąd Okręgowy w Szczecinie (Szczecin Regional Court, Poland))

(Reference for a preliminary ruling — Area of freedom, security and justice — Jurisdiction in civil and commercial matters — Special jurisdiction — Matters relating to a contract — *Actio pauliana*)

I. Introduction

1. In the early period of Roman history, every foreigner was an enemy of the State. He could not benefit from any rights or protection of the *ius civile*, reserved only for Roman citizens. [2] Later, particularly in the imperial period, a certain degree of legal plurality was authorised, in particular in the ever-extending provinces of the Empire. Moreover, the applicability of the *ius civile* to non-citizens was gradually enabled through various legal constructs, such as the 'fiction of citizenship', [3] stated by Gaius in the following terms: '… there is a fiction of Roman citizenship for a foreigner who is raising or defending an action established by our statutes, provided that it is equitable for that action to be extended to a foreigner…'. [4]

2. In any case, such an action would be heard by or within the framework of the institutions of the broadly understood Roman Empire. Politically, there were no sovereign states within the Empire, amongst which conflicts of laws in the modern sense (between equally sovereign legal orders) could arise. Thus, when in around 150 to 125 BC, a *preator* named Paulus apparently first allowed an action that enabled the creditor to challenge any acts carried out fraudulently by the debtor to the detriment of that creditor, an action that later became known as *actio pauliana*, [5] the issue of jurisdiction for such an action simply did not arise.

1 Original language: English.

2 See, for example, Rattigan, W. H., *De Iure Personarum or A Treatise on the Roman Law of Persons*, Wildy & Sons, London, 1873, pp. 126 to 130 or Rein, W., *Das Römische Privatrecht und der Civilprozess bis in das erste Jahrhundert der Kaiserherrschaft*, K. F. Koehler, Leipzig, 1836, pp. 47 to 48 and p. 106.

3 See, for example, Sullivan, W. P., 'Consent in Roman Choice of Law', *Critical Analysis of Law*, vol. 3, No 1, 2016, pp. 165 to 166 or Aldo, C., 'Legal Pluralism in Practice', du Plessis, P. J., Aldo, C. and Tuori, K. (eds.), *The Oxford Handbook of Roman Law and Society*, Oxford University Press, Oxford, 2016, pp. 286 to 287.

4 Gaius, *Institutiones*, Book 4:37: "Item civitas romana peregrino fingitur, si eo nomine agat aut cum eo agatur quo nomine nostris legibus actio constituta est, si modo iustum sit eam actionem etiam ad peregrinum extendi…". *The Institutes of Gaius*, Translated with an Introduction by Gordon, W. M. and Robinson, O. F., Duckworth, London, 1988, p. 431.

5 As vividly put by Advocate General Ruiz-Jarabo Colomer in *Deko Marty Belgium* (C-339/07, EU:C:2008:575, points 24 to 26).

3. Anno Domini 2018, the situation is different. The Polish companies Feniks Sp. z o.o., established in Szczecin ('Feniks') and COLISEUM 2101 Sp. z o.o., also established in Szczecin ('COLISEUM'), entered into a contractual relationship relating to a development project in Poland. COLISEUM concluded further contracts with subcontractors, but was unable to pay them. Those subcontractors were paid by Feniks instead. As a result, COLISEUM became Feniks's debtor.

4. COLISEUM subsequently sold a plot of land located in Poland to Azteca Products & Services SL, established in Alcora (Spain) ('Azteca'). The sale price was set off against an existing debt that COLISEUM owed to Azteca.

5. Feniks brought legal proceedings against Azteca pursuant to the provisions of the Polish Civil Code providing for the instrument known as *actio pauliana*, seeking a declaration that the sale of the immovable property is not effective with regard to Feniks. That action was brought before the Sąd Okręgowy w Szczecinie (Regional Court, Szczecin), the referring court. That court doubts whether the Polish courts have international jurisdiction. Its view is that jurisdiction can only be established if the claim at issue can be classified 'as relating to a contract' under Regulation No 1215/2012.[6] Failing that, international jurisdiction will be determined according to the general rule of jurisdiction in the Member State of the defendant's domicile, in this case in Spain, where Azteca is established.

II. Legal Framework

A. EU law

6. As the main proceedings were launched on 11 July 2016, Regulation (EU) No 1215/2012 is applicable *ratione temporis*.[7]

7. Recitals 15 and 16 of Regulation No 1215/2012 state that:

'(15) The rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile. Jurisdiction should always be available on this ground save in a few well-defined situations in which the subject matter of the dispute or the autonomy of the parties warrants a different connecting factor …

(16) In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close connection between the court and the action or in order to facilitate the sound administration of justice.'

8. Pursuant to Article 1(2)(b) of Regulation No 1215/2012, the latter does not apply to 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings'.

9. Article 4(1) of Regulation No 1215/2012 states that: 'Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.'

10. Article 5(1) provides that: 'Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.'

6 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 (OJ 2012 L 351, p. 1).

7 Article 66(1) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 (OJ 2012 L 351, p. 1).

11. Article 7, which is part of Section 2 of Chapter 2 of the same regulation, sets out that: 'A person domiciled in a Member State may be sued in another Member State:

(1) (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;;

(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

– in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,

– in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided;;

(c) if point (b) does not apply, then point (a) applies.'

B. National law

12. Article 527 et seq. of the ustawa z dnia 23 kwietnia 1964 – Kodeks cywilny (Law of 23 April 1964 establishing the Civil Code, *Dziennik Ustaw* of 2017, item 459) ('the Civil Code') lays down the instrument referred to as *actio pauliana* in Polish law. Article 527 is worded as follows:

'1. If, as a result of a legal act of a debtor done to the detriment of creditors, a third party has obtained an economic advantage, any of the creditors may request that that act be declared ineffective in respect of him, where the debtor knowingly acted to the detriment of the creditor, and the third party knew or, in the exercise of due diligence, could have known, about it.

2. A legal act of a debtor is done to the detriment of creditors if, as a result of such act, the debtor has become insolvent or insolvent to a greater degree than he was before the act was done.

3. If, as a result of a legal act of a debtor done to the detriment of creditors, a person who is in a close relationship with the debtor has obtained an economic advantage, it shall be presumed that such person knew that the debtor knowingly acted to the detriment of the creditors.

4. If, as a result of a legal act of a debtor done to the detriment of creditors, an undertaking in a permanent commercial relationship with the debtor has obtained an economic advantage, it shall be presumed that it was aware that the debtor knowingly acted to the detriment of the creditors'.

13. Pursuant to Article 530 of the Civil Code 'the provisions of the preceding articles shall apply *mutatis mutandis* where a debtor acted with the intention of causing detriment to future creditors. If, however, a third party has obtained economic advantage in return for payment, a creditor may request that the act be declared ineffective only if the third party knew of the debtor's intention'.

14. Article 531 of the Civil Code reads as follows:

'1. An act of a debtor done to the detriment of creditors shall be declared ineffective through an action or plea raised against the third party who has obtained economic advantage as a result of that act.

2. Where a third party has disposed of the advantage obtained, the creditor may directly sue the person to whom the disposition was made if that person knew of circumstances justifying the debtor's act being declared ineffective or if the disposition was free of charge'.

15. Article 533 of the Civil Code provides that '[a] third party who has obtained an economic advantage as a result of a legal act of the debtor done to the detriment of creditors may be exempted from meeting a claim raised by a creditor requesting that the act be declared ineffective if he satisfies that creditor, or indicates to him, property of the debtor sufficient to satisfy him'.

III. Facts, national proceedings and questions referred

16. The company COLISEUM 2101 Sp. z o.o. is established in Szczecin (Poland). As a general contractor, it concluded a contract with the company Feniks Sp. z o.o., also established in Szczecin, as an investor ('the Applicant'). The contract concerned works to be carried out in Gdańsk (Poland). COLISEUM concluded a number of contracts with subcontractors but subsequently failed to meet its obligations in respect of all of them.

17. Under rules for joint and several liability in Polish law, Feniks paid off, pursuant to conditional agreements and debt acquisition agreements, the PLN 757 828.10 owed by COLISEUM to the subcontractors. As a result, Feniks became COLISEUM's creditor for a total amount of PLN 1 396 495.48.

18. By virtue of a contract dated 30 January 2012, signed in Szczecin, COLISEUM sold immovable property located in Szczecin to Azteca Products & Services SL established in Alcora (Spain) ('the Defendant').

19. The Defendant thus became COLISEUM's debtor for an amount of PLN 6 079 275. At the same time, COLISEUM was the Defendant's debtor by virtue of loan contracts for the amount of PLN 4 987 861.30. In a different contract concluded in Szczecin on 31 January 2012, the Defendant and COLISEUM agreed to set off their claims. As a result, the Defendant was required to pay COLISEUM the amount of PLN 1 091 413.70.

20. The Applicant considered COLISEUM to be insolvent, that the contract for the sale increased that insolvency, and that when COLISEUM concluded it, it knowingly acted to the detriment of current and future creditors.

21. On 11 July 2016, the Applicant therefore brought an action against the Defendant before the Sąd Okręgowy w Szczecinie (Regional Court, Szczecin), seeking a declaration that the contract for the sale is ineffective in respect of the Applicant.

22. To establish the international jurisdiction of that court, the Applicant relied on Article 7(1)(a) of Regulation No 1215/2012. It noted that the term 'sprawy dotyczące umowy' ('matters relating to a contract') must be interpreted as relating to a situation where a contract is the reason for bringing proceedings, with a view to resolving the claim directly relating to it. This is the case of an *actio pauliana* launched against the Defendant.

23. The Defendant alleged that the Polish courts do not have jurisdiction and claimed that the action should be dismissed. In its view, declaring an act ineffective is not a 'matter relating to a contract' within the meaning of Article 7(1) of Regulation No 1215/2012. Nor did it consider that the claim at issue was covered by any other special or exclusive head of jurisdiction provided for by Regulation No 1215/2012. It considered that as the Defendant is established in Spain, the action should be brought in that Member State, further to the general rule in Article 4 of Regulation No 1215/2012.

24. In those circumstances, the Sąd Okręgowy w Szczecinie (Regional Court, Szczecin) decided to stay the proceedings and refer the following questions to the Court of Justice:

'(a) Does a case brought against a buyer established in one Member State, seeking a declaration that a contract for the sale of immovable property situated in the territory of another Member State, which was concluded and performed in its entirety in the territory of another Member State, is ineffective on the ground of detriment to the seller's creditors, constitute a "matter relating to a contract" within the meaning of Article 7(1)(a) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters?

(b) Must the above question be answered applying the principle of acte éclairé with reference to the judgment of the Court of Justice in *Handte* v *Traitements mécano-chimiques des surfaces SA* (C-26/91, EU:C:1992:268), despite the fact that it concerned the liability for defects in goods of a manufacturer who could not foresee to whom the goods would subsequently be sold, and thus who would be able to bring claims against him, whereas the present action against a buyer "seeking a declaration that a contract for the sale of immovable property is ineffective" on the ground of detriment to the seller's creditors, requires, in order to be effective, knowledge on the part of the buyer that the legal act (contract of sale) was done with detriment to creditors, and thus the buyer must anticipate that such an action may be brought by a personal creditor of the seller?'

25. Written submissions were lodged by the Applicant, the Defendant, the Polish Government, the Government of the Swiss Confederation, and by the Commission. The Applicant, the Defendant, the Polish Government and the Commission presented oral argument at the hearing that took place on 11 April 2018.

IV. Assessment

26. The referring court wishes to know whether a claim bringing an *actio pauliana*, as provided for in the Polish Civil Code, can be considered as 'a matter relating to a contract' within the meaning of Article 7(1) of Regulation No 1215/2015. It also asks whether the Court's ruling in *Handte*[8] extends to this situation.

27. I shall address both questions together. First, I will outline the origins and different forms of *actio pauliana* that exist (A). Second, I will examine the EU's jurisdictional rules concerning *actio pauliana* and explain why *actio pauliana* cannot be classified, in the specific context of the present case, as a 'matter relating to a contract' (B). Finally, I will turn to the same issue at a general level: after several decisions of this Court setting out what *actio pauliana* is not, perhaps the time is ripe to address the question of what an *actio pauliana* such as the one in the main proceedings actually is, and how it should be treated for jurisdictional purposes (C).

A. The origins and the many faces of actio pauliana

28. The roots of *actio pauliana* are found in Roman law (1). Today, although some common features attributable to that ancestry persist, there is in fact a number of different national forms of *actio pauliana* in the Member States (2).

8 Judgment of 17 June 1992, *Handte* (C-26/91, EU:C:1992:268).

1. Roman law

29. As Advocate General Ruiz-Jarabo Colomer put it, even in Roman times, *actio pauliana* had already evolved from being 'an enforcement instrument which granted the creditor the right to sell the debtor as a slave', to a procedure 'which enabled a creditor to revoke any acts carried out fraudulently and to his detriment' by bringing an 'action against a third party who has acquired the disputed asset'.[9]

30. In the classical period, it would appear that two particular remedies to address the fraudulent transfer of assets existed: *restitutio in integrum ob fraudem* and *interdictum fraudatorium*.[10]

31. First, *restitutio in integrum ob fraudem* allowed the insolvency administrator (*curator bonorum*) to request the respective magistrate to order the reintegration of the fraudulently transferred assets back to the estate of the debtor. This remedy was usually triggered after the initiation of the insolvency proceedings but before the execution of the assets. It allowed the fraudulently transferred assets to be taken into consideration in the execution of the debtor's estate.

32. Second, the *interdictum fraudatorium* was a remedy for a particular creditor. The affected creditor could request the magistrate to issue an order (*interdictum*) to restore the fraudulently transferred assets to the debtor's estate, so that the affected creditor could claim the damages caused by such a transfer.

33. The Justinian codification seems to have merged these two remedies into one action named *Pauliana*.[11] Interestingly enough (and perhaps with some present-day relevance), it was apparently believed that the nature of the action is sufficiently similar, irrespective of whether it is filed within the insolvency procedure or by an individual creditor, thus justifying the fusion of both previously separate remedies under one heading.

34. In any case, there appears to be a consensus on three defining elements of such an action:[12] First, effective harm (of an objective nature) which existed at the time the action was filed (*eventus damni*); second, the debtor's intention to harm its creditors (*consilium fraudis*), that is, a will on the part of the debtor to carry out an *eventus damni*; and third, the bad faith of the third party (*scientia fraudis*), the awareness of the third party that the fraudulent act was carried out with the *consilium fraudis* of the debtor.

9 Opinion of Advocate General Ruiz-Jarabo Colomer in *Deko Marty Belgium* (C-339/07, EU:C:2008:575, points 24 to 26).

10 For a description of these two remedies, see, for example, Talamanca, M., *Istituzioni di Diritto Romano*, Dott. A. Giuffrè Editore, Milano, 1990, p. 659; Kaser, M., *Das römische Privatrecht, Erster Abschnitt, Das altrömische, das vorklassische und das klassische Recht*, 2nd edition, C.H. Beck'sche Verlagsbuchhandlung, Munich, 1971, p. 252; Marrone, M., *Lineamenti di Diritto Privato Romano*, G. Giappichelli Editore, Torino, 2001, p. 299; Guarino, A., *Diritto Privato Romano*, Editore Jovene Napoli, Napoli, 2001, p. 1020; Impallomeni, G., 'Azione Revocatoria (Diritto Romano)', *Novíssimo Digesto Italiano*, vol. II, 1957, Unione Tipografico — Editrice Torinese, Torino, p. 147; Fernández Barreiro, A. and Paricio Serrano, J., *Fundamentos de Derecho Privado Romano*, 9th edition, Marcial Pons, Ediciones Jurídicas y Sociales, Madrid, 2016, p. 105.

11 See, for example, Marrone, M., *Lineamenti di Diritto Privato Romano*, G. Giappichelli Editore, Torino, 2001, p. 300; Guarino, A., *Diritto Privato Romano*, Editore Jovene Napoli, Napoli, 2001, p. 1020; Kaser, M., *Das römische Privatrecht, Zweiter Abschnitt, Die nachklassischen Entwicklungen*, 2nd ed., C.H. Beck'sche Verlagsbuchhandlung, Munich, 1975, pp. 94 to 95; Kaser, M., Knütel, R., Lohsse, S., *Römisches Privatrecht — Ein Studienbuch*, 21st edition, C.H. Beck, Munich, 2017, paragraph 9.12; Fernández Barreiro, A. and Paricio Serrano, J., *Fundamentos de Derecho Privado Romano*, 9th edition, Marcial Pons, Ediciones Jurídicas y Sociales, Madrid, 2016, p. 106.

12 See, for example, Marrone, M., *Lineamenti di Diritto Privato Romano*, G. Giappichelli Editore, Torino, 2001, p. 299; Guarino, A., *Diritto Privato Romano*, Editore Jovene Napoli, Napoli, 2001, p. 1021; Talamanca, M., *Istituzioni di Diritto Romano*, Dott. A. Giuffrè Editore, Milano, 1990, p. 659; Impallomeni, G., 'Azione Revocatoria (Diritto Romano)', *Novíssimo Digesto Italiano*, vol. II, 1957, Unione Tipografico — Editrice Torinese, Torino, p. 148; Fernández Barreiro, A. and Paricio Serrano, J., *Fundamentos de Derecho Privado Romano*, 9th edition, Marcial Pons, Ediciones Jurídicas y Sociales, Madrid, 2016, p. 105; Carballo Piñeiro, L., 'Acción Pauliana e integración Europea: una propuesta de ley aplicable', Revista Española de Derecho Internacional, vol. LXIV, 2012, p. 48.

2. Current national forms

35. Today, *actio pauliana* is generally used to refer to a specific type of legal remedy that provides a creditor with the possibility to have an act declared ineffective with respect to that creditor, that act having been carried out by a debtor to diminish its assets by passing them on to a third party. The creditor typically brings the action directly against the third party. The notion of *actio pauliana* is described as a 'series of techniques for granting protection to creditors in cases where the debtor diminishes his seizable assets to avoid paying his debts'. [13]

36. However, on a closer look, the common elements give way to many differences. Perhaps not in type, but certainly in how the instrument is executed. Metaphorically, much like in Cloud Atlas, [14] a number of (general) themes and motives remain the same throughout the film, while the (actual) times, faces, and locations in which those themes are set and rerun keep changing. From a comparative perspective, there are currently two common elements, but also at least two significant divergences amongst the Member States.

37. The first common element is the triangular relationship between the three parties based on (i) the existence of a debt between a debtor and a creditor, (ii) a transaction between the debtor and the third party, and (iii) the existence of an 'intent to defraud' on the part of the debtor — as well as the transferee's awareness of that fact. In this triangular relationship, the function of *actio pauliana* is essentially protectionary in all systems: limiting the legal effects vis-à-vis the creditor of the disposal of the debtor's assets where such a disposal hinders the creditor's possibilities of collecting the debt. [15]

38. A second relatively common feature is an internal division of *actio pauliana* between its more general form in the context of civil law and its more specific expression in the context of insolvency. [16] The main difference between these two categories 'lies in the effects which each action produces': as in civil law effects are 'confined to the individual creditors who have brought the action' whereas under the insolvency rules, the benefit concerns all the creditors concerned by the insolvency proceedings. [17]

39. As far as the differences are concerned, first, at the level of the conceptual classification of *actio pauliana*, there does not seem to be a consensus as to whether *actio pauliana* constitutes a right *in rem*, attached to the assets fraudulently transferred, or a right *in personam*, attached to the specific creditor. According to some, the latter approach seems to prevail 'even if certain proprietary effects [of *actio pauliana*] are recognised'. [18]

13 See, for example, Pretelli, I., 'Cross-Border Credit Protection Against Fraudulent Transfers of Assets: Actio Pauliana in the Conflict of Laws', *Yearbook of Private International Law*, vol. 13, 2011, p. 590. For a similar description see Linna, T., 'Actio Pauliana — "Actio Europensis?" Some Cross-Border Insolvency Issues', *Journal of Private International Law*, vol. 10, 2014, p. 69. See also Virgós Soriano, M. and Garcimartín Alférez, F., *Derecho procesal civil internacional: litigación internacional*, 2nd edition, Thomson Civitas, Cizur Menor, 2007, pp. 704 to 705 or Göranson, U., 'Actio pauliana outside bankruptcy and the Brussels Convention', Sumampouw M. et al. (eds.), *Law and Reality*: *Essays on National and International Procedural Law in Honour of Cornelis Carel Albert Voskuil*, T.M.C. Asser Instituut, The Hague, 1992, p. 91.

14 Cloud Atlas, dir. Tykwer, T., Wachowski L. and Wachowski, L., 2012.

15 Virgós Soriano, M. and Garcimartín Alférez, F., *Derecho procesal civil internacional: litigación internacional*, 2nd edition, Thomson Civitas, Cizur Menor, 2007, pp. 704 to 705, at 24.44.

16 See, in this sense, for example, McCormack G., Keay A., Brown S., *European Insolvency Law: Reform and Harmonization*, Edward Elgar Publishing Ltd, Cheltenham, 2017, p. 159; Göranson, U., 'Actio pauliana outside bankruptcy and the Brussels Convention', Sumampouw, M., et al. (eds.), *Law and Reality*: *Essays on National and International Procedural Law in Honour of Cornelis Carel Albert Voskuil*, T.M.C. Asser Instituut, The Hague, 1992, p. 90; Linna, T., 'Actio Pauliana — "Actio Europensis?" Some Cross-Border Insolvency Issues', *Journal of Private International Law*, vol. 10, 2014, p. 69; Pretelli, I., 'Cross-Border Credit Protection Against Fraudulent Transfers of Assets: Actio Pauliana in the Conflict of Laws', *Yearbook of Private International Law*, vol. 13, 2011, pp. 598 to 599.

17 See Opinion of Advocate General Ruiz-Jarabo Colomer in *Deko Marty Belgium* (C-339/07, EU:C:2008:575, point 27 and further doctrine quoted).

18 See, for example, Göranson, U., 'Actio pauliana outside bankruptcy and the Brussels Convention', Sumampouw M. et al. (eds.), *Law and Reality*: *Essays on National and International Procedural Law in Honour of Cornelis Carel Albert Voskuil*, T.M.C. Asser Instituut, The Hague, 1992, p. 92.

40. That differentiation in fact has much deeper roots. It has a link with the systemic perception and classification of *actio pauliana* in the respective legal system. Some national laws provide for that action under the procedural provisions for asset execution. Other systems regulate it by substantive law rules such as those applicable to contracts and obligations. There are also legal systems that conceive of the action as a general remedy, systematically connected to the issue of the validity or opposability of legal acts. The latter scenario also seems to be the case of the Polish rules quoted in the order for reference.

41. Second and more importantly for the present case, a comparative study reveals further differences when it comes to classifying *actio pauliana* for the purpose of determining the international jurisdiction and the law applicable to it.[19] On both accounts, the fact that *actio pauliana* concerns a triangular relationship between the creditor, debtor and a transferee creates difficulties in classification of the legal relations created in this context. Those difficulties stem from the multiplicity of connecting factors and interests at stake, that multiplicity making it problematic to determine 'any of these interests as predominant and guiding'.[20]

B. Actio pauliana and EU jurisdictional rules

42. At the level of international jurisdiction, the key question to be asked at the outset is whether a specific *actio pauliana* claim is filed in the context of insolvency proceedings, or outside that context. Depending on the answer, different jurisdictional and applicable-law rules apply.

43. The Court clarified rather early on that an *actio pauliana* filed in the context of *insolvency* proceedings does not fall within the scope of Regulation No 1215/2012 (and its legal predecessors) because its Article 1(2)(b) excludes matters related to insolvency.[21]

44. The specific jurisdictional rules that apply in the context of insolvency are defined in the Insolvency Regulation.[22] The Court has given further guidance as to when a particular claim to set an act aside falls within the context of insolvency. Heavily dependent on the factual and legal context of each individual case, the application of that guidance may not always be straightforward.[23]

45. In the context of the present case, the order for reference mentions that COLISEUM is insolvent. However, it appears that an application that was filed for insolvency of that company was unsuccessful. That was also confirmed at the hearing. It follows that when the Applicant filed the action against the Defendant, COLISEUM was not subject to any insolvency proceedings. As a result, the relevant rules to determine international jurisdiction must be found in Regulation No 1215/2012.

19 For a comparative overview, see, for example, Pretelli, I., 'Cross-Border Credit Protection Against Fraudulent Transfers of Assets: Actio Pauliana in the Conflict of Laws', *Yearbook of Private International Law*, vol. 13, 2011, p. 590.

20 See, for example, Göranson, U., 'Actio pauliana outside bankruptcy and the Brussels Convention', Sumampouw M. et al. (eds.), *Law and Reality: Essays on National and International Procedural Law in Honour of Cornelis Carel Albert Voskuil*, T.M.C. Asser Instituut, The Hague, 1992, p. 93.

21 See judgment of 22 February 1979, *Gourdain* (133/78, EU:C:1979:49, paragraphs 4 to 6) concerning a general statement on proceedings concerning insolvency matters. For application of that general statement to insolvency proceedings, see judgment of 12 February 2009, *Deko Marty Belgium* (C-339/07, EU:C:2009:83).

22 Regulation (EU) No 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (OJ 2015 L 141, p. 19). The latter repealed Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1).

23 See, in this context, judgments of 12 February 2009, *Deko Marty Belgium* (C-339/07, EU:C:2009:83); of 10 September 2009, *German Graphics Graphische Maschinen* (C-292/08, EU:C:2009:544), and of 19 April 2012, *F-Tex* (C-213/10, EU:C:2012:215). See also the Virgos-Schmit Report on the Convention on Insolvency Proceedings of 3 May 1996, Council document No 6500/1/96 REV1 DRS 8 (CFC), paragraph 77, available in Moss, G., Fletcher, I. F. and Isaacs, S., *The EC Regulation on Insolvency proceedings A Commentary and Annotated Guide*, Second Edition, Oxford University Press, 2009, p. 381 et seq.

46. However, neither Regulation No 1215/2012 nor its legal predecessors contain any rule on which court has jurisdiction over a claim such as the *actio pauliana* at issue in the main proceedings. Similarly, the Rome I [24] and Rome II [25] Regulations, dealing respectively with the law applicable to contractual and extra-contractual relations are silent on the matter and thus do not offer any source of inspiration as to how *actio pauliana* could be approached. [26]

47. That being said, the Court has already had an opportunity to take a position on different heads of jurisdiction considered (and excluded) in this context (1). The main question raised in the present case is whether a head of jurisdiction that has not been explicitly examined (that is the one for 'matters relating to a contract') could apply in a case like the present one (2).

1. Heads of jurisdiction already excluded

48. The Court has specified that an *action* similar in its main features to the one at issue in the present proceedings [27] cannot fall under the heads of exclusive or special jurisdiction concerning the rights *in rem* in immovable property, [28] enforcement of judgments, [29] provisional measures, [30] and tort. [31]

49. In its judgement in *Reichert I*, [32] the Court held that the French civil law *actio pauliana* does not fall within exclusive jurisdiction concerning rights *in rem* in immovable property. In that case, the Reicherts, domiciled in Germany, donated immovable property in France to their son. Their creditor, Dresden Bank, challenged that transfer before a French court.

50. The Court explained that the exclusive jurisdiction *in rem* 'does not encompass all actions concerning rights *in rem* in immovable property but only those which […] seek to determine the extent, content, ownership or possession of immovable property or the existence of other rights *in rem* therein and to provide the holders of those rights with the protection of the powers which attach to their interest'. That was not the case in the action at issue, the latter being 'based on the creditor's personal claim against the debtor and seek[ing] to protect whatever security he may have over the debtor's estate. If successful, its effect is to render the transaction whereby the debtor has effected a disposition in fraud of the creditor's rights ineffective as against the creditor alone'. Moreover, 'the hearing of such an action, […], does not involve the assessment of facts or the application of rules and practices of the *locus rei sitae* in such a way as to justify conferring jurisdiction on a court of the State in which the property is situated'. [33] The Court concluded by noting that that finding was unaffected by the fact that the national rules governing public registration of rights in immovable property may require actions to be taken in the state of that property's location. [34]

24 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).

25 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ 2007 L 199, p. 40).

26 There is nonetheless one element from the legislative history of Regulation Rome II that indicates that the matter had been contemplated. A proposed (but not adopted) version of Article 10 (entitled 'Actio Pauliana') provided that 'The conditions and the effects arising from an obligation where a creditor may contest a contract concluded by a debtor with a third party, endangering the satisfaction of the creditor [fulfilment of the claim], shall be determined by the law applicable to the obligation existing between the creditor and his debtor.' See Note of the General Secretariat of the Council to the Committee on Civil Law (Rome II), (No. prev. doc.: 10231/99 JUSTCIV 112) 11982/99 JUSTCIV 150, of 9 December 1999.

27 The referring court notes that the Polish *actio pauliana* is different from the French one that was discussed in the cases referred to in this section of the Opinion (footnotes 32 and 35). Indeed, as already outlined above at points 36 to 41, as far as detailed procedural and substantive requirements are concerned, any two varieties of an *actio pauliana* are likely to differ. It is nonetheless equally true that in their overall characteristics, as outlined in particular in point 35 above, both systems are quite comparable.

28 Article 16(1) of the Brussels Convention (now Article 24(1) of Regulation No 1215/2012).

29 Article 16(5) of the Brussels Convention (now Article 24(5) of Regulation No 1215/2012).

30 Article 24 of the Brussels Convention (now Article 35 of Regulation No 1215/2012).

31 Article 5(3) of the Brussels Convention (now Article 7(2) of Regulation No 1215/2012).

32 Judgment of 10 January 1990, *Reichert and Kockler* (C-115/88, EU:C:1990:3).

33 Judgment of 10 January 1990, *Reichert and Kockler* (C-115/88, EU:C:1990:3, paragraphs 11 to 12).

34 Judgment of 10 January 1990, *Reichert and Kockler* (C-115/88, EU:C:1990:3, paragraph 13).

51. Soon afterwards, the Court added in *Reichert II*[35] that the same *actio pauliana* was neither a provisional measure nor an action bringing proceedings concerned with the enforcement of a judgment. It was also not a matter relating to tort, delict or quasi-delict.

52. The Court explained that first, the action at issue could not be equated to a provisional or protective measure and that, second, 'although [it] preserves the interests of the creditor with a view […] to a subsequent enforcement of the obligation, it is not intended to obtain a decision in proceedings relating to "recourse to force, constraint or distraint on movable or immovable property in order to ensure the effective implementation of judgments and authentic instruments"'.[36] Third, the Court further stated that the head of jurisdiction for torts could not apply because the purpose of the *actio pauliana* 'is not to have the debtor ordered to make good the damage he has caused his creditor by his fraudulent conduct, but to render ineffective, as against his creditor, the disposition which the debtor has made. It is directed not only against the debtor but also against the person who benefits from the act, who is not a party to the obligation binding the creditor to his debtor, even, in cases where there is no consideration for the transaction, where that third party has not committed any wrongful act'.[37]

53. In these two judgments the Court examined the applicability of the heads of special or exclusive jurisdiction that could possibly be envisaged in the context of *actio pauliana* with the exception of the one for matters relating to a contract. The potential applicability of that head of jurisdiction, to which I turn in the following section, is at the heart of the present case.

2. The present case: a 'matter relating to a contract'?

54. Pursuant to established case-law, 'the concept of "matters relating to a contract" must be interpreted independently in order to ensure that it is applied uniformly in all the Member States'.[38] In *Handte*, a decision invoked by the referring court, as well as in related case-law, the Court explained that the applicability of that head of jurisdiction requires the existence of an 'obligation freely assumed by one party towards another'[39] on which the claimant's action is based, although it does not require the conclusion of a contract.[40] In other words, the possibility to refer to that head of jurisdiction is based on the *cause of action*,[41] not the identity of the parties.[42] Nevertheless, the identification of an obligation is necessary 'since the jurisdiction of the national court is determined […] by the place of performance of the obligation in question'.[43]

35 Judgment of 26 March 1992, *Reichert and Kockler* (C-261/90, EU:C:1992:149).

36 Judgment of 26 March 1992, *Reichert and Kockler* (C-261/90, EU:C:1992:149, paragraphs 35, as well as paragraphs 27 and 28).

37 Judgment of 26 March 1992, *Reichert and Kockler* (C-261/90, EU:C:1992:149, paragraph 19).

38 Recently, for example, judgment of 7 March 2018, *flightright and Others* (C-274/16, C-447/16 and C-448/16, EU:C:2018:160, paragraph 58).

39 Judgment of 17 June 1992, *Handte & Co* (C-26/91, EU:C:1992:268, paragraph 15). As noted in paragraph 17 of that judgment, that case concerned a chain of international goods contracts in which the parties' contractual obligations 'may vary from contract to contract, so that the contractual rights which the sub-buyer can enforce against his immediate seller will not necessarily be the same as those which the manufacturer will have accepted in his relationship with the first buyer'. See also judgments of 17 September 2002, *Tacconi* (C-334/00, EU:C:2002:499, paragraph 22), and of 21 January 2016, *ERGO Insurance and Gjensidige Baltic* (C-359/14 and C-475/14, EU:C:2016:40, paragraph 44).

40 Judgment of 7 March 2018, *flightright and Others* (C-274/16, C-447/16 and C-448/16, EU:C:2018:160, paragraphs 58 to 60 and case-law quoted).

41 Judgment of 7 March 2018, *flightright and Others* (C-274/16, C-447/16 and C-448/16, EU:C:2018:160, paragraph 61 and case-law cited). For a different perspective see also judgments of 13 March 2014, *Brogsitter* (C-548/12, EU:C:2014:148, paragraphs 24 and 25), and of 14 July 2016, *Granarolo* (C-196/15, EU:C:2016:559, paragraph 21).

42 In contrast to jurisdiction over consumer contracts under Article 18(1) of Regulation No 1215/2012, which is available to the contractual parties only — judgment of 25 January 2018, *Schrems* (C-498/16, EU:C:2018:37, paragraphs 43 to 45).

43 Judgment of 17 September 2002, *Tacconi* (C-334/00, EU:C:2002:499, paragraph 22).

55. According to some, the Court has already *implicitly* excluded the applicability of a jurisdictional head for contractual matters to the French *actio pauliana* in *Reichert*. In this sense Advocate General Gulmann in *Reichert II* noted that 'it will probably be neither right nor appropriate to take the view that the revocatory action is based on the law of contract. That is true even if the creditor's claim against the debtor has […] a contractual basis and even if the transaction at issue is a conveyance of property'. [44] A similar idea was expressed by Advocate General Ruiz-Jarabo Colomer in *Deko Marty Belgium* when he commented that 'although [in *Reichert I*], the Court did not make an explicit ruling to that effect, it is apparent from the judgment that jurisdiction lies with the courts in the defendant's State of domicile'. [45] Some scholars have also expressed a similar view. [46]

56. However, the fact remains that the Court has never explicitly excluded the head of jurisdiction for matters relating to a contract. The pragmatic reason for that is that in the specific context of both *Reichert* judgments, that question was not posed by the referring court. By contrast, a question concerning that head of jurisdiction has been asked explicitly in the present case.

57. It is certainly true that in most situations, the allegedly fraudulent act (between the debtor and the transferee) is likely to be of a contractual nature. Often, the underlying right that the creditor will seek to protect through *actio pauliana* will also be contractual.

58. A similar scenario could be said to exist in the present case, although it is not entirely clear whether the Applicant paid for COLISEUM's debts as a result of the Applicant's contractual obligations, statutory obligations (because of the joint and several liability imposed by statute), or a mixture of both.

59. However, even assuming that both relationships involved in the present case (Applicant-COLISEUM, COLISEUM-Defendant) are of a contractual nature, is that contractual underpinning a sufficient reason to conclude that the *actio pauliana* at issue falls within the head of jurisdiction for 'matters relating to a contract'?

60. The Defendant, the Polish and Swiss Governments, as well as the Commission take the position that the *actio pauliana* at issue in the main proceedings does not fall under Article 7(1)(a) of Regulation No 1215/2012.

61. I agree with the outcome that those intervening parties propose albeit for different reasons.

62. Assuming that the applicability of the head of jurisdiction for matters relating to a contract were to be contemplated, the question that immediately arises is which of the two contracts potentially involved should be taken as relevant? To which of the two contracts would an *actio pauliana* in fact relate?

63. Three options could theoretically be contemplated.

44 Opinion of Advocate General Gulmann in *Reichert II* (C-261/90, EU:C:1992:78, I-2164).

45 Opinion of Advocate General Ruiz-Jarabo Colomer in *Deko Marty Belgium* (C-339/07, EU:C:2008:575, point 32).

46 *Ancel, B.*, 'De la loi applicable à une donation attaquée par la voie de l'action paulienne', *Revue critique de droit international privé*, 1992, p. 714, point 12. The same view is held by Forner Delaygua, J., 'The Actio Pauliana under the ECJ — a critical look on Reichert II', *Gemeinsame Prinzipien des Europäischen Privatrechts*, 2003, pp. 291 to 301.

64. First, the *actio pauliana* could be said to relate to the contract that came first in time, between the Applicant (as the creditor) and COLISEUM (as the debtor). The logic attaching the *actio pauliana* to that contract would be one of securing certain rights and obligations stemming from that first contract, namely to obtain the reimbursement of the amount corresponding to COLISEUM's debt. Thus the jurisdiction for the secondary action (*actio pauliana*) should follow the jurisdiction of the first contract.[47]

65. Leaving aside both the question of whether such an approach would be at all possible under the respective national law, and what in fact the precise legal relationship between the Applicant and COLISEUM on the national level was,[48] the fact remains that such a connection is simply too tenuous and too remote. A transfer of property to a third party has simply very little to do with the first, or original, contract. Defining 'matter relating to a contract' in such an overly broad manner would run counter to the logic of special head of jurisdiction. It would also simply mean that any subsequent legal acts by either party to the original contract could always be a 'matter relating to a contract', because the decrease of assets of either contractual party would, under this logic, always be a matter relating to the original contract.

66. Second, connecting the *actio pauliana* with the contract that was concluded later in time, between COLISEUM and the Defendant, allegedly to the detriment of the Applicant, could seem more appropriate. It would be, on a certain level, more logical: what the *actio pauliana* aims at is to render ineffective an element of that second contract — the disposition of the assets that were the subject matter of the later contract.

67. That second approach is, however, also problematic. What the Applicant is ultimately seeking is not to render the later contract ineffective, or even void, but to protect its rights. It is in principle not relevant whether those rights will be safeguarded through the sale of the assets affected by the later contract or in some other way, such as when the transferee agrees to satisfy the Applicant 'or indicates to him, property of the debtor [such as COLISEUM] sufficient to satisfy him'.[49] In other words, such an *actio pauliana* is also detached from any specific and concrete obligations arising under the later contract. The only element that the two legal acts appear to have in common is the setting of a certain monetary amount.

68. Be that as it may, it should also be added and underlined that both approaches outlined above fail to satisfy the requirement of 'obligation freely assumed by one party towards another',[50] that is by the Defendant towards the Applicant. Even if the case-law of this Court does not require that there is identity between the parties to the proceeding and to the respective contract, it appears difficult to consider that the mere filing of an *actio pauliana* creates a substantive-law relationship between the Applicant and the Defendant resulting from, for example, some kind of legal subrogation founded by an act of COLISEUM (as the Applicant's initial debtor).[51]

69. Third, it could perhaps also be argued, similarly to what was suggested by Advocate General Sharpston in *Ergo Insurance*[52] in the context of a recourse action filed by an insurer against another insurer (linked mutually by no contract but each of them having a contract with the party responsible for an accident) that what matters is the existence of contractual obligations in which the respective

47 Thus in a way embracing the logic that was proposed in terms of applicable law in the abovementioned draft Article 10 of Regulation Rome II (above, footnote 26).

48 Above, point 58.

49 As stated in Article 533 of the Civil Code (cited above in point 15 of this Opinion).

50 Above (footnote 39).

51 Thus, in contrast to, for example, judgments of 7 March 2018, *flightright and Others* (C-274/16, C-447/16 and C-448/16, EU:C:2018:160), or of 20 July 2017, *MMA IARD SA* (C-340/16, EU:C:2017:576).

52 Opinion of Advocate General Sharpston in Joined Cases *ERGO Insurance and Gjensidige Baltic* (C-359/14 and C-475/14, EU:C:2015:630, points 57 to 62).

claim is rooted and without which the respective applicant would have no legal basis to sue. Thus, there would be no need to select one of the two contracts. From this perspective, as *actio pauliana* in any case finds itself 'on the orbit' of a contract, it becomes a matter related to a contract, without the need to specifically single out which contract.

70. While such an approach might be a pragmatic solution in the specific insurance context, where indeed, at the end of the day, all the actors will be related one to another by a network of contracts, in the present case, it would hardly be acceptable to conclude that the situation is of a 'contractual' nature irrespective of which contract allows for such a conclusion. That is not only because such an answer would be based on a number of rather questionable assumptions, but also quite pragmatically: for Article 7(1)(a) of Regulation No 1215/2012 to apply, it is necessary to identify the relevant place of performance. Both of the contracts involved in the present proceedings have a distinct object and thus autonomously defined places of performance.

71. To sum up, *in this specific case*, it does not seem possible to rely on one or the other contract that may exist between the Applicant and COLISEUM, and COLISEUM and the Defendant, to conclude that the head of jurisdiction for matters relating to contracts applies.

72. For these reasons, my first interim conclusion is therefore that Article 7(1)(a) of Regulation (EU) No 1215/2012 must be interpreted as meaning that the notion 'matters relating to a contract' in that provision does not cover an action, such as the one in the main proceedings, by which a case is brought against a buyer established in one Member State, seeking a declaration that a contract for the sale of immovable property situated in the territory of another Member State, is ineffective on the ground of detriment to the seller's creditors.

C. What is actio pauliana for the purposes of international jurisdiction?

73. Over time, in the case-law referred to above,[53] the Court excluded *actio pauliana* claims from different heads of jurisdiction: tort/delict; provisional measures; enforcement of judgments; and exclusive jurisdiction in concerning rights *in rem* in immovable property. In the previous section of this Opinion, I proposed, in the context of the present case, also to exclude the head for matters relating to a contract.

74. Judicial minimalism is a virtue. However, as with many other good things, the precondition of their ongoing goodness is moderation. After years of 'judicial dodgeball' that provided (quite understandably, in view of the exact formulation of the questions referred) for *negative* replies, eliminating one head of jurisdiction after another, and unless other heads of jurisdiction wish to be explored in similar vein in the future (although the pool of reasonably conceivable heads of jurisdiction has grown rather thin by now), perhaps the time is ripe to provide also for some *positive* guidance: not only on what an *actio pauliana* is not, but also what, in terms of international jurisdiction, it could be.

75. Such a course of action is also advisable for two additional reasons. First, having analysed most of the reasonably conceivable heads of special (and exclusive) jurisdiction available, a principled explanation as to why, with regard to *actio pauliana* such as the one in the main proceedings, it is the general head of jurisdiction under Article 4(1) of Regulation No 1215/2012 that will be applicable, appears to be clearly emerging by now (1). Second, notwithstanding potential practical difficulties that may arise from such a result in a specific case, but being of the view that they cannot alter the principled answer provided, the discussion of such issues might nevertheless provide stimuli for potential future legislative reflections on the Union level (2).

53 Points 48 to 53 of this Opinion.

1. The chameleon-like nature of the actio pauliana

76. In a nutshell, the principled reason why *actio pauliana* of the type in the main proceedings does not fit into any of the (special or exclusive) boxes of Regulation No 1215/2012 is the chameleon-like nature of that action. The individual heads of special jurisdiction, in particular such as those for contracts or delict/torts, are essentially (*ex ante*) *title based*. By contrast, an *actio pauliana* such as the one in the main proceedings, but apparently also present in a number of other Member States, is (*ex ante*) *title indeterminate*: any *legal act*, not just a contract, carried out to the detriment of the creditor, can be challenged.

77. It is quite likely that in practice, *actio pauliana* will often relate, in one way or another, to a contract. However, that does not necessarily mean that that underpinning will always be present. There can be, in fact, a double differentiation. First, the underlying right of the creditor can be of a different nature: it can be of statutory origin or it can be a right to receive compensation for harm caused or based on statutory obligation. Second, and perhaps more importantly, the allegedly fraudulent act itself committed by the debtor that is being challenged can be of a non-contractual nature. It could be a delict or tort. It could also be another unilateral legal act aimed at disadvantaging the creditors.

78. Looking at the specifics of the present case, *actio pauliana* such as that described in the order for reference seems to have a broad scope of application. Based on Article 527 et seq. of the Polish Civil Code, it appears to provide a legal remedy against *any* legal *act* of a debtor done to the detriment of creditors. As indeed underlined by the Polish Government at the hearing, that wording shows that it can be used by the creditor to protect their rights independently of the contractual or non-contractual nature of the allegedly fraudulent act.[54]

79. Unless and until filed, that action has no specific contractual or other content. Metaphorically speaking, much like a chameleon, an *actio pauliana* such as the one in the main proceedings appears to be able to camouflage itself depending on the type of legal act it wishes to challenge. Before the chameleon's contact with the respective background in question, it is impossible to state, in general, which colour it will adopt. That unique ability, however, prevents its classification under Regulation No 1215/2012, which for the special heads of jurisdictions to be applicable requires that colour to be known and foreseeable *ex ante*.

80. It seems this problem has already reared its head in the context of the Court's gradual exclusionary process over the years, in a nutshell meaning that that type of action cannot simply be classified abstractly, in general, and *ex ante* in order to fall under an abstract head of jurisdiction. Even if naturally carried out with regard to a defined national form of the *actio pauliana*, those exclusions also stand on a more general level, with regard to the principled answer.

81. Perhaps two additional remarks are called for in this regard. First, concerning the jurisdictional head for tort[55] it is true that the fraudulent nature of the property transfer shifts the *actio pauliana* quite close to the area of tort law. It could be suggested that, irrespective of what exact legal act of the debtor is being challenged, an *actio pauliana* could always be understood as type of a tort: essentially a type of fraud.[56]

54 See points 12 to 15 of this Opinion above.

55 Judgment of 26 March 1992, *Reichert and Kockler* (C-261/90, EU:C:1992:149).

56 Going thus indeed back to the Roman law roots of variously framed *fraus* (above point 30).

82. That being said, independently of the reasons for which the Court already excluded that head of jurisdiction in *Reichert II*,[57] conceiving of an *actio pauliana* as always being a type of delict or tort still creates a twofold problem: conceptual as well as pragmatic. On the conceptual level, the possible applicability to a broadly conceived ('chameleon-like') *actio pauliana* leads to similar problems as the application of the head of jurisdiction for matters relating to a contract.[58] On a pragmatic level, approaching an *actio pauliana* as always amounting to a delict or tort would lead to establishing yet another place of jurisdiction under Article 7(2) of the Regulation No 1215/2012, potentially different from that under Article 7(1) and/or Article 4(1).

83. Second, in the same judgment, the Court also excluded the application of head of jurisdiction for provisional measures.[59] However, it could be suggested that the *actio pauliana* creates a sort of lien burdening the property that was subject to the fraudulent disposal until the creditor's claim is satisfied. From that perspective, it has a similar function.

84. Considering the substantive requirements relating to provisional measures, it is a rather common feature that national laws subject the granting of those measures to the requirement of *fumus boni iuris* (presumption of sufficient legal basis which corresponds by and large to the common-law concept of a good arguable case) and *periculum in mora* (the risk that the claimant's right may be impaired by the lapse of time).[60] Similar requirements were also set out at the EU level.[61]

85. Thus, given the similarity of the function of *actio pauliana* on the one hand and of protective measures on the other hand, one could perhaps suggest that criteria similar to *fumus boni iuris* and *periculum in mora* could also be used in the context of *actio pauliana*. That would be in order to shift international jurisdiction in favour of the applicant where there are indications that that action may be well founded, and where there are elements showing the intention to structure the fraudulent transfer in such a way as to make litigation harder for the applicant (by choosing a transferee domiciled in a Member State otherwise unconnected to the pre-existing legal relationship between the debtor and the creditor).

86. However attractive such an approach may be, it fails to take into consideration the fact that *actio pauliana* does not institute 'incidental' proceedings not prejudging the merits (decided upon in different proceedings).[62] It is rather the contrary: *actio pauliana* seeks and leads to (when successful) a decision on merits in its own right. The *de facto* lien that is created as a result of it itself constitutes the result on merits that is sought by the creditor. It is thus in principle (subject to the respective national rules) a full-fledged action on merits which does not sit well with application of lighter tests of burden of proof that *fumus boni iuris* and *periculum in mora* presumably constitute.

87. In sum, the unique nature of the *actio pauliana*, which, even if approached on a more abstract level, does not warrant the reopening of any of the heads of jurisdiction already excluded by the Court, leads to my second interim conclusion that the court that has jurisdiction over an action such as the one in the main proceedings has to be determined pursuant to Article 4(1) of Regulation No 1215/2012.

57 Judgment of 26 March 1992, *Reichert and Kockler* (C-261/90, EU:C:1992:149, paragraph 19).

58 Discussed above in points 57 to 72 of this Opinion.

59 Judgment of 26 March 1992, *Reichert and Kockler* (C-261/90, EU:C:1992:149, paragraph 35). The current rule on jurisdiction for protective measures is provided for in Article 35 of Regulation No 1215/2012.

60 Calvo Caravaca, A.-L. and Carrascosa González, J., Litigación internacional en la Unión Europea I, Competencia judicial y validez de resoluciones en materia civil y mercantil en la Unión Europea. Comentario al Reglamento Bruselas I Bis, Cizur Menor (Navarra), Editorial Aranzadi, 2017, p. 535.

61 See, for instance, judgments of 9 November 1995, *Atlanta Fruchthandelsgesellschaft and Others (I)* (C-465/93, EU:C:1995:369, paragraph 32), and of 17 July 1997, *Krüger* (C-334/95, EU:C:1997:378, paragraph 44).

62 That is reflected also through two main conditions that the Court developed for that head of jurisdiction to apply — see, in particular, judgment of 17 November 1998, *Van Uden* (C-391/95, EU:C:1998:543, paragraphs 37 and 40).

2. Potential difficulties of the application of the general rule

88. Applied to the facts of the main proceedings, the general rule under Article 4(1) of Regulation No 1215/2012 will effectively lead to attributing the jurisdiction over the Applicant's claim to the Spanish courts. As explored in detail at the oral hearing, that solution may seem impractical given that both the Applicant and COLISEUM are domiciled in Poland, and as other elements of this case are also located in that Member State (the place of execution of the development project, location of the immovable property at issue, conclusion of the agreement of the sale of that property). It is 'only' the seat of the Defendant that is located in Spain.

89. Moreover, as the referring court recalls, the creditor may not only be obliged to bring an *actio pauliana* claim against the transferee (such as the Defendant) but also against potential other acquirers of the assets at issue. If the jurisdiction has to be determined based on the defendant's domicile, the creditor will have to bring further actions in the courts of (potentially) several Member States. That may lead to disproportionate costs and the detriment to the creditor will be compounded as a result of the rules governing jurisdiction.

90. It could thus be argued that the objective of sound administration of justice generally justifying the application of special heads of jurisdiction, encapsulated in recital 16 of Regulation No 1215/2012, should shift the competent forum to Poland because there would be a closer connection between that Member State and the dispute in the main proceedings.

91. That reasoning is not convincing.

92. First, the reference to the objective stated in a recital on which special heads of jurisdiction rely cannot, on its own, override the application of the main rule where the conditions for the application of the special head of jurisdiction are not satisfied.

93. Second, the defendant's domicile is precisely the *key* connecting factor for the purpose of application of Regulation No 1215/2012. Therefore, the fact that 'only' the Defendant's domicile is located in Member State A while all other elements are located in Member State B, does not establish the jurisdiction of Member State B, where none of the special or exclusive heads of jurisdiction can apply. In addition, the (implicitly dismissive) statement that 'only' the Defendant's domicile is located in Spain disregards the fact that the Defendant's awareness of the alleged fraudulent intent of COLISEUM constitutes an element that will need to be ascertained and that may be, for evidentiary purposes, linked with Spain.

94. Third, granting special jurisdiction on account of the facts of a particular case would (apart from infringing the jurisdictional rules in Regulation No 1215/2012) equate to effectively *presuming* the existence of the awareness of the fraud on the part of the transferee (such as the Defendant). Deciding on the matter of jurisdiction in this way would effectively prejudge the success of the *actio pauliana* in its entirety. However, whether the awareness and other conditions for a successful *actio pauliana* are established is a matter of assessment of the case on the merits.

95. On a structural level, that would effectively mean (while making no statement whatsoever on the facts of the present case) that there would be a 'presumption of fraud' for jurisdictional purposes, which would allow the Defendant to be attracted to the forum of the Applicant. That could perhaps work in case of a well-founded *actio pauliana* case. But what about those that are not founded? What about potentially vexatious proceedings? This again underlines the circularity of the proposition, which would effectively mean adjudicating first on merits and then deciding on jurisdiction.

96. Fourth, however tempting it may be to search for arguments favouring the Applicant litigating under circumstances similar to the ones in the present proceedings, such an approach would appear to be completely unjustified in situations where different factual elements relate to several Member States. What if a Czech company were to start a development project with a Polish contractor in relation to property located in Slovakia, with the Polish company disposing of immovable property located in Austria by transferring it to a German company?

97. In other words, what has to be sought is a *principled* answer that applies largely independently of the factual elements in an individual case. While fully acknowledging and commending the attractive flexibility of rules such as *forum (non) conveniens* that allow for derogation in the light of the facts of a specific case, the fact remains that the structure and the logic of the Brussels Convention and Regulations is indeed built on different premises.[63] What is understandably needed in a diverse legal space composed of 28 legal orders are *ex ante* reasonably foreseeable, and thus perhaps somewhat inflexible rules at times, and less of an *ex post facto* explanation (mostly as to why one declared oneself competent) heavily dependent on a range of factual elements.

98. All in all, in the current state of EU law, *actio pauliana* seems to be 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'.[64]

V. Conclusion

99. In the light of the above, I suggest that the Court respond to the questions posed by Sąd Okręgowy w Szczecinie (Szczecin Regional Court, Poland) as follows:

Article 7(1)(a) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that the notion 'matters relating to a contract' in that provision does not cover an action, such as the one in the main proceedings, by which a case is brought against a buyer established in one Member State, seeking a declaration that a contract for the sale of immovable property situated in the territory of another Member State is ineffective on the ground of detriment to the seller's creditor.

The court that has jurisdiction over such an action has to be determined pursuant to Article 4(1) of Regulation No 1215/2012.

63 See, in this context, judgment of 1 March 2005, *Owusu* (C-281/02, EU:C:2005:120, paragraphs 37 to 46). For a broader discussion, see Briggs, A., 'Some Points of Friction between English and Brussels Convention Jurisdiction', Andenas, M. and Jacobs, F., (eds.), *European Community Law in the English Courts*, Clarendon Press, Oxford, 1998, pp. 278 to 279; Briggs, A., *The Conflict of Laws*, 3rd edition. Oxford University Press, Oxford, 2013, pp. 52 to 54; Dickinson, A., 'Legal Certainty and the Brussels Convention — Too Much of a Good Thing?', De Vareilles-Sommières, P. (ed.) *Forum Shopping in the European Judicial Area*, Hart Publishing, Oxford and Portland, 2007, p. 115 *et seq.*; Fentiman, R., 'Foreign Law and the *Forum Conveniens*', Nafziger, J. and Symeonides, S., (eds.), *Law and Justice in a Multistate World, Essays in Honor of Arthur T. von Mehren*, Transnational Publishers Inc, Ardsley, New York, 2002, p. 291.

64 Göranson, U., 'Actio pauliana outside bankruptcy and the Brussels Convention', Sumampouw, M., et al. (eds.), *Law and Reality*: *Essays on National and International Procedural Law in Honour of Cornelis Carel Albert Voskuil*, T.M.C. Asser Instituut, The Hague, 1992, p. 97.