



Reports of Cases

OPINION OF ADVOCATE GENERAL
TANCHEV
delivered on 3 April 2019¹

Case C-722/17

**Norbert Reitbauer,
Dolinschek GmbH,
B.T.S. Trendfloor Raumausstattungs-GmbH,
Elektrounternehmen K. Maschke GmbH,
Klaus Egger,
Architekt DI Klaus Egger Ziviltechniker GmbH**
v
Enrico Casamassima

(Request for a preliminary ruling from the Bezirksgericht Villach (District Court, Villach, Austria))

(Reference for a preliminary ruling — Area of freedom, security and justice — Regulation (EU) No 1215/2012 — Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters — Special jurisdiction — Article 24(1) and (5) — Distribution of proceeds from a judicially ordered auction — Opposition proceedings — Article 7(1)(a) — Concept of ‘matters relating to a contract’ — *Actio pauliana*)

1. The present reference from the Bezirksgericht, Villach (District Court, Villach, Austria) concerns the interpretation of Articles 7 and 24 of Regulation (EU) No 1215/2012² in the context of Austrian ‘opposition proceedings’ which, as we shall see, in this case basically amount to an *actio pauliana* (in particular, for the purposes of Article 7 of that regulation).
2. Apparently, in around 150 to 125 BC, a *praetor* named Paulus 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 an *actio pauliana*.³ Article 1167, I, of the French ‘*Code Napoléon*’ provides for the first codified rule on the ‘*action paulienne*’ and states that creditors ‘peuvent aussi, en leur nom personnel, attaquer les actes faits par leur débiteur en fraude de leurs droits’.⁴
3. The present reference has been brought in the context of the ‘opposition proceedings’ provided for in Paragraph 232 of the Exekutionsordnung (Austrian Enforcement Code, ‘the EO’) in a dispute arising with respect to the distribution of proceeds from a judicially ordered auction of a house. The action is between the traders Norbert Reitbauer, Dolinschek GmbH, B.T.S. Trendfloor

¹ Original language: English.

² Regulation 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 (OJ 2012 L 351, p. 1, ‘the Recast Brussels I Regulation’).

³ See the Opinion of Advocate General Bobek in *Feniks* (C-337/17, EU:C:2018:487, point 2, referring to the Opinion of Advocate General Ruiz-Jarabo Colomer in *Deko Marty Belgium* (C-339/07, EU:C:2008:575, points 24 to 26)).

⁴ Pretelli, I., ‘Cross-border credit protection against fraudulent transfers of assets: *actio pauliana* in the conflict of laws’, *Yearbook of private international law*, Vol. XIII/2011 (2012), p. 590. That article of the French *Code civil* was replaced in 2016 by Article 1341-2: ‘Le créancier peut aussi agir en son nom personnel pour faire déclarer inopposables à son égard les actes faits par son débiteur en fraude de ses droits, à charge d’établir, s’il s’agit d’un acte à titre onéreux, que le tiers cocontractant avait connaissance de la fraude.’

Raumausstattungs-GmbH, Elektronunternehmen K. Maschke GmbH, Klaus Egger and Architekt DI Klaus Egger Ziviltechniker GmbH ('the applicants'), on the one hand, and Dr Enrico Casamassima (lawyer, 'the defendant'), on the other. The applicants contend that their claim over the proceeds of the sale takes precedence over the defendant's claim and that the Austrian court has jurisdiction under the Recast Brussels I Regulation.

4. Although the referring court has submitted questions for a preliminary ruling in relation to Article 24(1) and (5) of the Recast Brussels I Regulation, I have come to the conclusion that it is instead Article 7 of that regulation which may provide the legal basis for the jurisdiction of the referring court in this case.

I. Legal context

A. EU law

1. The Recast Brussels I Regulation

5. Chapter II of this regulation, entitled 'Jurisdiction', contains in particular a Section 1 ('General provisions') and a Section 2 ('Special jurisdiction'). Article 4(1), which can be found in Section 1, provides that, 'subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State'.

6. According to Article 7(1)(a), which can be found in Section 2 of the same regulation, 'a person domiciled in a Member State may be sued in another Member State ... in matters relating to a contract, in the courts for the place of performance of the obligation in question'.

7. Article 24(1) and (5) provides:

'The following courts of a Member State shall have exclusive jurisdiction, regardless of the domicile of the parties:

(1) in proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated.

...

(5) in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced.'

B. Austrian law

8. Regarding the nature of the opposition proceedings pursuant to Paragraph 232 of the EO, the distribution of proceeds from the compulsory auction of real property must be negotiated in an oral hearing; to this end, the creditors are requested to register their claims to the distribution proceeds and to provide documentary evidence. During the hearing, the accuracy and the ranking of the claims are examined. The creditors and the debtor can oppose claims being taken into account. The opposition can be based on the accuracy, in certain cases on the due date, of the total claim or of parts of the claim, on the liability of the real property and on the ranking in the land register, in particular also on the validity of the acquired pledge.

9. As far as relevant here, the *Anfechtungsordnung* (Austrian Avoidance Code, which is the Austrian law concerning the *actio pauliana*, ‘the AnfO’), provides that the creditor has a right of avoidance if enforcement proceedings against the debtor’s assets did not or would not cover the creditor’s claims in full and avoidance proceedings offer the prospect of the claims being fulfilled. Avoidance proceedings can be brought on grounds of fraudulent intention or the dissipation of assets, including any disposals made free of charge. If the debtor carries out the legal act with the intention of placing his creditors at a disadvantage, and the other party is aware of such intention, the period within which to declare that such act is being contested is 10 years, in all other cases 2 years. Contesting an act is not precluded by reason of the fact that a judicially enforceable instrument has been obtained for the act to be contested or that the act was brought about by way of enforcement.

II. The dispute in the main proceedings and the questions referred for a preliminary ruling

10. In this case the Court is asked whether legal proceedings which are termed under the EO as ‘opposition proceedings’ come within the scope of Article 24(5) of the Recast Brussels I Regulation, when such proceedings concern a disagreement between competing creditors over the distribution of proceeds from a judicially ordered auction of a house.

11. More specifically, the referring court raises the question in a context in which it is alleged in the ‘opposition proceedings’ that the claim of creditor A (the defendant Mr Casamassima), which arises from a loan agreement secured by a pledge, and which competes with a counterclaim of creditors B (the applicants Reitbauer and Others) is invalid due to the (wrongful) preferential treatment of creditor A. This objection is similar to what is known under Austrian law as an action for avoidance (*Anfechtungsklage*).

12. In the event of a negative answer to the first question, the referring court asks whether the same opposition proceedings fall within Article 24(1) of the Recast Brussels I Regulation.

13. The facts can be summarised as follows on the basis of what is set out in the order of reference.

14. The defendant and Isabel C. (‘the debtor’) are resident in Rome, Italy, and lived together, at least until the spring of 2014. In 2010, they purchased a house in Villach, Austria; and the debtor was registered in the land register as being the sole owner. The order for reference states, without providing further elaboration, that contracts for extensive renovation work of the house were entered into between the debtor and the applicants, contracts which were entered into with the ‘participation’ of the defendant.

15. Because the costs of the renovation work far exceeded the original budget, payments to the applicants were suspended. From 2013 onwards, the applicants were therefore involved in judicial proceedings in Austria against the debtor; in early 2014, the first judgment was handed down in favour of the applicants, and others followed. The debtor appealed against those judgments.

16. On 7 May 2014, in Italy before a court in Rome, the debtor acknowledged the defendant’s claim against her with respect to a loan agreement, amounting to EUR 349 772.95,⁵ and undertook to pay this amount to the latter within five years under a court settlement. In addition, the debtor undertook to have a mortgage registered on the house in Villach (Austria) in order to secure the defendant’s claim.

⁵ The defendant explained that this sum is the result of a debt claim and a counterclaim. The debtor requested the defendant to pay her EUR 70 000 for overtime work. Then, in proceedings in Italy, the latter requested the former to pay approximately EUR 380 000 for the purchase of the house and the works. According to the defendant, the house belonged *formally* only to the debtor, who was registered as the sole owner, but the funds were provided by the defendant. Finally, the two parties reached an agreement, whereby the defendant would obtain the sum of money for the house, would pay the debtor for overtime work (in part) and the outstanding amount equals EUR 349 722.95.

17. On 13 June 2014 a (further) certificate of indebtedness and pledge certificate was drawn up under Austrian law in Vienna by an Austrian notary to guarantee the above arrangement (pledge 1). With this certificate, the pledge on the house in Villach was created on 18 June 2014.

18. The judgments in favour of the applicants did not become enforceable until after this date. The pledges on the house of the debtor held by the applicants, obtained by way of legal enforcement proceedings (pledge 2), therefore rank behind the contractual pledge 1 in favour of the defendant.

19. On 3 September 2015, the court in Rome confirmed that the court settlement of 7 May 2014 constituted a European Enforcement Order.⁶

20. In order to realise the pledge, the defendant applied in February 2016 to the referring court (Bezirksgericht Villach (District Court, Villach, Austria)) for an order against the debtor, requiring a compulsory auction of the house in Villach. The house was auctioned off in the autumn of 2016 for EUR 280 000. The order of entries in the land register shows that the proceeds would go more or less entirely to the defendant because of pledge 1 (registered under Austrian law in June 2014).

21. With a view to preventing this, the applicants brought an action for avoidance (*Anfechtungsklage*) in June 2016 before the Landesgericht Klagenfurt (Regional Court, Klagenfurt, Austria) against the defendant and the debtor. The action was dismissed by that court ‘due to a lack of international jurisdiction in view of the [debtor’s and the defendant’s] domicile’ outside of Austria. In July 2017, that decision became final.

22. At the same time the applicants filed an opposition before the referring court (Bezirksgericht Villach (District Court, Villach)) at the hearing of 10 May 2017 regarding the distribution of the proceeds from the compulsory auction, and subsequently brought opposition proceedings, as provided for in the EO, against the defendant.

23. In these opposition proceedings, the applicants seek a declaration that the decision regarding the distribution to the defendant of EUR 279 980.43 was not legally valid in so far as: (i) the debtor had damages claims against the defendant⁷ of at least the same amount as the claim arising from the loan agreement, with the result that a claim no longer existed (they claim that the debtor confirmed that the defendant had placed orders with the applicants without her knowledge and consent); and (ii) the certificate of indebtedness and pledge certificate of June 2014 were drawn up merely as a formality and for the purpose of pre-empting and preventing the applicants from bringing any enforcement proceedings in relation to the house.

24. The defendant submitted a plea of lack of jurisdiction against the opposition proceedings. The applicants argue that the referring court has jurisdiction pursuant to Article 24 of the Recast Brussels I Regulation.

25. It is against this background that the Bezirksgericht, Villach (District Court, Villach) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘[1.] Must Article 24(5) of [the Recast Brussels I Regulation] be interpreted as meaning that the opposition proceedings provided for in Paragraph 232 of the [EO] in the event of a dispute regarding the distribution of proceeds from a judicially ordered auction come within the scope of application of that provision,

⁶ Pursuant to Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (OJ 2004 L 143, p. 15).

⁷ The applicants submit that on 21 July 2015 the debtor introduced before the civil tribunal in Rome an action seeking damages of EUR 517 340 from the defendant. Therefore, ‘those circumstances prove that the claim of the latter which was secured by a pledge no longer existed’.

even if the action brought by one pledgee against the other pledgee

- (a) is based on the objection that the latter's claim arising from a loan agreement, which was secured by a pledge, no longer existed due to a counterclaim of the debtor for damages, and
- (b) is furthermore based on the objection — similar to an action for avoidance (*Anfechtungsklage*) — that the creation of the pledge for that claim under a loan agreement was invalid due to the preferential treatment of creditors?

[2.] If Question 1 is answered in the negative:

Must Article 24(1) of [the Recast Brussels I Regulation] be interpreted as meaning that the opposition proceedings provided for in Paragraph 232 of the [EO] in the event of a dispute regarding the distribution of proceeds from a judicially ordered auction come within the scope of application of that provision,

even if the action brought by one pledgee against the other pledgee

- (a) is based on the objection that the latter's claim arising from a loan agreement, which was secured by a pledge, no longer existed due to a counterclaim of the debtor for damages and
- (b) is furthermore based on the objection — similar to an action for avoidance — that the creation of the pledge for that claim under a loan agreement was invalid due to the preferential treatment of creditors?

26. Written observations were submitted to the Court by the applicants, the defendant, the Portuguese and Swiss Governments and the European Commission. At the hearing on 16 January 2019, the above parties, save for the two governments, presented oral argument.

III. Analysis

A. Summary of the positions of the parties

27. The applicants submit in essence that it is possible to rely on jurisdiction for proceedings concerned with the enforcement of judgments pursuant to Article 24(5) of the Recast Brussels I Regulation or, failing that, under Article 24(1) of that regulation *inter alia* because the opposition proceedings present a direct connection to the enforcement proceedings.

28. The defendant contends in substance that Article 24(5) of that regulation is not applicable to the action in question. He argues that the action lacks a direct connection to official enforcement measures; a substantive examination of the pledge entered into in favour of the defendant is being sought. By its nature, the action lodged is equivalent to an action for avoidance; and the Court has already ruled that this jurisdiction is not applicable to actions for avoidance.⁸ This must therefore also apply if the action for avoidance is exercised by way of an opposition against the distribution and ensuing opposition proceedings. Moreover, Article 24(1) of the Recast Brussels I Regulation is not applicable, as in the opposition proceedings the connection with the location of the house at issue is lacking (the opposition proceedings took place only after the immovable property had been auctioned off by the court).

⁸ Judgment of 26 March 1992, *Reichert and Kockler* ('*Reichert II*'), C-261/90, EU:C:1992:149.

29. The Portuguese Government and the Commission submit in essence that it follows from the judgments of 4 July 1985, *AS Autoteile* (220/84, EU:C:1985:302), of 10 January 1990, *Reichert and Kockler* (*Reichert I*, C-115/88, EU:C:1990:3), and of 16 November 2016, *Schmidt* (C-417/15, EU:C:2016:881), that the scope of application of Article 24(1) and (5) of the Recast Brussels I Regulation does not cover the opposition proceedings at issue here.

30. The Swiss Government contends essentially that the opposition proceedings form part of the framework of enforcement proceedings and thus come within the scope of Article 24(5) of the Recast Brussels I Regulation. Should that action be also considered to constitute an *actio pauliana*, then the question of jurisdiction would have to be dealt with separately. Given the affirmative answer to the first question, that government considers the second question to be moot.

B. Assessment

1. Preliminary remarks

31. First, in his observations, the defendant suggested that the Court should answer an additional preliminary question. That request cannot be granted in so far as the national court alone has jurisdiction to find and assess the facts in the case before it and to interpret and apply national law.⁹ The parties may not change the tenor of the questions that the referring court decides to put to the Court¹⁰ and it is not for the Court to examine other preliminary questions submitted by the parties to the main proceedings.¹¹ While those parties are free to propose preliminary questions to the referring court, the latter is not bound by such demands when it makes a reference to the Court.

32. Secondly, there seems to be some disagreement among the parties as to what constitutes the relevant pledge in dispute in the main proceedings. The parties appeared to argue at the hearing that it was either the arrangement in Italy between the defendant and the debtor or the act drawn up by the Austrian notary with respect to that arrangement. However, it follows clearly from the order for reference that it was the pledge certificate drawn up in Vienna by the Austrian notary between the defendant and the debtor which formed the basis of the pledge on the house in Villach. That pledge was created on 18 June 2014. The judgments in favour of the applicants did not become enforceable until after that date. The court settlement of 7 May 2014 was confirmed as a European Enforcement Order on 3 September 2015, that is to say, a year after the constitution of the pledge on the house.

33. The referring court invites the Court to examine in essence whether the exclusive jurisdiction rules, provided in Article 24(1) and (5) of the Recast Brussels I Regulation, should, in relation to the ‘opposition proceedings’, be determined on the basis of the function of the action as a whole or on the basis of the actual and individual objections raised.

34. As I will explain in my analysis below, Article 24(1) and (5) of that regulation is not applicable in the present case. However, I have come to the conclusion that in fact it is Article 7(1) of the same regulation which may provide the legal basis for the jurisdiction of the referring court in this case.

⁹ Judgment of 11 September 2008 in *Eckelkamp and Others*, C-11/07, EU:C:2008:489, paragraph 32 and the case-law cited.

¹⁰ Judgment of 6 October 2015, *T-Mobile Czech Republic and Vodafone Czech Republic* (C-508/14, EU:C:2015:657, paragraph 28 and the case-law cited).

¹¹ See, to this effect, judgments of 11 July 2013, *Belgian Electronic Sorting Technology* (C-657/11, EU:C:2013:516, paragraph 31), and of 8 June 2016, *Hünnebeck* (C-479/14, EU:C:2016:412, paragraph 36, and the case-law cited).

2. *First preliminary question (Article 24(5) of the Recast Brussels I Regulation)*

35. I submit (as does the Commission) that to consider the opposition proceedings *as a whole* as a procedure relating to execution of decisions would not be compatible with the derogatory character of the exclusive jurisdiction provided for under Article 24(5) of the Recast Brussels I Regulation, in so far as the content of those proceedings may vary considerably and they encompass claims which are very diverse.

36. This is so not least because that provision must not be given a wider interpretation than is required by its objective (judgment of 26 March 1992, *Reichert v Dresdner Bank* ('*Reichert II*'), C-261/90, EU:C:1992:149, paragraph 25).

37. It is true that the action in the main proceedings is brought in the context of the distribution of proceeds from a judicially ordered auction and that the ultimate objective of the applicants is to obtain the fulfilment of their claims from the proceeds of that auction. However, that does not mean that there is an automatic close connection with 'recourse to force, constraint or distraint on movable or immovable property in order to ensure the effective implementation of judgments and authentic instruments' as required by the judgment of 26 March 1992, *Reichert v Dresdner Bank* ('*Reichert II*'), C-261/90, EU:C:1992:149, paragraphs 26 and 27, and by the Jenard report.¹²

38. Therefore, in order to establish such a close connection (and exclusive jurisdiction), it is necessary to examine every individual claim. In other words, relying in a global and abstract way on the type of action should be rejected in the present case, in so far as that is the only manner in which it is possible to respect the spirit and the objective of this derogation.

(a) *The applicants' first objection*

39. The applicants allege that the claim arising from the loan agreement, which was secured by a pledge, no longer existed due to a counterclaim of the debtor for damages from the defendant. However, verifying the merits of that objection would require the referring court to carry out an examination which departs considerably from the questions concerning the implementation of the judicially ordered auction as such.

40. Such a situation would be comparable to the one examined in *AS Autoteile*,¹³ in which the Court rejected the argument that a party — in an application to oppose enforcement made to the courts of the contracting State in which enforcement is to take place — to plead a set-off between the right the enforcement of which is being sought and a claim over which the courts of that State would have no jurisdiction if it were raised independently. The Court relied on the system of the Convention¹⁴ and on the derogatory character of its Article 16 and held that the action at issue was contrary to the allocation of competences between the courts of the defendant's domicile and the courts of the place of enforcement.

41. Such a situation is comparable to that here, in which the claim for compensation is in relation to a debt which must be enforced, in the absence of international jurisdiction of the enforcement court if that counterclaim were raised independently (in other words, if it were the subject of an independent action).

12 Report by Mr P. Jenard on the Protocols of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 29 February 1968 on the mutual recognition of companies and legal persons and of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1979 C 59, p. 66).

13 Judgment of 4 July 1985, 220/84, EU:C:1985:302. In paragraph 13 the Court considered 'the point whether, in enforcement proceedings, a party may raise an objection based on a debt over which the courts of the Contracting State in which enforcement is to take place would have no jurisdiction if an independent action were brought on that debt'.

14 Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36).

42. Extending international exclusive jurisdiction to such a case — concerning debt rights or rights of a tort nature *prima facie* independent of the enforcement action — would go beyond what is required by the objective of the provision in question.

43. Therefore, the first objection does not justify exclusive jurisdiction of the referring court under Article 24(5) of the Recast Brussels I Regulation.

(b) The applicants' second objection

44. This objection concerns the notarial act recognising the debt of 13 June 2014. In that context, the applicants seem to be opposing the document on which the judicially ordered auction was based, but do not oppose the manner in which the enforcement authorities proceeded in and of itself. Therefore, it is possible to draw a parallel with the judgment of 26 March 1992, *Reichert v Dresdner Bank* ('*Reichert II*'), C-261/90, EU:C:1992:149.

45. In paragraph 28 of that judgment, the Court ruled that, admittedly, an action such as the *actio pauliana* under French law seeks to protect the creditors' interests. However, 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" and does not therefore come within the scope of Article 16(5) of the Convention'.

46. In view of the foregoing considerations, Article 24(5) of the Recast Brussels I Regulation (which essentially corresponds to Article 16(5) of the Convention) should be interpreted as meaning that the opposition proceedings pursuant to Paragraph 232 of the EO do not come, as such, within the scope of application of Article 24(5). Instead, every individual objection needs to be examined. Objections concerning the non-existence of a claim underlying a judicially ordered auction and concerning the invalidity of the creation of the pledge for that claim under a loan agreement do not have a sufficiently close connection with enforcement proceedings (the referring court itself states in paragraph 45 of the order for reference that this might be so) and may not justify exclusive jurisdiction under Article 24(5).

3. Second preliminary question (Article 24(1) of the Recast Brussels I Regulation)

47. In the event that the first question should be answered in the negative, the referring court wishes to know whether exclusive jurisdiction may be founded on Article 24(1).

48. I agree with the Commission that the same reasoning must necessarily apply also to the second preliminary question, given that the exclusive jurisdiction under Article 24(1) too constitutes derogation from the general principle.

49. The exceptional character of the strict interpretation has been recently recalled in the judgment of 16 November 2016, *Schmidt* (C-417/15, EU:C:2016:881, paragraphs 27-34), where the Court ruled in essence that, in a situation where the action in the main proceedings contains several objections, the examination must be carried out on each objection and should not be based on the type of action in general.

50. Therefore, in line with the arguments presented in the analysis of the first question referred (which are essentially transposable here), the examination under Article 24(1) of the Recast Brussels I Regulation should be based on each individual objection.

51. I refer again to the above judgment in *Schmidt* (paragraph 34): ‘it is not sufficient that the action concerns a right *in rem* in immovable property or that the action have a link with immovable property in order to attract the jurisdiction of the court of the Member State in which the property is situated’.

52. The applicants are seeking an order for the proceeds from the judicially ordered auction not to be (entirely) paid to the defendant. According to the referring court, ‘the main issue [is] whether and to what extent the defendant creditor participates in the distribution’. In that regard, the action is based on two objections: (i) on the underlying debt/claim — that the claim arising from a loan agreement no longer existed; and (ii) on the underlying pledge — that the creation of the pledge for that claim under a loan agreement was created with the intention to commit fraud.

(a) The applicants’ first objection

53. It follows from the above point that the first objection is devoid of *in rem* character in the present case, since what is at stake is the existence of rights between the debtor and the defendant. This right formed the basis of the creation of the pledge at issue by the defendant and of the enforcement proceedings which followed.

54. It is true that the existence of the claim, and of the underlying right, served as the basis for the creation of the pledge *in rem* and the ensuing enforcement proceedings. However, as the Commission has pointed out, in the context of that objection, the right *in rem* is neither the main motive of the action nor the subject matter of the proceedings. Particular analysis of the facts is not required to determine whether the claim of the defendant creditor vis-à-vis the debtor no longer exists. Nor does it require the application of the rules and customs of the place where the immovable property is located (which is the only circumstance that would justify exclusive jurisdiction). The examination of the first objection merely has an automatic effect on the constitution of the pledge *in rem* and on the enforcement proceedings, but it does not constitute the main motive for the action.

(b) The applicants’ second objection

55. The applicants call into question the validity of the creation of pledge 1 in favour of the defendant. It follows from the order for reference that this objection should be regarded as an *actio pauliana*. In that regard, a parallel must necessarily be drawn with the judgment of 10 January 1990, *Reichert and Kockler* (*Reichert I*, C-115/88, EU:C:1990:3, paragraph 12).

56. There the Court held that the French ‘*action paulienne*, however, is based on the creditor’s personal claim against the debtor and seeks 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’.

57. The applicants submit that the creation of the pledge for the claim at issue was done with the fraudulent purpose of removing the house at issue from their reach.

58. However, the examination of the question whether the conditions of an *actio pauliana* are met does not presuppose an assessment strictly linked with the house in Villach, which would in and of itself justify exclusive jurisdiction (judgment of 16 November 2016, *Schmidt* (C-417/15, EU:C:2016:881)).

59. Even if the action has some connection to that house and the related distraint rights, those connection points are not sufficiently strong to establish exclusive jurisdiction under Article 24(1) of the Recast Brussels I Regulation.

60. Therefore, that provision is not applicable to a dispute such as the one in the main proceedings.

61. Having said that, I consider that, in order to provide the referring court with an answer which will be useful for resolving the dispute before it, it is necessary for the Court to examine also the potential applicability in the present case of Article 7(1) of the Recast Brussels I Regulation¹⁵ (which concerns matters relating to a contract).

4. Article 7(1) of the Recast Brussels I Regulation

62. It is true that the referring court does not expressly ask the Court to provide a preliminary ruling on other rules of jurisdiction provided for in that regulation.

63. However, ‘the fact that a national court has, formally speaking, worded its request for a preliminary ruling with reference to certain provisions of EU law does not preclude the Court of Justice from providing to the national court all the elements of interpretation which may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to them in its questions. It is for the Court to extract from all the information provided by the national court, in particular from the grounds of the order for reference, the points of EU law which require interpretation, having regard to the subject matter of the dispute’.¹⁶

64. Given the fact that, in particular, in *Reichert I* and *Reichert II*¹⁷ the Court ruled that the *actio pauliana* comes within the scope of neither Article 16(1) of the Convention (which essentially corresponds to Article 24(1) of the Recast Brussels I Regulation) nor Articles 5(3), 16(5) (now essentially Article 24(5) of the above regulation) and 24 of the Convention, either we need to acknowledge that the principle *actor sequitur forum rei* does not tolerate any exception in cases concerning the *actio pauliana*, or the only alternative *forum* is the *forum contractus* in Article 5(1) of the Brussels Convention¹⁸ (now Article 7(1) of the Recast Brussels I Regulation) — it follows from the scheme of that regulation that, if its Article 24 (exclusive jurisdiction) is not applicable, then we may turn to its Article 7 (special jurisdiction).

65. I consider the second alternative to be the correct one.

66. For instance, that approach has already been upheld by national supreme courts (such as the Italian *Corte di cassazione*, which allowed a party (Ms Corkran) to challenge the contract by which her debtor and former husband had sold an immovable property situated in Italy to a company incorporated in the British Virgin Islands).¹⁹

67. Importantly, in the course of these proceedings before the Court and prior to the hearing in the present case, the Court of Justice also upheld that approach in its judgment in *Feniks*,²⁰ a case pertaining to an *actio pauliana*.

¹⁵ cf. judgment of 28 June 1978, *Simmenthal* (70/77, EU:C:1978:139, paragraph 57).

¹⁶ Judgment of 29 September 2016, *Essent Belgium* (C-492/14, EU:C:2016:732, paragraph 43).

¹⁷ Respectively, judgments of 10 January 1990, *Reichert and Kockler* (C-115/88, EU:C:1990:3), and of 26 March 1992, *Reichert v Dresdner Bank*, C-261/90, EU:C:1992:149.

¹⁸ Pretelli, I, op. cit., p. 603. See also, to this effect, the 13th Report On National Case Law Relating To The Lugano Conventions, by Borrás, A., Neophytou, I., and Pocar, F., May 2012. On *actio pauliana*, see also the oft cited Göranson, U., *Actio Pauliana outside bankruptcy and the Brussels Convention, Law and Reality*, in Essays on National and International Procedural Law in Honour of Voskuil, Dordrecht, 1992, in particular p. 101 et seq.

¹⁹ Pretelli, I., Cass. sez. Un. 7.3.2003 n. 6899, *Corkran c. Casa Napoleone Ltd e Cashin*, Rev. crit. dr. int. pr. 2003, p. 612 et seq.

²⁰ Judgment of 4 October 2018, *Feniks* (C-337/17, EU:C:2018:805). Given the large number of references to this judgment, I will hereafter refer to it simply as the ‘judgment in *Feniks*’.

68. In the judgment in *Feniks*, the Court ruled that where the *actio pauliana* is based on debts arising from obligations entered into by the conclusion of a contract, the holder of those debts may bring that action in the courts ‘for the place of performance of the obligation in question’. Were it otherwise, the creditor would be bound to bring its action before the courts of the place where the defendant is domiciled, which forum possibly has no link to the obligations of the debtor with regard to its creditor. In that case, since the action was brought by the creditor to preserve his interests in the performance of the obligations flowing from the contract for construction works, it follows that ‘the place of performance of the obligation in question’ is, under that contract, the place where the works were carried out. The Court took the view that such a conclusion satisfied the objective of the predictability of the rules of jurisdiction, especially in the case where a professional who entered into a contract for the purchase of immovable property can — where a creditor of the other party to that contract claims that the contract unduly hinders the performance of that other party’s obligations vis-à-vis that creditor — reasonably expect to be sued in the courts of the place of performance of those obligations.

69. The phrase ‘matters relating to a contract’ must not be taken as referring to how the legal relationship in question is classified by the relevant national law (judgment of 17 June 1992, Handte, C-26/91, EU:C:1992:268, paragraph 10). Generally, the wording of Article 7(1) of that regulation should not be overrated in this respect since the versions in the different languages are sometimes wider (*‘en matière contractuelle’* in French, *‘in materia contrattuale’* in Italian, ‘matters relating to a contract’ in English), sometimes narrower (*‘verbintenissen uit overeenkomst’* in Dutch) and sometimes in-between (*‘wenn ein Vertrag oder Ansprüche aus einem Vertrag den Gegenstand des Verfahrens bilden’* in German).²¹

70. In the present case, the applicants carried out renovation works on the house in Villach, which belonged to the debtor, on the basis of a contract (contracts) concluded with her. The debtor subsequently failed to pay for (all) the works.

71. Therefore, since there are contractual relations between the applicants and the debtor — contracts related to the renovation works on the house (and potentially also between the debtor and the defendant — see, for instance, the creation of the pledge in the land registry), the applicants may rely on Article 7(1)(a) of the Recast Brussels I Regulation in order to bring an action before the courts in ‘the place of performance of the obligation in question’, that is to say, in Austria, the place where the renovation works were carried out.

72. It is possible to draw the following conditions from the judgment in *Feniks* in order for an *actio pauliana* to found a contractual jurisdiction.

73. First, it is necessary that there should be a triangular relationship between the applicants and the defendant. All are creditors of the debtor: there is, in principle, a contractual relationship between the applicants and the debtor, but not between the creditors (between the applicants and the defendant).

74. Secondly, there are claims existing between the applicants and the defendant which follow from an infringement of obligations that the debtor granted to the applicants. As the Court held in the judgment in *Feniks*, paragraph 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*’ (emphasis added).

²¹ See Martiny, D., ‘Internationale Zuständigkeit für “vertragliche Streitigkeiten”’, in *Einheit und Vielfalt des Rechts: Festschrift für Reinhold Geimer zum 65. Geburtstag*, 2002, p. 641 and 648, and Magnus, U., and Mankowski, M., *ECPIL Commentary — Volume I, Brussels Ibis Regulation*, p. 163.

75. Thirdly, the debtor transfers his assets to a third party, *in casu* the defendant. That leads to a loss/damage for the applicants, who assert their rights from the contract concluded with the debtor.

76. We are dealing with obligations originating in contracts when (to cite paragraph 44 of the judgment in *Feniks*) ‘the *actio pauliana* ... is brought on the basis of the creditor’s rights created upon the conclusion of a contract’.

77. The judgment in *Feniks* does not require (at least not explicitly) the knowledge by the defendant of the first contract, nor does it require an intention to defraud. However, in the present case, there was certainly knowledge of the third party and there was perhaps even intention to defraud,²² given the personal and organisational connections which exist between the debtor and the third party (the defendant). In fact, while it is true that the information available to the Court in this regard is limited, it can be pointed out that, *prima facie* at least, the timing of the creation of the pledge between the debtor and the defendant may cast certain doubts on the genuineness of the operation, because it appears that the main objective (and the timing does not appear to be happenstance) was to impair the satisfaction of the creditors’ claims. As the applicants pointed out at the hearing, there was a certain chain of events: first, one of the creditors had introduced a claim and there was already an execution order in relation to the house in Villach (even though it had been rejected at that stage). It was only then that the pledge at issue was created. In any event, it is clear that the defendant had knowledge of the foregoing as well as of the contractual obligations of the debtor before creating the pledge.

78. It follows from the foregoing considerations that the solution in the judgment in *Feniks* may be transposed to the present case.

79. This will ultimately be a matter for the referring court to verify and the onus to plead the facts supporting jurisdiction under Article 7 of the Recast Brussels I Regulation is generally on the applicant²³ (that is, on the party invoking a specific ground of jurisdiction under that Article 7). During the oral hearing, the parties were able to take position on the judgment in *Feniks* and, in particular, the applicants argued that it supports their position that the referring court has exclusive jurisdiction.

80. As the Commission rightly pointed out at the hearing, the triangular relationship seems comparable in both cases. It is possible to conclude that the defendant knew that the debtor had not discharged her contractual obligations vis-à-vis the applicants. In fact, it appears from the documents before the Court that it was the defendant himself who ordered the works and was in charge of surveying them as well as, in pending proceedings since 2013 between the applicants and the debtor (that is, even before the creation of the pledge in 2014), the defendant always acted as a witness to the debtor.

81. The defendant explained at the hearing that there was a framework agreement between the architect (Mr Egger, who is one of the applicants in the present case) and the debtor: the former acting as architect but also as the general contractor (meaning that various contracts were concluded with other companies under his direction). These individual companies challenged the debtor over non-payment of invoices. As for the defendant, he provided the funds for the purchase of the house and for the renovation works ‘and, in part, acted as the person in charge and signed the contracts’.

²² See in this connection, by analogy, ‘although ... the national courts may, case by case, take account — on the basis of objective evidence — of abuse or fraudulent conduct on the part of the persons concerned in order, where appropriate, to deny them the benefit of the provisions of [EU] law on which they seek to rely, they must nevertheless assess such conduct in the light of the objectives pursued by those provisions’ (judgment of 9 March 1999, *Centros*, C-212/97, EU:C:1999:126, paragraph 25).

²³ Magnus, U., and Mankowski, M., *op. cit.*, p. 145.

82. Two of the main objectives of the Recast Brussels I Regulation are, first, to strengthen legal protection of persons domiciled in the European Union by enabling the applicants to have easy access to the courts in which they choose to sue. Second, that regulation aims at enabling defendants reasonably to foresee the courts in which they may be sued.²⁴

83. While I agree that we need to avoid a situation in which the defendant finds himself sued before a jurisdiction which he could not reasonably have foreseen (recital 16 of the Recast Brussels I Regulation, see point 96 of the present Opinion), that is clearly not the case here.

84. Given the fact that in the judgment in *Feniks* the jurisdiction in contractual matters in disputes brought against a third party was extended to an *actio pauliana* even though there was no contractual relationship between the applicant and the defendant, knowledge of a third party should act as a limiting factor: as in the present case, the third party needs to know that the legal act binds the defendant to the debtor and that that causes harm to the contractual rights of another creditor of the debtor (the applicants).

85. As follows from the order for reference, ‘with the second objection put forward in the present action, the applicants are exercising ... the right of avoidance in the context of a distribution made as part of the enforcement proceedings against the defendant’ (that is, an *actio pauliana*). This is entirely comparable to the *actio pauliana* in the case which gave rise to the judgment in *Feniks*.

86. Therefore, jurisdiction in contractual matters is applicable and the referring court is competent.

87. However, the first objection put forward by the applicants consists in contesting the claim underlying the pledge. The order for reference mentions a claim of the debtor for damages, and therefore compensation, but it does not indicate clearly whether that objection can also be considered to constitute an *actio pauliana* under national law.

88. I consider that it follows from the judgment in *Feniks* that that consideration is not decisive per se. I agree with the Commission that, given that the judgment in *Feniks* determines the conditions for jurisdiction in contractual matters in the context of an *actio pauliana* which is based on a contract, we are not relying on the conditions of the *actio pauliana* in detail under national law — not least because those conditions will necessarily vary between the Member States.

89. For instance, the *actio pauliana* is foreseen in the legal systems of numerous Member States, but there are clear differences between the various systems. Certain Member States consider this action to be a contractual instrument and others consider it to be a non-contractual instrument, whilst in certain Member States that action is possible only in the context of insolvency proceedings.²⁵

90. Therefore, the jurisdiction in contractual matters foreseen by the Recast Brussels I Regulation cannot depend on the concrete form of an *actio pauliana* pursuant to national law. If the *actio pauliana* originates in the execution of a contractual obligation between the applicants and the debtor, the jurisdiction in contractual matters will be applicable to an action brought against a third party to whom the debtor had transferred assets.

²⁴ Judgment of 19 February 2002, *Besix* (C-256/00, EU:C:2002:99, paragraph 26). See Magnus, U., and Mankowski, M., op. cit.

²⁵ Cf. Göranson, U., op. cit., p. 89.

91. In paragraph 47 of the judgment in *Feniks*, the Court ruled that ‘such a conclusion meets the objective concerning the predictability of the rules relating to jurisdiction, all the more since a professional who has concluded a contract for the sale of immovable property may, where the creditor of the other contracting party objects that the contract obstructs the performance of obligations which the other contracting party has towards that creditor, reasonably expect to be sued in the courts of the place of performance of these obligations’.

92. In that connection, the defendant’s knowledge of the existence of the contract(s) at issue is important.

93. It should be pointed out that recital 21 of the Recast Brussels I Regulation reads as follows: ‘In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in different Member States. There should be a clear and effective mechanism for resolving cases of *lis pendens* and related actions, and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending. For the purposes of this Regulation, that time should be defined autonomously.’

94. If one applies the judgment in *Feniks* to the present case, then the Austrian referring court will have jurisdiction and, as far as questions which are apparently pending before an Italian court are concerned (in particular, the claim of the debtor for damages from the defendant), it will be the Italian court which is competent in that regard. In other words, it seems that to a certain extent concurrent proceedings in the present case in two different Member States are unavoidable.

95. However, the procedure in Italy concerns parties which are not identical to those concerned by the main proceedings emanating from Austria. Hence, suffice it to say that it is not a case of a strict connection in terms of recital 21.

96. In support of the solution advocated above I would recall recital 16 of the Recast Brussels I Regulation, according to which ‘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. The existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen. ...’.

97. In that regard, the following connection points are present here: the house at issue is located in Austria; the relevant works were carried out, and services provided, in Austria; the invoices were issued in Austria; the proceedings for the attribution of the writs of execution were held in Austria; the act at issue was established by an Austrian notary; the pledge was registered in the land registry in Austria; and the enforcement proceedings are being conducted in Austria.

98. Indeed, as the Court held in the judgment of 19 February 2002, *Besix* (C-256/00, EU:C:2002:99, paragraph 31), ‘the reason for the adoption of the jurisdictional rule in Article 5(1) of the Brussels Convention [which corresponds to Article 7(1) of the Recast Brussels I Regulation] was concern for sound administration of justice and efficacious conduct of proceedings ... The court of the place where the contractual obligation giving rise to the action is to be performed will normally be the most appropriate for deciding the case, in particular on the grounds of proximity and ease of taking evidence’.

99. Moreover, we should bear in mind that Article 7 of the Recast Brussels I Regulation attempts to strike a balance between the applicants' and the defendant's interests and to put them on a more evenly balanced level, whereas, if only Article 4 of that regulation existed, the defendant/debtor would be overly favoured.²⁶

100. If one were to found the jurisdiction in a rigid way on the domicile of the defendant in a case such as the one here, it could open doors to abuse — in so far as it would be possible to create pledges in favour of natural or legal persons in any Member State of the European Union and so deprive creditors of their ranking concerning the rights to a house the ownership of which was transferred abroad.

101. Finally, as an *obiter dictum*, it may be interesting to point out the analysis of the *Schutzwürdigkeitsgesichtspunkte*, as applied by the German Courts in cases such as this one (the conflict of laws solutions are oriented by a prior evaluation of the point of view that deserves the highest degree of protection): the applicable law is selected by choosing the law governing the legal relationship that deserves the highest judicial protection among the three legal relationships within the scheme of the *actio pauliana*, to respect the principle *nemo liberalis nisi liberatus*.²⁷ In particular, in substantive law, this means protecting the creditor when the contract was artificially created to deprive him of his rights or when the rights of the transferee are less *schutzwürdig* (deserving of protection) because of the gratuitous nature of the transfer. In conflict of laws, the protection of the three subjects involved in an *actio pauliana* may well be achieved by applying the law that the parties in good faith expect to be applied.²⁸

IV. Conclusion

102. For those reasons, I propose that the Court should answer the questions referred for a preliminary ruling by the Bezirksgericht, Villach (District Court, Villach, Austria) as follows:

- (1) Article 24(5) 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 opposition proceedings pursuant to Paragraph 232 of the Austrian Enforcement Code do not come within the scope of application of that provision. Instead, it is necessary to examine the individual objections raised by the applicants. The objections concerning both the non-existence of the claim arising from a loan agreement underlying the judicially ordered auction, and the fact that the creation of the pledge for that claim under a loan agreement was invalid due to the preferential treatment of creditors are not sufficiently close to the enforcement proceedings and, therefore, do not justify the exclusive jurisdiction under that Article 24(5).
- (2) Article 24(1) of Regulation No 1215/2012 must be interpreted as meaning that it is not applicable to a dispute between creditors regarding the distribution of proceeds from a judicially ordered auction, and in which objections are raised which seek to contest the existence of the underlying claim and — similarly to an *actio pauliana* — allege unenforceability of the creation of the pledge *in rem*.

²⁶ Ignatova, *Art. 5 Nr. 1 EuGVVO — Chancen und Perspektiven der Reform des Gerichtsstands am Erfüllungsort*, 2005, p. 71 et seq.; Lehmann, M., in Dickinson/Lein, paragraph 4.07.; and Magnus, U., and Mankowski, M., op. cit., p. 143. See also Schack, *Der Erfüllungsort im deutschen, ausländischen und internationalen Privat- und Zivilprozessrecht*, 1985, p. 104; Lehmann, M., ZZP Int. 9 (2004), pp. 172, 283.

²⁷ No one can give a gift unless he is free from debt, for instance, a bankrupt person is not in a position to transfer property or wealth. See Lipstein, K., *Principles of the conflict of laws national and international*, The Hague, 1981, p. 39 et seq.

²⁸ See Pretelli, I. (2012), op. cit. p. 638.

- (3) However, in a situation such as that at issue in the main proceedings, an *actio pauliana*, which originates in the execution of a contractual obligation between the applicants and the debtor, may be covered by the rule of international jurisdiction provided for in Article 7(1)(a) of Regulation No 1215/2012.