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Feniks sp zoo v Azteca Products & Services
Case C-337/17 Feniks sp zoo v Azteca Products & Services 4 October 2018
Request for a preliminary ruling under Article 267 TFEU from Poland
Court of Justice of the European Union

Key Words
Jurisdiction; recognition; enforcement; *actio pauliana*; matters relating to a contract; special jurisdiction; closely connected proceedings; Judgements Regulation (recast).

Summary of Facts of the Case

Feniks was a creditor of Coliseum (to the sum of approximately 340, 000 Euro), a general contractor with whom Feniks had an investment agreement regarding a construction project in Poland- both companies were established in Poland [para 14]. Coliseum was technically insolvent in that it was unable to pay subcontractors, but in relation to which proceedings had not yet been opened. Coliseum sold property in Poland to Azteca on 31 January 2012, a Spanish company, in partial fulfilment of prior claims by Azteca [para 16]. This transaction would normally be subject to some sort of clawback action and a claim was duly brought against Azteca in Poland on 11 July 2016 seeking a declaration that the contract for the sale of property to Azteca should be declared ineffective because it had been conducted by its debtor, Coliseum, in fraud of the creditor's (Fenik's) rights [para 17].

Under Polish law any creditor (and not just an insolvency practitioner or appointed liquidator) can bring this claw back action. Feniks as a creditor of Coliseum brought the action against Azteca to clawback money before a Polish regional court (the Szczecin Regional Court- the referring court), seeking a declaration that the contract of sale referred to above was ineffective in relation to it, because of the fact that it was concluded by the debtor in fraud of the creditor's rights. Feniks relied on Article 7(1)(a) of the Judgments Regulation (Recast) 1215/2012 to establish the jurisdiction of the court, which provides that a Member State can be sued in a different Member state if it is in the place of performance of the obligation under a contract (Poland in this case where the property sold was situated). Azteca argued that the correct forum was rather the Spanish court on the basis that the general provision on jurisdiction under Article 4(1) of the same Regulation should apply, which states that persons domiciled in a Member State shall regardless of nationality be sued in the

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courts of that Member State, and that the clawback action was not a matter relating to contract to which the special jurisdiction provision would apply.

The questions for the CJEU was as follows:

Is an *actio pauliana* (the clawback action) whereby the person entitled to a debt (creditor) requests that an act by which his debtor has transferred an asset to a third party and which is allegedly detrimental to creditors' rights can be declared ineffective in relation to the creditor a matter relating to a contract that can be covered by the rule of international jurisdiction provided for in Article 7(1)(a) of the Judgments Regulation, thus establishing jurisdiction for the clawback action in Poland on the facts of this case [para 26].

Cooperation and/ or Coordination Issue

The cooperation issue here is a matter of jurisdiction to hear an action brought by a creditor to claw back a purchase price paid to a third party by the debtor. Should such an action be heard in the Member State where the company against which the action has been taken is domiciled or in the Member State in which the obligations under a contract are to be performed? It also provides a view on the nature of a clawback action that is brought by a creditor (rather than an insolvency practitioner) and whether such an action could be considered as falling within the insolvency exception of the Brussels Regulation.

Clawback actions are commonly associated with insolvency proceedings to protect and expand the asset pool available to repay creditors. They are usually brought by an insolvency practitioner but this series of CJEU cases have revealed that many jurisdictions have stand-alone actions that can accomplish the same thing outside of an insolvency proceeding. While the preliminary reference does not ask about jurisdiction under the EIR Recast, it does explore the nature of a particular *actio pauliana* in relation to whether it should be considered an action arising in relation to a contract where there is a contract for the sale of property.

Disputes about jurisdiction for claims such as these could be viewed as an attempt to avoid cooperation under the EIR and its Recast.

Resolution

In the court's consideration of the questions referred, it acknowledged that the EIR 2000 was also in play as the company was now insolvent and it revived the discussion that has been had in cases like *FTex* and *Nickel & Goeldner* as to whether proceedings that appear to be closely connected to the main proceedings should also be subject to the law applicable in the Member State where such proceedings have been opened. This raises the question dealt with in a long line of cases about the interplay between the Judgements Regulation (Recast) and its insolvency exception in Article 1(2)(b) of that Regulation and the application of jurisdiction principles under the European Insolvency Regulation 1346/2000. The court recalls that the EIR must continue to be interpreted to avoid any overlap or vacuum between the rules of it and the Brussels Regulation [para 30]. In addition, an action can be considered related to an insolvency proceeding if it derives directly from it and is closely connected to it [para 31].

The court recognised that the action brought by Feniks in this case did not seem to be connected in any way with an insolvency proceeding principally because no insolvency proceedings were begun against Coliseum [para 32]. Thus, despite the debtor being functionally insolvent, there was no main proceedings to which the clawback action could be closely connected. The court went on

to observe about the specifics of the Polish clawback procedure that it aims to preserve the creditor's own interests and not to increase the assets of Coliseum, placing it within the notion of 'civil and commercial matters' in under Article 1(1) of the Brussels Regulation (thus even had there been a main insolvency proceeding, it is doubtful if the clawback action in this case would be considered directly derived from that proceeding [para 33]. This reflects to some extent the later finding in *BNP Paribas* (see JCOERE Case Note) that in part reasons that because the action can be brought by individual creditors (rather than solely by an insolvency practitioner) it should not qualify as an action derived from the main proceedings or closely connected to it to be covered by the EIR Recast.

The *actio pauliana* in this case 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 [para 40]. It preserves the interest of the individual creditor by protecting its right to enforce the debtor's obligations at a later stage [para 41]. In addition, the security held by Feniks over the debtor's estate and the action relating to the ineffectiveness of the sale concluded between the debtor and a third party originate in the 'obligations freely consented to by Coliseum with regard to Feniks upon the conclusion of their contract…' [para 42]

The CJEU therefore found in this case that the *actio pauliana* based on a creditor's right created upon the conclusion of a contract, falls within 'matters relating to a contract' of Article 7(1)(a) Judgment Regulation [para 44].

Applicability to Preventive Restructuring

Actions in relation to the avoidance of transactions entered into prior to insolvency may not be as prevalent in preventive restructuring procedures given the nature of those proceedings occurring notionally *prior to functional insolvency.* That said, transactions entered into which are not *directly arising* from the restructuring itself, may also be covered by an alternative regulation if it cannot be covered by the EIR Recast (Article 6). This leaves a grey area, especially for preventive restructuring, as the possibilities are nearly endless in terms of what can be agreed under the circumstances of preventive restructuring.

However, where there is an *actio pauliana* in relation to a transaction connected to a restructuring, but not directly a part of a procedure falling within the scope of Annex A of the EIR Recast, this and other cases such as *F-Tex, Trachte, and BNP Paribas* seem to indicate that courts will find such actions as falling outside of the insolvency procedure and being covered instead by the Brussels Regulation or other Conventions or Regulations where relevant.

Applicability of Existing Rules and Guidelines

EIR Recast

In terms of the interface between the Recast Regulation and the Judgements Regulation there is a lack of certainty and clarity as to the borderline between insolvency matters and other causes of actions. In addition, there is quite a shadow cast by these decisions regarding the purported legal certainty and predictability created by the Recast Regulation with the consequence of a splintering off of some actions, depending on location.

Although this case does not deal with a claim for jurisdiction under the EIR Recast, the findings in relation to the treatment of an *actio pauliana* is still instructive if considered in an insolvency context.

One key change between the EIR and the EIR Recast is set out in Article 6, which deals with the 'jurisdiction for actions deriving directly from insolvency proceedings and closely linked with them'. In Article 6(1), it makes an example of avoidance actions as an action that would typically be closely linked with the insolvency proceeding. The second paragraph widens the scope of jurisdiction to civil and commercial actions against the same defendant, giving the IP the choice of bringing actions where the defendant is domiciled provided those courts will have jurisdiction under the Brussels Regulation. Perhaps key in this new provision in the EIR Recast is the final paragraph, which explains that 'actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.' In the present case, it is therefore worth questioning whether, if main proceedings had been opened, the claw back action might be considered expedient to consider in connection with those proceedings in the jurisdiction in which they were opened. However, this line of cases seems to be trying to draw a solid line between the Brussels Regulation and the EIR Recast with the result of strictly limiting those actions that can be covered by the latter.

Recommendations and Guidelines

As this case does not deal with jurisdiction under the EIR *per se,* the relevant guidelines and recommendations do not really apply. However, the decision also gives credence to the importance of the *principles* of cooperation that should permeate all levels of EU regulation wherever there is a cross-border element to consider.