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Actio Pauliana of the
bankruptcy receiver within or
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proceedings?

Danuta Brzezinska

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Introduction

Actio Pauliana of the Roman law developed into the commonly known civil law fraudulent conveyance remedy to avoid certain transactions that are to the detriment of creditors¹. *Actio Pauliana* covers broad range of the fraudulent dispositions and exist both inside and outside of bankruptcy proceedings. Within the bankruptcy proceedings, when the suspect transactions of the debtor occur before the commencement of the bankruptcy proceedings the bankruptcy receiver may seek to set these transactions aside for the benefit of the bankruptcy estate and consequently demand for return of, for example, certain properties, that were the subject of undervalued legal actions.

The actual *actio Pauliana* case initiated by the bankruptcy receiver against a Swiss resident before the Polish court for declaring ineffective legal act to the detriment of the creditors enables the brief presentation of the European courts' standpoint on the interpretation of the rules on jurisdiction of the European courts applicable in this and similar cross – borders cases.

The rules on jurisdiction applicable to *actio Pauliana* initiated by bankruptcy receiver

In the light of the rules on jurisdiction applicable in Europe the presented matter constitutes a question whether an *actio Pauliana* brought by the bankruptcy receiver is covered by Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings² or by Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters³.

In accordance with the provisions of Article art. 1 (2) (b) of Regulation No 44/2001 and previously art. 1 (2) (2) of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters⁴, the general rules on jurisdiction do not apply to:

“bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings”.

¹ further referred to as *actio Pauliana*

² OJ 2000 L 160, p. 1, as amended, further referred to as Regulation No 1346/2000

³ OJ 2001 L 12, p. 1, as amended, further referred to as Regulation No 44/2001

⁴ OJ 1978 L 304, p. 36, as amended, further referred to as Brussels Convention

The equivalent of the above provision applying in particular between European Union (EU) Member States and Switzerland is Article 1 (2) of the Conventions of 16 September 1988 and of 30 October 2007 on jurisdiction and the enforcement of judgments in civil and commercial matters⁵.

The rules on jurisdiction in the above matters are subject to Regulation No 1346/2000 of 29 May 2000 on Insolvency Proceedings. Article 3(1) of Regulation No 1346/2000, which deals with international jurisdiction, sets out the following basic rule of jurisdiction:

“The courts of the Member State within the territory of which the center of a debtor’s main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the center of its main interests in the absence of proof to the contrary.”

Article 25 of Regulation No 1346/2000 which relates to the recognition and enforceability of other judgments, provides in paragraphs 1 and 2: “

1. Judgments made by a court whose judgment concerning the opening of proceedings is recognized in accordance with Article 16 and which concern the course and closure of insolvency proceedings, and compositions approved by that court shall also be recognized with no further formalities. Such judgments shall be enforced in accordance with Articles 31 to 51, with the exception of Article 34(2), of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Conventions of Accession to this Convention.

The first sub paragraph shall also apply to judgments derived directly from the insolvency proceedings and which are closely linked with them, even if they were made by another court.

2. The recognition and enforcement of judgments other than those referred to in paragraph 1 shall be governed by the Convention referred to in paragraph 1, provided that that Convention is applicable.”

The Court of Justice of the European Union (CJEU) within several rulings⁶ set out general criteria in order to determine the direct relation between the action and the bankruptcy proceedings. In the event of recognizing such a relation, the case shall be subject to regimes of Regulation No 1346/2000. Those criteria are also used to

⁵ Further referred to as Lugano Convention

⁶ Case Henri Gourdain - Franz Nadler (C- 133/78); case Christopher Seagon - Deko Marty (C-339/07) in accordance to the previous cases: case AS Autoteile (C-220/84), case Reichert I (C-115/88), case Reichert II (C-261/90), as well as case SCT Industrier AB i likvidation - Alpenblume AB (C-111/08), German Graphics Graphische Maschinen GmbH - Alce van der Schee (C-292/08), F -Tex SIA - Lietuvos - Anglijos UAB "Jadecloud - Vilma" (C-213/10)

examine the relationship of *actio Pauliana* to bankruptcy⁷. The connection is determined by reference to the nature of each action as it is defined in the relevant national legislation.

If the court finds no connection with the bankruptcy proceedings justifying the allocation of the case to "bankruptcy, compositions and other similar proceedings", general conflict-of-law rules shall apply⁸, and it may result in recognition of legal action by the bankruptcy receiver by a court in another country than the country where bankruptcy proceedings are carried out.

The concept of *actio Pauliana* in Europe and its more detailed presentation in Poland

In the opinion in the case Christopher Seagon - Deko Marty, C - 339/ 07 the Advocate General Damas Ruiz - Jarabo Colomer made a detailed analysis of an aspect of *actio Pauliana* explaining the nature of the legal defenses to legal actions taken by the bankrupt.

According to Advocate General Damas Ruiz- Jarabo Colomer, in the European Union was adopted division into the claims under the general law of obligations and specific instruments in the context of bankruptcy, regulated differently in the provisions of bankruptcy law. This distinction is important in relation to the conflict-of-law rules, because this or the other legal classification leads to different results⁹. Furthermore, as the Advocate General indicates, in some national legal systems, such as the French one, the distinction between the aspect of civil and bankruptcy law also includes the legal regime governing the nullity of actions as administrative receiver may lead to the determination of the annulment of certain actions by operation law, which in the general legal regime of *actio Pauliana* is limited to the option of canceling. The latter feature is also found in the UK system of law, in which acts may be declared void by operation of law, but depending on the circumstances, which constitute the basis¹⁰.

The above-mentioned distinction of actions applies in Poland. Pursuant to the Polish law, the bankruptcy receiver may carry out proceedings in connection with the transactions taken by bankrupt in □□detriment to creditors on the basis of separate regulations of bankruptcy law or on the basis of the civil law, in particular in the course of *actio Pauliana*.

The provisions of Polish Bankruptcy and Rehabilitation Law as of 23 February 2003¹¹ provide for a special regime of the effect of the ineffectiveness, by operation of law or

⁷ see nb. 38 of the judgment in the case F -Tex SIA - Lietuvos - Anglijos UAB "Jadecloud - Vilma" (C-213/10)

⁸ Regulation No 44/2001 (as previously the Brussels Convention) or Lugano Convention

⁹ see nb . 30 of the opinion of an Advocate General Dámaso Ruiz-Jarabo Colomer in the case Christopher Seagon - Deko Marty (C - 339/07)

¹⁰ see nb . 28 of the opinion of an Advocate General Dámaso Ruiz-Jarabo Colomer in the case Christopher Seagon - Deko Marty (C - 339/07)

¹¹ Dz. U. 2003 nr 60 poz. 535, as amended, further referred to as Bankruptcy and Rehabilitation Law

upon decision of the bankruptcy judge, of transactions taken by the bankrupt in detriment to creditors (Articles 127 - 134 Bankruptcy and Rehabilitation Law). Notwithstanding the above, the provisions of the Polish Civil Code as of 23 April 1964¹² provide for *actio Pauliana* against a third party who along with the debtor committed a legal act detrimental to the creditors.

Furthermore, as a result of the ineffectiveness of the transaction of the bankrupt with the third party towards the bankruptcy estate, regardless whether under Bankruptcy and Rehabilitation Law or under the Civil Code, a bankruptcy receiver acquires against the third party, under Article 134 of the Bankruptcy and Rehabilitation Law, a claim to give the subject of such transaction in kind over bankruptcy estate, and if it was impossible, a claim for payment of the equivalent of the loss incurred as a result of ineffective transaction. Conversely, neither the bankrupt nor the bankruptcy estate is vested with proprietary rights towards the subject of ineffective transaction.

An example of an *actio Pauliana* case initiated before the Polish court

The facts of the case to be presented substantially differ from the cases that are the basis in the previous rulings of CJEU and are as follows:

The bankruptcy receiver of the Polish limited liability company A applied before a Polish court for declaration as ineffective in relation to the bankruptcy estate of the company A (and in respect of reported claims in bankruptcy proceedings) the establishment of mortgage by Polish limited liability company B in favor of a natural person who is a resident in Switzerland.

The real estate encumbered with the mentioned mortgage was owned by company B that earlier bought the said real estate from company A before A was declared bankrupt. The sale of the said real estate from A to B has already been legally recognized by the Polish court to be ineffective, with respect to the bankruptcy estate of the company A as a result of a claim made by a bankruptcy receiver against the company B pursuant to the provisions regulating the *actio Pauliana* (Article 527 et seq. of Civil Code). Consequently, under Art. 134 of Bankruptcy and Rehabilitation Law the bankruptcy receiver is entitled to a claim to give the real property in kind over bankruptcy estate, and if it was impossible, a claim for payment of the equivalent of the loss incurred as a result of ineffective sale of the real property. Company B remains, however, the owner of the real estate.

In the action against Swiss resident the bankruptcy receiver again used as the legal basis provisions of the Civil Code of *actio Pauliana*. The receiver claimed that the establishment of a mortgage by the company B provided for disposing financial benefit obtained by the company B from company A as a result of the sale of real estate.

¹² Dz.U. 1964 nr 16 poz. 93, as amended, further referred to as Civil Code

As a consequence of raising by the Swiss defendant the defense of lack of jurisdiction of Polish courts to recognize the case, the Polish Supreme Court relying on the judgments of the CJEU¹³ briefly held that *actio Pauliana* brought by the bankruptcy receiver of the company A has no connection with the bankruptcy proceedings of the company A which entitle, pursuant to art. 1 (2) of the Lugano Convention, to exclude the application of this Convention. Consequently, the court in Switzerland was indicated to deal with this case, because of the defendant's domicile, and not the court in Poland, where the bankruptcy proceedings are carried out¹⁴.

The following part of this paper contains an attempt to analyze why in the light of the CJEU's judgments the Polish Supreme Court stated the absence of relation between the actions taken by the bankruptcy receiver of bankruptcy estate A and bankruptcy proceedings A.

Relation of *actio Pauliana* brought by a Polish bankruptcy receiver against Swiss resident to bankruptcy proceedings

In examining the relation of actions to bankruptcy proceedings the Court of Justice of the European Union has not added a separate common concept of challenging the actions taken by the bankrupt.

In the case *Henri Gourdain - Franz Nadler* (C - 133/78) the CJEU stated that: "*Not every judgment on bankruptcy or reorganization proceedings of insolvent companies or other persons is for that reason excluded from the scope of the Convention [Brussels Convention – own note], but only those judgments that are directly related to such proceedings.*" In addition, the CJEU concluded that challenging the bankrupt's actions is under "*analogous proceedings*" referred to in art. 1 (2) of the Brussels Convention, provided that such actions constitute "*a direct result of the bankruptcy and are covered by the proceedings to wind up the assets or composition proceedings of the above-mentioned characteristics.*"¹⁵

In that case the relation between the bankruptcy proceedings and the proceedings in question has been confirmed for the following reasons: firstly, according to the French legislation applicable to the main proceedings, the case in the field of challenging the actions taken by the bankrupt may be brought only in a court which declared bankruptcy, secondly, only the administrator or the court (on its own) may exercise such right, in the third place, the action is brought only in the name and on behalf of the bankruptcy estate, and, finally, the provisions of the bankruptcy law provide for a special period for bringing an action of this type¹⁶.

¹³ Please see footnote No. 6 above

¹⁴ The judgment of 13 March 2013, IV CSK 499/12

¹⁵ The above requirements presented in the case *Henri Gourdain - Franz Nadler* (C - 133/78) have been repeated by CJEU in the case *SCT Industrij AB i likvidation - Alpenblume AB* (C-111/08) (nb. 25) and in case *F -Tex SIA - Lietuvos - Anglijos UAB "Jadecloud - Vilma"* (C-213/10) (nb. 38)

¹⁶ see nb. 34 -36 of the opinion of an Advocate General Dámaso Ruiz-Jarabo Colomer in the case *Christopher Seagon - Deko Marty* (C - 339/ 07)

Applying the criteria adopted in case *Henri Gourdain - Franz Nadler* (C - 133/78) the CJEU in its judgment in case *Christopher Seagon - Deko Marty* (C - 339/07)¹⁷ has analyzed the action of a transaction to set aside legal action taken by the bankrupt governed by German law in par. 129 *Insolvenzordnung* and detected a relation with bankruptcy proceedings conducted in Germany, which allows to exclude the application of Regulation No 44/2001 on the basis of Art. 1(2)(b) of the Act.

In discussing the relation with the bankruptcy proceedings, Advocate General Damas Ruiz - Jarabo Colomer in the opinion in the latter case emphasized that a claim on challenging a legal action taken by a bankrupt in the German bankruptcy law is subject to the exclusive control of German bankruptcy law and may be brought only in the context of bankruptcy proceedings. Furthermore, he underlined that: "*In bankruptcy proceedings has been rejected the subjective element of actio Pauliana, which requires the plaintiff to prove that the debtor acted in detriment to creditors. In contrast to its equivalent aspect in civil law, bankruptcy law standards introduce a presumption of an intent to act in detriment to creditors, and thus reverse the burden of proof.*"¹⁸

The above mentioned criteria are also used to examine the relationship of the *actio Pauliana* to bankruptcy, which was confirmed by the CJEU in the case *F -Tex SIA - Lietuvos - Anglijos UAB "Jadecloud - Vilma"* (C-213/10) in the following statement: "*It must therefore be examined whether, in view of the specific characteristics of the action brought by the applicant in the main proceedings [actio Pauliana – own note], that action has a direct link with the insolvency of the debtor and is closely connected with the insolvency proceedings*"¹⁹.

Applying the criteria adopted by the Court of Justice of the European Union in the above-mentioned cases to the facts in the dispute that was brought before the Polish court, the following conclusions are made:

Firstly, as mentioned above, the subject of the *actio Pauliana* claim made by bankruptcy receiver was declaration as ineffective the establishment of mortgage by company B on the real estate to which the company B was vested with the ownership right. Thus, the claim made by the bankruptcy receiver was to challenge a legal transaction made by company B and not by the bankrupt company A.

Bankruptcy and Rehabilitation Law govern the conditions for ineffectiveness only in relation to activities undertaken by the bankrupt. The provisions of Bankruptcy and Rehabilitation Law do not provide for an action to challenge the transaction of the debtor of the bankruptcy estate. That was the reason why the bankruptcy receiver of A based its claim on *actio Pauliana*, as a concept provided for in the Civil Code.

¹⁷ OJ C 82 of 4 April 2009, p 4

¹⁸ see nb. 28 of the opinion of an Advocate General Damas Ruiz - Jarabo Colomer in the case *Christopher Seagon - Deko Marty* (C - 339/ 07)

¹⁹ see nb. 38 of the judgment in the case *F -Tex SIA - Lietuvos - Anglijos UAB "Jadecloud - Vilma"* (C-213/10)

Secondly, as indicated Advocate General Damas Ruiz- Jarabo Colomer in the opinion in Deko Marty (C - 339/07), the provisions of Bankruptcy and Rehabilitation Law on of the effect of the ineffectiveness of bankrupt's transactions do not require that the receiver proves that the debtor acted in detriment to creditors. In contrary, pursuant to Civil Code, the plaintiff in *actio Pauliana* case may use the presumption of an intent to act in detriment to creditors subject to the additional conditions prescribed by law.

Finally, the Civil Code which regulates the aspect of *actio Pauliana* states that each creditor is entitled to bring *actio Pauliana* without limiting a title to bring the action before the court to the bankruptcy receiver. Thus, the purpose of *actio Pauliana* may be of interest to a single creditor.

In the light of the general common criteria set out by the CJEU in the presented above judgments for examination of the relation between legal action of the bankruptcy receiver and the bankruptcy proceedings the clear distinction between the provisions of Bankruptcy and Rehabilitation Law and Civil Code on the effect of the ineffectiveness of bankrupt's transactions justifies the decisions of the Polish Supreme Court that stated that there is no relation between the bankruptcy proceedings of Company A and a claim made by the bankruptcy receiver for the recognition of the mortgage established by B on its real estate as ineffective with respect to the bankruptcy estate A.

Taking into consideration, however, brief justification of the determination in this case, the above-presented argumentation constitutes only the proposal of reasoning and does not illustrate the content of the actual wording of the judgment of the Polish Supreme Court as of 13 March 2013.

Conclusions

The decisive factor in determination of a bankruptcy nature of the proceedings is the type of claim raised by the bankruptcy receiver, and not the fact that the bankruptcy receiver is a plaintiff in the proceedings, and therefore the effects of the judgment are extended to the bankruptcy estate, which should be the case for each legal action taken by the bankruptcy receiver in the interests of the creditors of the bankruptcy estate.

Notwithstanding the foregoing, taking into consideration identical, from the perspective of the bankrupt's creditors, results of legal actions taken by the bankruptcy receiver under the provisions of Bankruptcy and Rehabilitation Law and *actio Pauliana* under Civil Code, as provided for in the said Article 134 of Bankruptcy and Rehabilitation Law, the interpretation, according to which the Regulation No 1346/2000 applies to *actio Pauliana* brought by the bankruptcy receiver against the bankrupt's fraudulent transactions could be deemed appropriate and within the general common criteria set out by the CJEU for examination of the relation between legal action of the bankruptcy receiver and the bankruptcy proceedings

The above, however, shall not apply to *actio Pauliana* brought by the bankruptcy receiver, aimed at challenging the transactions made by the third party, which is a subject of the case presented in this paper.

Adwokat Danuta Brzezińska