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EUROPEAN COURT OF JUSTICE JURISPRUDENCE IN THE FIELD OF AVOIDANCE ACTIONS WITH INTERNATIONAL ELEMENTS FOR FILLING THE INSOLVENCY ESTATE

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Abstract: *With the development of the internal market, the need to establish rules ensuring the protection of creditors in insolvency proceedings with a cross-border effect is increasing. Mechanisms at national level are difficult to provide the desired protection for foreign creditors. Since 26.06.2017 EU has a new Regulation 848/2015 which repeals the current Regulation 1346/2000. Despite the radical changes, it is attempting to implement this legislative act, the main objective of insolvency proceedings remains unchanged, namely, to achieve fair satisfaction of creditors. One of the mechanisms for the realisation of this objective are avoidance actions with international element for filling the insolvency estate. In view of the specifics of the procedure, the standard civil law mechanisms such as the Actio Pauliana are not impossible but are extremely inadequate and difficult to prove. In the practice of the Member States, many issues arise concerning the determination of jurisdiction and applicable law, creation of preconditions for the abuse in searching the most favourable legal system (forum shopping), there are differences in the so-called 'suspicious periods' and transactions concluded with affiliates. On this basis a fundamental jurisprudence of the CJEU has been enacted, the achievement of which will be the subject of this paper.*

Keywords: Avoidance actions, insolvency procedure, creditor's rights, Actio Pauliana

1. Introduction

With the development of the internal market within the EU, participants in commercial and civil exchange are becoming increasingly active and the number of private relations with an international element is growing significantly. As any commercial relationship may have an international dimension, the insolvency proceedings may be such a manifestation. It is prompted by the international trade activity of the entities within the EU. Of course, to protect legal certainty and to ensure the rights and legitimate interests of parties to the various commercial relationships, and in cross-border insolvency proceedings, there should be legislation. Historically, the insolvency framework is undergoing some amendments. The European legislator has reached the insight that, within the framework of European legislation, conflict-of-law rules should be set up which would lead to the respective national substantive laws governing insolvency matters, since there is a wide variety and specificity of the individual national substantive rules and a single substantive provision would not result in the attainment of the objectives of those proceedings. However, some authors are beginning to talk about the Europeanisation of insolvency law [1]. Nevertheless, the basis for legislative amendments is the principles

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of effectiveness and efficiency of cross-border insolvency proceedings [2]. The settlement of insolvency issues and additional issues that arise in order to protect the rights of creditors and to ensure their equal satisfaction with the insolvency estate for many years is in a standstill, as the work of the working group, which produced a draft convention on insolvency in 1970, could not succeed. Only after the entry into force of the Treaty of Amsterdam [3]and with the adoption of Regulation 1346/2000[4], is admitted an appropriate tool to address insolvency issues. After 15 years of implementation, the European Commission prepares a report [5], because of which the new legislative amendments to the legal framework have been proposed, as well as taking into account the Court of Justice of the European Union's (CJEU) case-law. Thus, was born the new Regulation 848/2015, which enters into force on 26.06.2017 and repeals Regulation 1346/2000, the latter shall retain its effects in respect of the insolvency proceedings instituted before the 26.06.2017. It is important to note that in Regulation 848/2015, the European legislator provided a review clause (article 90) to allow an adequate analysis of the implementation of the regulation and, if necessary, to propose operational measures and/or legislative amendments that would improve the implementation process in the Member States. It should also be noted on that legislative basis that Regulation 1346/2000 did not have any explicit norm which would clearly govern international jurisdiction and the applicable law on claims arising directly from insolvency proceedings and which are closely connected with it, which are in fact avoidance actions to fill the insolvency estate. Pending the adoption of Regulation 848/2015, the questions raised, as regards avoidance actions, were resolved by the experience and case-law of the interpretation of article 3 (1) of Regulation 1346/2000, both by national courts and by the CJEU. I should point out that the European legislator has provided a very far-sighted vision in both the previous regulation and Regulation 848/2015. A review clause obliging the European Commission to present to certain periods of time the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation, accompanied, if necessary, by proposals for adapting the same. It is in the spirit of article 90 of Regulation 848/2015 that this article aims to expose the achievements of the CJEU's case-law in relation to avoidance actions to replenish the insolvency estate in cross-border proceedings and to highlight the same as effective means of protecting creditors' rights. And so almost on the eve of the second report [6], for the purposes of this provision, the Commission should present a study of possible abuses of the demand for the most favorable legal system (forum shopping). The examination of the present legal issues relating to avoidance actions to fill the insolvency estate with an international element as special ones, as compared to traditional methods, including Actio Pauliana, is fully up to date.

2. Avoidance actions in the insolvency proceedings and the Actio Pauliana.

In its substance, avoidance actions in insolvency are based on the so-called Actio Pauliana. The latter was created by the ancient Roman jurists to protect the creditor's rights from the unlawful damaging actions taken by his debtor in order to reduce his property, which serves as a comprehensive guarantee to creditors. In this direction, the opinion of Advocate General COLOMER should be shared, which in his opinion in the case Seagon argues that, although each Member State regulates in its substantive law in a different way the protection of the creditor from the damaging actions of the debtor, there is, however, a genetic code which lies in the fact that the Action Pauliana is an exception to the internal effects of a contract between the parties [7]. Thus, with the development of commercial exchange, we should distinguish the Actio Pauliana in civil and commercial law and, particular in insolvency proceedings, where a distinction can be made in view of the fact to which creditors may realize that claim. In civil law, these are precisely the designated persons, namely, those who have a quality creditor, while in the insolvency proceedings it benefits all creditors of the insolvency estate. While in civil law actively legitimated to bring Actio Pauliana is only a person who has a quality creditor, in the case of avoidance actions this can also be done by the insolvency practitioner, in his capacity as managing the insolvency estate in order to fairly satisfy all creditors, and in his failure this can make any creditor of the insolvency [8]. It should also be noted that in the different Member States the traditional factual composition of Actio Pauliana can also be used in insolvency proceedings beyond the other possibilities of avoidance actions, as is the case for example in Republic of Bulgaria. In other countries such as France and Spain, the general Actio Pauliana has a subsidiary character in relation to the avoidance actions to replenish the insolvency estate, which is evidence of the autonomous importance of the avoidance actions in the insolvency proceedings. A further argument in this direction may be drawn again from the legislation of those two Member States in which the Actio Pauliana submission is admissible only if the factual formations of the avoidance proceedings cannot be met. In this spirit is also the practice of the CJEU, which in its decisions distinguishes between the Actio Pauliana in the civil law and the special avoidance actions in the area of insolvency. In conclusion, it should be summed up that, in view of the specific objective of insolvency proceedings, namely the equitable satisfaction of the creditors of the insolvency, as compared with the general regime in civil law, avoidance actions have an autonomous meaning in the substantive law of each EU Member State and, on that basis, a distinction is made and in the case-law of the CJEU.

3. The CJEU's practice in cross-border insolvency

During the period of implementation of the Regulation 1346/2000 and Regulation 848/2015, several questions on the interpretation of the legal framework arose from a practical point of view. The currently available CJEU practice covers the application of Regulation 1346/2000. Although it does not apply already, the judgments given are of major importance and are at the heart of some of the new provisions introduced by Regulation 848/2015. The practice laid down in the field of avoidance actions has therefore been consistent and has not lost its relevance in relation to the application of Regulation 848/2015.

4. International jurisdiction

At the heart of the definition of international jurisdiction, applicable law, recognition and admission to enforcement and protection of creditors' rights in insolvency proceedings, the European legislator has put a bet on the link, 'center of main interests', and, as regards the law applicable, that of the Member State which initiated insolvency proceedings. The problems that arise with the interpretation of the center of main interests' in practice are also the main reason for dealing with a court and seeking more favorable insolvency regimes[9].

4.1. The CJEU's case-law in relation to the notion of 'center of main interests'

The fundamental practice of the CJEU, which provides guidelines on the definition of the 'center of main interests' is enshrined in the judgments in cases C-1/04-Staubitz-Schreiber[10], C-341/04-Eurofood IFSC [11], C-396/09– Interedil[12]. Quite topical in matter is outdated on 30 April 2020 the conclusion of the advocate general Szpunar in the case C-253/19-Novo Banco[13]. In its judgment in case C-1/04, the CJEU declared that the court having jurisdiction to initiate the main insolvency proceedings remained an international competent even if the debtor had shifted his center of main interests after filing for a request of insolvency and prior to the decision declaring the insolvency. Secondly, it is important that the fundamental criteria for determining the center of main interests as objective and ascertainable by the third party are the judgment in case C-341/04. The Interedil Srl, in a consistent and contradictory manner, confirms the criteria for determining the center of main interests giving the reasons that, where the management and supervisory bodies of a company are where it has its registered office, and the decisions on the management of that company are taken in the same place and can be verified by third parties, the presumption provided for in the regulation becomes unreasonable. In this connection, the CJEU's judgement on Novo Banco will be interesting, since it will be the first to apply Regulation 848/2015 relating to the concept of 'center of main interests'. On 30 April 2020, the Advocate general's opinion was concluded in the case where, in relation to the practice established to date, the term should continue to be regarded as an autonomous concept of EU law. Such as article 3, par. 1, the first and fourth subparagraphs of Regulation 2015/848 must be interpreted as meaning that the place of normal residence of a debtor who does not exercise an independent activity is presumed to be a center of his main interests. It may be rebutted where that place does not fulfil his role in the place where the debtor's economic decisions are taken, or where most of his assets are located. Following an analysis of that conclusion, it must be concluded that, in view of the possibility given to them by art. 4. (1) of the Regulation 848/2015, the court seized of a request for the opening of insolvency proceedings shall, on its own motion, examine whether it rebutted the presumption in the light of the evidence adduced.

4.2. The CJEU's case-law in relation to avoidance actions arising directly from insolvency proceedings and closely related to it.

The international jurisdiction for such actions may be inferred from the CJEU's case-law until the adoption of Regulation 2015/848. The previous regulation did not contain an explicit provision. The case C-339/07- Seagon[14], which, on the interpretative road, makes a distinction between the substantive scope of Regulation 44/2001 and Regulation 1346/2000, is fundamental in that regard. In the proportion of Lex generalis-Lex specialis respectively, and concludes that the courts of the Member State in whose territory insolvency proceedings are opened have jurisdiction to rule an avoidance action based on insolvency and directed against a defendant who has its registered office in another Member State. Next, in its judgment in case C-213/10-F-Tex [15] , the court has made it clear that the criterion set out in the judgment in case C-133/78-Gourdain/Nadler[16] is reflected in recital 6 in the preamble to Regulation 1346/2000 in order to unblock the latter's scope of Regulation 44/2001, on the basis of which it is also inferred from the final decision that the action brought against a third party by the claimant, who acts on the basis of a transfer of a claim made by the appointees in insolvency proceedings, the insolvency practitioner whose object is the right to revocation which the insolvency practitioner derives from the national law applicable to that procedure falls within the concept of civil and commercial matters within the meaning. The following question, in a chronological order of the CJEU, states that the courts in the territory of which insolvency proceedings have been opened have jurisdiction to hear an action for avoidance brought against a defendant who is not domiciled in the territory of a Member State. On a case before a Bulgarian court in the area of avoidance actions to fill the insolvency estate, the CJEU ruled in case C-296/17-Wiemer & Trachte[17]. That decision also has a leading role, since it categorically states that the jurisdiction of the courts of a Member State in the territory of which insolvency proceedings are opened to rule on an avoidance action based on insolvency and directed against a defendant domiciled or residing in another Member State is exclusive. However, in the context of the exclusive jurisdiction, the judgment in case C-493/18-Tiger and Others[18], which shows that an action by an insolvency practitioner appointed by a court of the Member State in whose territory the insolvency proceedings have been opened, which has as its object, declared to be relatively invalid, in respect of all creditors, of the sale of immovable property situated in another Member State and of the mortgage constituted on the same, falls within the exclusive jurisdiction of the courts of the first Member State.Likewise, a decision by which a court of the Member State of the opening of proceedings authorizes an insolvency practitioner to bring an action in another Member State, even though it falls within the exclusive jurisdiction of that court, does not have the effect of conferring international jurisdiction on the courts of that other Member State.

5. Conclusion

Based on the analysis, it should be noted that the Regulation 2015/848 merely harmonizes the rules on international jurisdiction, the recognition of decisions and the law applicable in insolvency proceedings which have cross-border implications. As the uniform rules aim at reducing trade with a court[19]. The specific questions concerning the admissibility of an application for an insolvency of a debtor and the fulfilment of the substantive preconditions for the realization of a specific avoidance action remain governed by the applicable national law. The CJEU's case-law serves as a roadmap for national judges to lead them in resolving the most cross-border disputes that are being registered in view of the developing internal market. And despite, whereas there is no new case law on Regulation 2015/848, this should not deter national judges from following the guidelines for interpreting the provisions in the spirit of the provision laid down in Regulation 1346/2000. Last but not least in the spirit of the court's case C-173/09-Elchinov [20] follows that national courts must take into account that EU law precludes a national court from being bound by a national procedural provision, according to which the conclusions made by a superior national court are binding on it, where it is established that those conclusions are not in conformity with EU law, as interpreted by the Court of Justice.

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