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SUMMARY OF PhD THESIS
"LEGAL EFFECTIVENESS OF *ACTIO PAULIANA* IN POLISH AND GERMAN LAW"

This PhD thesis is devoted to the subject of fraudulent conveyance claims – or *actio Pauliana* claims, as they are generally referred to in Continental European legal systems. While the roots of *actio Pauliana*, being as it is a classical institution of civil law, go back to Roman times, it is also present in modern European legal orders, mainly due to the specific value system on which the concept was based. The long-standing tradition of *actio Pauliana* does not detract from its relevance in present times; quite on the contrary, the practical meaning of this legal concept has been growing apace with intensification of business operations, rise of creditors' legal awareness, and increase of debtors' activities aimed at creditors' detriment. These factors are duly reflected in recent development of jurisprudence in Poland as well as in Germany.

The central issue around which this PhD thesis is structured is the legal effectiveness of *actio Pauliana*, which might be defined in terms of the necessity to afford creditors effective protection against acts in law performed by debtors which, while ostensibly lawful, are informed by a deliberate intent to harm the creditors. At the same time, it is emphasized that the need for such protection must always be analysed in a broader context, taking into account values such as certainty of economic life and third party interests. The dissertation includes analysis of those aspects of *actio Pauliana* which engender the most debate and which are most important from the perspective of its legal effectiveness.

The PhD thesis is comparative in character. Pertinent regulations of the Polish Civil Code were assessed mainly through the prism of the German legal order since the construction of Polish and German *actio Pauliana* claims are very similar and belong to the so-called "enforcement" model. This model is based on the assumption that if, as a result of a legal act performed by a debtor to the detriment of creditors, a third party gains a material benefit, each of the creditors may demand that the said act be declared ineffective with respect to him and satisfy his claims from assets that left or did not enter

the debtor's property as a result of an act found to be ineffective. In chapter 1, the thesis refers also to the model of creditor protection in tort (reflected, to the extent possible, under French law), the concept of fraudulent conveyances introduced in common law systems, as well as the European approach to *actio Pauliana* – encompassing analysis of its legal nature presented by the Court of Justice of the European Union as well as the necessity for its inclusion in the European Civil Code.

The comparative approach taken by the author enables formulation of conclusions pertaining to different prerequisites and aspects of *actio Pauliana.*

Chapter 2 presents in-depth analysis of the notion of claim of a protected creditor. In this respect, it is of the utmost importance how the creditors are protected if their claims arise already after the legal act had been undertaken by the debtor (the so-called "future" creditors). The German solution in this regard is quite liberal and does not set forth any statutory restrictions in comparison to classical *actio Pauliana*, whereas the Polish Civil Code introduces stricter prerequisites on the side of the debtor and of the third party obtaining material benefit as a result of debtor's actions. It seems, however, that Polish law presents a more balanced approach, preventing unjustifiable favour to future creditors who, generally, benefit from the possibility of assessing the financial condition of their contractors and then refraining from contracting or requesting additional securities.

The notions of "protected claim" or "protected creditor" are closely connected to another highly controversial issue, that of the protection of public creditors, duly discussed in chapter 3 of this PhD thesis. In Germany, such protection was first provided in the context of civil proceedings. Later on, public creditors (such as tax authorities) received the possibility of issuing a specific kind of administrative decision (*Duldungsbescheid*) compelling third parties to bear enforcement proceedings from assets subject to fraudulent legal acts. Nowadays, the only remaining uncertainty is whether public creditors are free to choose between the two abovementioned ways of invalidating fraudulent acts in law, or whether they are entitled to make use solely of administrative measures. At the same time, there persist far-reaching controversies among Polish scholars whether *actio Pauliana* constitutes a proper way to protect creditors' interests. Such an approach is criticized within this PhD thesis on the basis of in-depth analysis of judgments of the Polish Supreme Court and Polish Constitutional Court.

Chapter 4 presents an analysis of a range of acts in law which might be held ineffective as a result of a creditor's lawsuit. In this regard, the German legal system refers to "legal actions" (*Rechtshandlungen*), whereas the Polish Civil Code – to "acts in

law" (*czynności prawne*) undertaken by the debtor. Of the two, the conceptual scope of the German "legal actions" is much broader – they may be defined as encompassing any and all actions which have legal meaning and which cause negative consequences for the possibility to conduct effective enforcement proceedings by the creditor. As opposed to the "acts in law" in the Polish legal system, they need not include a statement of debtor's intent. Thus, creditors in Germany are entitled to question the effectiveness of a practically unlimited range of debtors' activities. The chapter includes analysis of their particular categories in both legal systems, along with *de lege ferenda* conclusions.

In some aspects, the legal solutions implemented under Polish and German law are quite similar, as in the case of debtor's insolvency (analysed in-depth in chapter 5) as well as so-called subjective prerequisites of *actio Pauliana* (described in chapter 6). That said, there remain valuable lessons to be drawn from the German solutions, especially those presented in the abundant case-law.

The main right of the creditor is the possibility to conduct enforcement proceedings with regard to third party assets. Chapter 7 focuses on the question of what kinds of legal instruments the creditor has recourse to when the third party disposes of the benefit gained. Both Polish and German legal provisions (i.e. Article 531 para 2 of the Polish Civil Code and Article 15 of the *Anfechtungsgesetz*) set forth conditions under which it is possible to directly sue the person to whom the disposition was made. Be that as it may, the PhD thesis endeavours analysis of what kinds of legal protections might be available to creditors in situations not covered by these statutory provisions. German law provides creditors with two kinds of claims against a third party: to tolerate enforcement proceedings (*Primäranspruch* or *Duldungsanspruch,* which shall be brought in the first order of sequence) and the claim for payment (*Sekundäranspruch*, a second option where enforcement proceedings cannot be effectively prosecuted, e.g. due to disposal of the gained benefit by the third party). In other words, the German legislature has envisaged a scenario in which *Duldungsanspruch* is devoid of legal significance for the creditor. On the other hand, it is still disputed among Polish scholars whether, in factual circumstances not covered by Article 531 § 2 of the Polish Civil Code, a third party may be held liable on the basis of provisions regarding unjust enrichment, or whether it bears liability for damages only. The practical consequences of such approach are considered in chapter 7.

Chapter 8 sets out deliberations relating to various aspects of seeking *actio Pauliana* protection – by way of both classical claims as well as allegations raised by the creditor within proceedings initiated by a third party. The analysis covers, *inter alia*,

temporal scope of creditor protection, the conduct of security and enforcement proceedings, as well as purely procedural aspects, such as valuation of the object of the dispute. Importantly, the author scrutinises certain formal prerequisites under German law (i.e. the necessity to submit a judgment against the debtor and due character of protected claim) which, *prima facie*, might have negative impact on effectiveness of creditor protection.

The PhD thesis ends with a number of general conclusions. It appears that, in many cases, the German legal system is at least a step ahead in comparison to Polish law. Concern for legal effectiveness of *actio Pauliana* is in evidence in the work of the German legislature as well as in solutions posited in German jurisprudence. Most probably, this owes to the centuries-old tradition of German *actio Pauliana* coupled with deliberate attention to coherence of subsequent legislative solutions and judicial practice, always in a manner consistent with the axiology of this legal concept.

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