

## THE IMPACT OF RECAST LAW ON INSOLVENCY ON CROSS-BORDER LITIGATION BY NATIONAL INSOLVENCY PRACTITIONERS: AN *ACTIO PAULIANA* CASE STUDY

Giedrius Ožiūnas

*Mykolas Romeris University, Lithuania*  
*giedrius.ozionas@gmail.com*

### Abstract

**Purpose** – The purpose of this article is to analyze the impact of the new recast Law on Insolvency of Legal Persons of the Republic of Lithuania (hereinafter – Law on Insolvency) on cross border litigation by national insolvency practitioners. Jurisdiction of claims filed by insolvency practitioners is a delicate matter, often giving rise to disputes whether the courts' jurisdiction should be based on Regulation (EU) No 1215/2012 of the European Parliament and of the Council of December 12 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereafter – Brussels Ibis regulation) or Regulation (EU) 2015/848 of the European Parliament and of the Council of May 20 2015 on insolvency proceedings (hereafter – Insolvency Regulation). In insolvency related matters, national regulation and its implementation are very important for demarcation between Insolvency Regulation and Brussels Ibis regulation. Thus, this article will provide some insights on whether the new recast Law on Insolvency addressed the issues insolvency practitioners continue to face when suing persons domiciled in another member state.

**Design/methodology/approach** – linguistic, teleological, systematic analysis, comparative and historical methods of legal research were used. These methods were used to systematically evaluate the legal changes, compare them with legal regulation of other Member states as well as previous legal regulations.

**Finding** – Despite the stated goal of efficiency, comprehensive changes in the Law on Insolvency to the insolvency procedure resulted in uncertainty for cross-border litigation. Despite not directly addressing the issue, changes to other spheres (rebranding the autonomous procedures of bankruptcy and restructuring to insolvency) made a notable negative impact on the still contested boundary between the Insolvency Regulation and Brussels Ibis regulation. Changes to *actio Pauliana* in Law on Insolvency seem to indicate a deviation from the general rule. Moreover, all fundamental changes (the new insolvency procedure) in the Law on Insolvency are not included in Annex A of the Insolvency Regulation. This fact in itself is a significant issue since the Court of Justice of the European Union has established that only proceedings that are listed in Annex A fall within the scope of the Insolvency Regulation. Thus, with the recent changes in Law on Insolvency, Lithuanian insolvency practitioners face significant legal uncertainty in all cross-border disputes.

**Research limitations/implications** – This article does not cover different forms of avoidance actions as well as the in-depth impact of different remedies (i. e. in pre-insolvency and hybrid proceedings) on jurisdiction used by insolvency practitioners due to their broad and complex nature.

**Practical implications** – Clear jurisdiction in matters of insolvency leads to a foreseeable and efficient procedure, as time is one of the most essential aspects of insolvency/bankruptcy proceedings. Since national regulation and Insolvency Regulation share a somewhat symbiotic relationship, the impact of one on the other is of paramount importance.

**Originality/Value** – Due to the fact that Law on Insolvency entered into force just recently, no research regarding this topic exists.

**Keywords:** law on insolvency, bankruptcy disputes, insolvency disputes, bankruptcy jurisdiction, insolvency jurisdiction.

**Research type:** general review.

## Introduction

Bankruptcies of corporate entities is an important part of any economy, for it provides the means to remove inefficient businesses from the economy and reallocate capital to more effective businesses. The legal bankruptcy regime is significant since it sets the standard of how efficient this procedure in itself will be. That, in turn, may either facilitate faster and reliable procedure or do the exact opposite.

In the age of globalization, cross-border insolvency is far from a rare occurrence, and in such cases, national insolvency practitioners face numerous challenges of managing the insolvency. European Union never set any harmonized bankruptcy regulations, yet it is stated that “the proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively”. Regulation (EU) 2015/848 of the European Parliament and of the Council of May 20 2015 on insolvency proceedings<sup>1</sup> (hereafter – Insolvency Regulation) and its predecessor Regulation (EC) No 1346/2000 on insolvency proceedings<sup>2</sup> were adopted for this exact purpose.

The Insolvency Regulation set a very favorable regime for insolvency practitioners in cases of cross border insolvency. However, the Insolvency Regulation comes into effect only if national regulation meets certain conditions. Whether the new recast Law on Insolvency of Legal Persons of the Republic of Lithuania<sup>3</sup> (hereinafter – Law on Insolvency) meets these conditions is discussed in this article. The new recast Law on Insolvency entered into force on January 1 2020 and replaced the Enterprise Bankruptcy Law of the Republic of Lithuania<sup>4</sup> (hereafter – Law on Bankruptcy). The Law on Insolvency brought a complete revamp of both restructuring and insolvency procedures. One of the most important changes is that now bankruptcy and restructuring processes are governed by single Law on Insolvency and the bankruptcy and restructuring processes are merged under one common name and process – insolvency. While the initial reception of this new law seems to agree that it is more flexible<sup>5</sup>, there is always another side to flexibility, which is a degree of uncertainty. That means for most of the major changes, the upcoming case-law of the courts will be the leading guiding material.

In this article, it will be analyzed how national regulation impacts the jurisdiction of *actio Pauliana* suits in insolvency cases: when it can be considered stemming from general law despite the fact of insolvency of one of the parties to the suit; when it can be regarded as an action deriving directly from the bankruptcy or winding-up. The result of this difference is that different jurisdictional rules may apply. Numerous times insolvency administrators face the fact that the insolvent company possibly illegally lost its assets to the detriment of all of its creditors as pointed out in Voskuil (1992). In such cases, the recovery of assets is necessary, which is usually done by filing an *actio Pauliana* suit. As summarized by Magnus &

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<sup>1</sup> Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings

<sup>2</sup> Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings

<sup>3</sup> Law on Insolvency of Legal Persons of the Republic of Lithuania. *TAR*. 2019, Nr. 2019-10324

<sup>4</sup> Enterprise Bankruptcy Law of the Republic of Lithuania. *Official Gazette*. 2001, No. IX-216

<sup>5</sup> for example: Ingrida Maciūtė: the Expert Opinion. The New Insolvency Initiation Procedure. [accessed 2020-03-02]. <<http://www.primusderling.eu/publication/ingrida-maciute-the-new-insolvency-initiation-procedure>>

Mankowski, (2016), distinction when an action is stemming from general law and when it is stemming from bankruptcy law is not without practical problems and usually does not answer the difficult cases: actions under the general law are often tied into bankruptcy proceedings; those actions may be affected by a later bankruptcy, in that the right becomes unavailable or must be shared with other creditors; an *actio Pauliana* may derive from bankruptcy law but may be initiated without actual bankruptcy of the debtor.

Thus, national legal regulation on insolvency and *actio Pauliana* becomes the first and foremost source in assessing whether an *actio Pauliana* suit is deriving directly from the bankruptcy or winding-up. Law on Insolvency in this respect brings a few significant changes and possible issues along with it.

### **The impact of national legal regulation on *actio Pauliana* jurisdiction in insolvency related matters with an international element**

The material rules of insolvency vary greatly in Member States and in case of insolvency, there are usually different agents (for example: insolvency administrator, the creditors) who gain the right to decide as to whether the insolvent company should file a suit seeking to recover unjustly lost assets. Whoever makes such a decision usually considers at least three basic criteria whether to file the suit or not: 1. the recoverable amount of lost assets; 2. the approximate cost (legal services, expertise) of the case; 3. approximate duration of the case. These criteria are all intertwined and they all translate to assessing the fiscal value of the action, of which duration is the most important. The longer the duration of the case (consequently – the insolvency), the more cents on the dollar the creditors lose. For cross-border contracts jurisdiction is of paramount importance when assessing the criteria as mentioned above, as a foreign court means vastly larger legal expenses and far less prediction with the duration of the case, especially if it belongs to less effective jurisdictions. Moreover, it is necessary for the proper functioning of the internal market to avoid incentives for parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position to the detriment of the creditors.<sup>6</sup>

It must be first addressed that as seen in Pretelli, Ilaria (2012), an *actio Pauliana* has different names and legal content.<sup>7</sup> For example, the Court of Justice of the European Union (hereafter – CJEU) considered an *actio Pauliana* suit as a type of avoidance action.<sup>8</sup> However such a suit be classified, it has few key features when tied to insolvency. When an entity files for or is placed in insolvency, the debtor or an insolvency representative for its estate may commence an avoidance action to collect assets that the debtor fraudulently transferred out of its estate, often to place them beyond the reach of the debtor's creditors. Thus an avoidance action seeks to thwart the possibility that a debtor may sell their assets below market value or benefit just individual creditors without being subject to the effects of insolvency proceedings.<sup>9</sup> Ultimately, the objective is to prevent the unjustified enrichment of one individual party to the detriment of all creditors, whether they are preferential, general or

<sup>6</sup> Recital 5 of Insolvency Regulation.

<sup>7</sup> Pretelli, Ilaria, Cross-Border Credit Protection Against Fraudulent Transfers of Assets: Actio Pauliana in the Conflict of Laws (June 1, 2012). Yearbook of Private International Law, Vol. 13, pp. 589-640, 2011.

<sup>8</sup> Case C-337/17, Feniks sp. z o.o. v Azteca Products & Services SL, [2018] ECLI:EU:C:2018:805

<sup>9</sup> EU Briefing Note, 'Harmonization of Insolvency Law at EU Level: Avoidance Actions and Rules on Contracts' (2011)

unsecured.<sup>10</sup> In Lithuanian legal regulation, *actio Pauliana* suit is filed by the insolvency administrator, who represents all of the insolvent company's creditors<sup>11</sup>.

One of the more extreme examples of insolvency tied avoidance actions is the "Phoenix" cases. According to UK Insolvency Service, "Phoenixing, or phoenixism, are terms used to describe the practice of carrying on the same business or trade successively through a series of companies where each becomes insolvent (cannot pay their debts) in turn. Each time this happens, the insolvent company's business, but not its debts, is transferred to a new, similar "phoenix" company. The insolvent company then ceases to trade and might enter into formal insolvency proceedings (liquidation, administration or administrative receivership) or be dissolved."<sup>12</sup> De Weijs (2011) provides for more examples and classifications, such as fraudulent conveyance or finding that an already insolvent companies creditor took its full share before the rest (for example, by offsetting mutual obligations), i. e. transactions which give priority to one of the debtor's creditors.

An international element in such cases means that international jurisdiction is an issue which needs to be resolved. As eloquently summarized by Advocate General Bobek "At the level of international jurisdiction, the key question to be asked at the outset is whether a specific *actio pauliana* claim is filed in the context of insolvency proceedings, or outside that context. Depending on the answer, different jurisdictional and applicable-law rules apply".<sup>13</sup>

Actions in civil and commercial matters that are supplementary to insolvency proceedings cannot be based on Brussels Ibis Regulation and are based on Insolvency Regulation; actions missing such features fall within the Brussels Ibis Regulation as it "is intended to apply to all civil and commercial matters apart from certain well-defined matters".<sup>14</sup>

Thus, in theory the question of jurisdiction of an *actio Pauliana* claim can fall either within the Insolvency Regulation or Brussels Ibis Regulation. Now there is a world of difference for the insolvency administrator in this respect. Insolvency Regulation provides for far more accessible and predictable procedure since the courts of the Member State within the territory of which insolvency proceedings have been opened in accordance with Article 3 shall have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them, such as avoidance actions.<sup>15</sup> In such case, it is far easier for both the insolvency administrator and creditors to assess the potential cost and duration of the case. On the contrary, Brussels Ibis depends on the facts of the case and may imply that courts of Member States other than the insolvency state will have jurisdiction. For example, under the current case-law for *actio Pauliana*, once it is brought based on the creditor's rights created upon the conclusion of a contract, it falls within 'matters relating to a contract' prescribed by Article 7(1)(a) of Brussels Ibis regulation in addition to the court of the defendant's domicile (Article 4).<sup>16</sup> According to Magnus & Mankowski (2016), Article 4 procedurally favors the defendant while Article 7(1)(a) may turn out to be very complex and is actively avoided. It should also be noted that demarcation between Insolvency Regulation and Brussels Ibis

<sup>10</sup> *ibid*

<sup>11</sup> Law on Insolvency Article 64.

<sup>12</sup> The Insolvency Service. *Phoenix companies and the role of the Insolvency Service*. 24 March 2017, [accessed 2020-03-30] <<https://www.gov.uk/government/publications/phoenix-companies-and-the-role-of-the-insolvency-service>>

<sup>13</sup> Opinion of Advocate General Bobek delivered on 21 June 2018 in case Case C-337/17 [2018] ECLI:EU:C:2018:487

<sup>14</sup> Case C-295/13, *H v HK* [2014] ECLI:EU:C:2014:2410

<sup>15</sup> Case C-213/10, *F-Tex SIA v. Lietuvos-Anglijos UAB Jadecloud-Vilma* [2012] ECLI:EU:C:2012:215

Case C-292/08, *German Graphics Graphische Maschinen GmbH v Alice van der Schee* [2009] ECR 1-8421

<sup>16</sup> Case C-337/17, *Feniks sp. z o.o. v Azteca Products & Services SL*, [2018] ECLI:EU:C:2018:805

regulation is also part of a broader discussion on *vis attractiva concursus*<sup>17</sup> impact on jurisdiction<sup>18</sup>.

The practice of the Court of Justice of the European Union (hereafter – CJEU) is rather diverse in this respect and requires a closer inspection. CJEU in one of its earliest judgments *Henri Gourdain v Franz Nadler*<sup>19</sup> (hereafter – Gourdain case) stated that an *actio Pauliana* claim based on insolvency proceedings does not fall within the scope of Brussels Convention (the predecessor of Brussels Ibis). The case concerned a decision by a French court ordering the manager to pay a sum for the insolvent company. The CJEU ruled that it must be considered as given in the context of bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons or analogous proceedings. The CJEU established that if decisions relating to bankruptcy and winding-up are to be excluded from the scope of the Brussels Convention, they must derive directly from the bankruptcy or winding-up and be closely connected with the proceedings for the “liquidation des biens” or the “règlement judiciaire”.<sup>20</sup>

This was later reaffirmed in the case *Seagon v. Deko Marty Belgium NV*. The case concerned a liquidator’s suit to order to repay the money and set a transaction aside by virtue of the debtor’s insolvency. CJEU decided that this action derived directly from the bankruptcy as a liquidator brought it and according to German national law it was intended to increase the assets available to all creditors.<sup>21</sup>

In *F-Tex SIA v. Lietuvos-Anglijos UAB Jadecloud-Vilma* case the CJEU had to rule on creditors of the company actions against the company’s debtors by way of assignment from the liquidator. The CJEU decided that the assignee, when he decides to exercise his right of claim, acts in his interest and benefit. Like the right of claim which serves as the basis for his application, the proceeds of the action which he brings become owned by him personally. The consequences of his action are therefore different from those of an action to set a transaction aside brought by a liquidator, which is intended to increase the assets of the undertaking which is the subject of insolvency proceedings. Thus CJEU rules that an action brought against a third party by an applicant acting based on an assignment of claims which has been granted by a liquidator appointed in insolvency proceedings and the subject-matter of which is the right to have a transaction set aside that the liquidator derives from the national law applicable to those proceedings is covered by the concept of civil and commercial matters within the meaning of that provision.<sup>22</sup>

In *Kornhaas* case the CJEU ruled that an action directed against the managing director of a company established under the law of England and Wales, forming the subject of insolvency proceedings opened in Germany, brought before a German court by the liquidator of that company and seeking, based on a national provision such as the first sentence of Paragraph 64(2) of the Law on limited liability companies, reimbursement of payments made by that managing director before the opening of the insolvency proceedings but after the date on which the insolvency of that company was established, falls within the scope of Insolvency Regulation.<sup>23</sup>

<sup>17</sup> Principle of insolvency that all ancillary proceedings may brought before the forum concursus.

<sup>18</sup> Carballo Piñeiro, L. (2010). *Vis attractiva concursus in the European Union: its development by the European Court of Justice. In Dret, 3.*

<sup>20</sup> Case 133/78, *Henri Gourdain v. Franz Nadler* (1979) ECR 733

<sup>21</sup> Case C-339/07, *Seagon v Deko Marty Belgium NV* [2009] BCC 347

<sup>22</sup> Case C-213/10, *F-Tex SIA v. Lietuvos-Anglijos UAB Jadecloud-Vilma* [2012] ECLI:EU:C:2012:215

<sup>23</sup> Case C-594/14, *Kornhaas* ECLI:EU:C:2015:806

When assessing jurisdiction in *actio Pauliana* claims with an international element, the Supreme Court of Lithuania has summarized 4 criteria, which define whether a claim falls into Insolvency Regulation or Brussels Ibis regulation scope. These criteria are: 1) whether the claim can be filed only by the insolvency administrator; 2) is the claim based on rules, derogating from general private law; 3) whether the limitation period is based on bankruptcy law; 4) whether a positive decision is in the interest of the general body of creditors.<sup>24</sup> Now, if we compare to the most recent criteria of CJEU, it is far more general: an action is related to bankruptcy or winding-up if it derives directly from the bankruptcy or winding-up and is closely connected with the proceedings for the liquidation of assets or composition proceedings.<sup>25</sup>

Looking at Lithuanian case-law, it is quite difficult to see the majority of *actio Pauliana* claims by an insolvency administrator to be accepted as falling within the scope of Insolvency Regulation.<sup>26</sup> The courts consistently rejected the participation of an insolvency administrator as a reason to apply the Insolvency Regulation and consistently indicated that such claims are filed due to procedural and not material circumstances – the creditors had the freedom to file the same claim before the insolvency proceedings.<sup>27</sup> This position is essentially in line with CJEU, as in order to determine whether an action derives directly from insolvency proceedings, the decisive criterion adopted by the court to identify the area within which an action falls is not the procedural context of which that action is part, but the legal basis thereof. According to that approach, it must be determined whether the right or the obligation which forms the basis of the action has its source in the ordinary rules of civil and commercial law or in derogating rules specific to insolvency proceedings.<sup>28</sup>

It is evident that for an insolvency related *actio Pauliana* suit, national regulation is essential for demarcation between Insolvency Regulation and Brussels Ibis regulation.

Currently, all *actio Pauliana* claims are based on Paragraph 2 of Article 6.66 of the Civil Code of the Republic of Lithuania, providing for the right of the creditor to challenge transactions concluded by the debtor (*actio Pauliana*). It establishes that a bilateral transaction may be recognized as null and void under the grounds provided by Paragraph 1 of this article only if the third party was dishonest in concluding the transaction with the debtor, i.e. the former was aware or had to be aware of the fact that the transaction violated the rights of the creditor. In contrast, Paragraph 5 of the said article stipulates that the recognition of the transaction as null and void does not affect the rights of an honest third party to the property, which had been the object of the transaction that was recognized as null and void.<sup>29</sup>

If we look systematically at the Law on Insolvency main features and its *travaux préparatoires*<sup>30</sup>, there is no evidence that the issue of international jurisdiction was an area of consideration during the recasting of legal regulation. That in itself is a missed opportunity to

<sup>24</sup> The Supreme Court of Lithuania, Civil Division, 30 January 2014 ruling of the board of judges in the civil case “Accuratus” v. “Aquabaltia Group Latvia” (case No. 3K-3-142/2014)

<sup>25</sup> Case C-337/17, *Feniks sp. z o.o. v Azteca Products & Services SL* [2018] ECLI:EU:C:2018:805

<sup>26</sup> For example: The Supreme Court of Lithuania, Civil Division, 19 October 2018 ruling of the board of judges in the civil case “Snoras” v. „East-West United Bank S.A.” and „Multiasset S.A.” (case No. 3K-3-367-969/2018)

The Supreme Court of Lithuania, Civil Division, 27 march 2020 ruling of the board of judges in the civil case “Euronika” v. “Munck Islandi ehf” (case No. e3K-3-82-684/2020)

<sup>27</sup> Compare case No. 3K-3-142/2014, case No. 3K-3-367-969/2018 and case No. e3K-3-82-684/2020.

<sup>28</sup> Case C-157/13, *Nickel & Goeldner Spedition* [2014] EU:C:2014:2145; case C-641/16, *Tünkers* [2017] ECLI:EU:C:2017:847

<sup>29</sup> The Constitutional Court of the Republic Of Lithuania, 9 April 2003 ruling on the protection of the rights of the creditor

<sup>30</sup> Explanatory note for Law on Insolvency. TAR, Nr. XIIP-2777- XIIP-2789

at least consider the practical issues for recovery of assets and/or consolidate all the case-law on how fundamentally different an insolvency related *actio Pauliana* suit is.

An *actio Pauliana* suit filed by an insolvency administrator features certain elements that diverge from an ordinary *actio Pauliana* suit. Firstly, the limitation period to file an *actio Pauliana* suit “restarts” with the insolvency procedure (or even – with a change of insolvency administrator)<sup>31</sup>. Secondly, a special legal entity – the insolvency administrator – gains legal standing to bring the action<sup>32</sup>. Thirdly, such an action seeks to protect the interests of the general body of creditors<sup>33</sup>.

It must be acknowledged that, as stated before, the material basis of an *actio Pauliana* suit remains the same, as it is based on Article 6.66 of the Civil Code. However, it cannot be ignored that sometimes a difference in procedural rules change the very nature of the proceedings. One such overlooked difference is the courts’ role in ordinary *actio Pauliana* proceedings and insolvency tied *actio Pauliana* proceedings. Now in an ordinary *actio Pauliana* process, the court has extremely limited rights to be active, since the principle of free party disposition and the adversarial principle are in full effect.<sup>34</sup> The insolvency element, on the other hand, changes this completely – in such cases, the court must be active and gather evidence. Thus, the nature of the procedure shifts from an adversarial one to inquisitional. In the author’s opinion, this difference is the most fundamental one making for a compelling argument that *actio Pauliana* claims by an insolvency administrator in Lithuania do not share the same essential procedural rules of its conventional counterpart and thus could be considered as a separate action.

This distinction will be in question with the new Law on Insolvency. Both Law on Insolvency and its predecessor Law on Bankruptcy had special clauses, stipulating the duty of the insolvency administrator to act against transactions that infringed the rights of the creditors. Nevertheless, while Law on Bankruptcy had essentially a reference clause and did not set any material rules in respect to an *actio Pauliana* claim<sup>35</sup>, Law on Insolvency now stipulates a far more concrete rule that the insolvency administrator shall, not later than within six months from acquiring the documents of the companies transactions, inspect all transactions concluded at least three years before the date of insolvency proceedings and file a suit in court if the company was not obliged to enter into transactions or they infringe the rights of the creditor and the company knew or should have known about it (*actio Pauliana*).<sup>36</sup>

The author would argue that the change as mentioned earlier in Law on Insolvency could be brought as an argument that *actio Pauliana* suit by an insolvency administrator based on Law on Insolvency Article 64(1)(3) is no longer simply a reference to Article 6.66 of the Civil Code but an insolvency specific *actio Pauliana* rule. This conclusion, however, stems primarily from comparative and linguistic legal interpretation. As stated before, *travaux préparatoires* of the Law on Insolvency are silent regarding this matter and systemic as well as teleological interpretation of the law yields no clear results.

Should we accept the premise of an emergent new *lex specialis* rule, then according to the criteria stated above in the case-law of CJEU, it would be enough to state that an *actio Pauliana* suit by an insolvency administrator based on Law on Insolvency Art. 64(1)(3)

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<sup>31</sup> The Supreme Court of Lithuania, Civil Division, 28 December 2017 ruling of the board of judges in the civil case „Vevira“ v. R. S. (case No. 3K-3-479-687/2017)

<sup>32</sup> Law on Insolvency Articles 57 and 59.

<sup>33</sup> Ibid 29.

<sup>34</sup> Tamošiūnienė, E., Bolzanas, D., & Augytė-Kamarauskienė, L. (2017). Evidence in Civil law–Lithuania. *Institute for Local Self-Government and Public Procurement, Lex localis, Maribor.*

<sup>35</sup> Law on Bankruptcy Article 11(5)(8).

<sup>36</sup> Law on Insolvency Article 64(1)(3).

derives directly from the insolvency of the company. Thus, with an international element present, jurisdiction of such *actio Pauliana* suit would be based on Insolvency Regulation and not Brussels Ibis Regulation.

### **The role Annex A of the Insolvency Regulation**

While the Law on Insolvency seems to be a push from Brussels Ibis Regulation, it has other issues with the scope of Insolvency Regulation. For this, a short insight into the scope Insolvency Regulation is necessary: Recital 9, Article 1-1, Article 2-4 and Annex A *in corpore* set the scope of Insolvency Regulation.

According to Recital 9 of the Insolvency Regulation, it “should apply to insolvency proceedings which meet the conditions set out in it, irrespective of whether the debtor is a natural person or a legal person, a trader or an individual. Those insolvency proceedings are listed exhaustively in Annex A. In respect of the national procedures contained in Annex A, this Regulation should apply without any further examination by the courts of another Member State as to whether the conditions set out in this Regulation are met. National insolvency procedures not listed in Annex A should not be covered by this Regulation.” Article 2(4) also states that ‘insolvency proceedings’ means the proceedings listed in Annex A.

Article 1(1) of the Insolvency Regulation states that “this regulation shall apply to public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganization or liquidation: (a) a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed; (b) the assets and affairs of a debtor are subject to control or supervision by a court; or (c) a temporary stay of individual enforcement proceedings is granted by a court or by operation of law, in order to allow for negotiations between the debtor and its creditors, provided that the proceedings in which the stay is granted provide for suitable measures to protect the general body of creditors, and, where no agreement is reached, are preliminary to one of the proceedings referred to in point (a) or (b). Where the proceedings referred to in this paragraph may be commenced in situations where there is only a likelihood of insolvency, their purpose shall be to avoid the debtor’s insolvency or the cessation of the debtor’s business activities. The proceedings referred to in this paragraph are listed in Annex A.”

CJEU in *Bank Handlowy*<sup>37</sup> and *Radziejewski*<sup>38</sup> judgments established that only proceedings which are listed in Annex A fall within the scope of the Insolvency Regulation. That is a significant issue for Law on Insolvency, since the legal overhaul not only changed some procedural rules but rebranded the procedure and introduced completely new concepts, which are not part of Annex A of the Insolvency Regulation. The national proceedings are now called insolvency proceedings (orig. “nemokumo byla”) as opposed to the old divided proceedings of bankruptcy (orig. “įmonės bankroto byla”) and restructuring (orig. “įmonės restruktūrizavimo byla”). One might argue that while the proceedings in Law on Insolvency are not listed in Annex A, they still meet the conditions set out in Article 1(1) of the Insolvency Regulation. That, as mention before, is hardly relevant as they will fall outside the scope of Insolvency Regulation until the ordinary legislative procedure to amend Annex A is done.<sup>39</sup> The only possible argument here would be that bankruptcy and restructuring still

<sup>37</sup> Case C-116/11, *Bank Handlowy* [2012] ECLI:EU:C:2012:739

<sup>38</sup> Case C-461/11, *Radziejewski* [2012] ECLI:EU:C:2012:704

<sup>39</sup> The Implementation of the New Insolvency Regulation. Recommendations and Guidelines. JUST/2013/JCIV/AG/467, <<http://insreg.mpi.lu/Guidelines.pdf>>

remain a part of Law on Insolvency, but again, according to part II and Article 1(1) of Law on Insolvency the autonomous national procedures currently listed in Annex A no longer exist. The *travaux préparatoires* are silent on this matter.

The interesting takeaway is that the application of Brussels Ibis regulation at this point could be the safest option. Should the proceedings be indeed recognized as insolvency or insolvency related, they would fall outside Brussels Ibis because of the exemption in Article 1(2)(b). Now since insolvency proceedings are listed exhaustively in Annex A of the Insolvency Regulation, the proceedings would fall outside of this regulation as well.

Such a legal limbo would mean that jurisdiction would be determined according to the domestic rules of private international law. This could be considered as a worst-case scenario – even if the parties would seize a particular court, its judgement may not be automatically recognizable or enforceable in the other Member States. While that in no way means that the judgement would be of a declaratory nature, it simply means that in addition to the main proceedings the parties must also go through exequatur procedure in another member state according to its domestic rules. Moreover, due to divergent domestic rules of private international law in each Member State, foreseeability of jurisdiction becomes a major issue as well.

This legal limbo with the Law on Insolvency falling out of the scope of Insolvency Regulation may last a while. For example, the European Commission issued the first proposal for replacing Annexes A and B on May 30 2016, while Poland notified the Commission of a substantial reform of its domestic law on restructuring on December 4 2015 and requested to change the lists accordingly. In its proposal, the Commission has upheld that the modification of Annexes can only be accomplished with a legislative amendment of the Insolvency Regulation. Thus, the Annexes to the Insolvency Regulation can be amended only by a regulation to be adopted following the ordinary legislative procedure under the legal base on which the original regulation was adopted, namely Article 81 of Treaty on the Functioning of the European Union.<sup>40</sup> Thus until the ordinary legislative procedure to amend Annex A is completed, insolvency procedure in Law on Insolvency falls out of the scope of Insolvency Regulation.

So far it is unclear whether the European Commission has been notified of the reform in Law on Insolvency. Again, the *travaux préparatoires* are silent on this matter. It would be very hard to believe that there was any intention to opt-out of Insolvency Regulation. While Member States do not have a duty to notify European Commission of any new proceedings, it seems a diligent and reasonable practical step along with delaying entry into force until Annex A is amended. Unfortunately, for reasons unknown, none of these steps were taken.

## Conclusions

Despite the stated goal of efficiency, comprehensive changes in the Law on Insolvency to the insolvency and bankruptcy procedure resulted in uncertainty for cross-border litigation. Changes were made without a clear intent that seem to bring an *actio Pauliana* suit by an insolvency administrator based on Law on Insolvency Article 64(1)(3) closer to a *lex specialis* status regarding Article 6.66 of the Civil Code. That, in turn, would challenge the current case law regarding jurisdiction of such suits and demarcation between Insolvency Regulation and Brussels Ibis regulation. Application of Insolvency Regulation to define jurisdiction of an *actio*

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<sup>40</sup> Proposal for a Regulation of the European Parliament and of the Council replacing the lists of insolvency proceedings and insolvency practitioners in Annexes A and B to Regulation (EU) 2015/848 on insolvency proceedings (COM/2016/0317 final - 2016/0159 (COD))

*Pauliana* suit by an insolvency administrator in cases with an international element would be favorable for the insolvency administrator and the creditors of insolvent companies while still retaining the limited scope of *vis attractiva concursus*.

Changes to other spheres (rebranding the procedure from bankruptcy and restructuring to insolvency) made a negative impact on the still contested boundary between the Insolvency Regulation and Brussels Ibis Regulation, since the changes (the new insolvency procedure) in the Law on Insolvency are not included in Annex A of the Insolvency Regulation. This fact in itself is a significant issue since the CJEU has established that only proceedings which are listed in Annex A fall within the scope of the Insolvency Regulation. Thus, with the recent changes in Law on Insolvency Lithuanian insolvency practitioners face significant legal uncertainty in cross-border *actio Pauliana* cases.

## References

- Carballo Piñeiro, L. (2010). *Vis attractiva concursus* in the European Union: its development by the European Court of Justice. *InDret*, 3.
- Case 133/78, *Henri Gourdain v. Franz Nadler* (1979) ECR 733
- Case C 641/16, *Tünkers* [2017] ECLI:EU:C:2017:847
- Case C-116/11, *Bank Handlowy* [2012] ECLI:EU:C:2012:739
- Case C-157/13, *Nickel & Goeldner Spedition* [2014] EU:C:2014:2145;
- Case C-213/10, *F-Tex SIA v. Lietuvos-Anglijos UAB Jadecloud-Vilma* [2012] ECLI:EU:C:2012:215
- Case C-292/08, *German Graphics Graphische Maschinen GmbH v Alice van der Schee* [2009] ECR I-8421
- Case C-295/13, *H v HK* [2014] ECLI:EU:C:2014:2410
- Case C-337/17, *Feniks sp. z o.o. v Azteca Products & Services SL* [2018] ECLI:EU:C:2018:805
- Case C-339/07, *Seagon v Deko Marty Belgium NV* [2009] BCC 347
- Case C-461/11, *Radziejewski* [2012] ECLI:EU:C:2012:704
- Case C-594/14, *Kornhaas* [2015] ECLI:EU:C:2015:806
- Council regulation (EC) No 1346/2000 of May 29 2000 on insolvency proceedings
- De Weijjs, R. J. (2011). Towards an objective European rule on transaction avoidance in insolvencies. *International Insolvency Review*, 20(3).
- Enterprise Bankruptcy Law of the Republic of Lithuania. *Official Gazette*. 2001, No. IX-216
- EU Briefing Note, 'Harmonization of Insolvency Law at EU Level: Avoidance Actions and Rules on Contracts' (2011)
- Explanatory note for Law on Insolvency. *TAR*. No. XIIP-2777- XIIP-2789
- Law on Insolvency of Legal Persons of the Republic of Lithuania. *TAR*. 2019, No. 2019-10324
- Magnus, U., & Mankowski, P. (Eds.). (2016). *Brussels Ibis Regulation: commentary*. Otto Schmidt.
- Opinion of Advocate General Bobek delivered on June 21 2018 in case Case C-337/17 [2018] ECLI:EU:C:2018:487
- Pretelli, Ilaria, Cross-Border Credit Protection Against Fraudulent Transfers of Assets: Actio Pauliana in the Conflict of Laws (2012). *Yearbook of Private International Law*, Vol. 13, pp. 589-640, 2011.
- Proposal for a Regulation of the European Parliament and of the Council replacing the lists of insolvency proceedings and insolvency practitioners in Annexes A and B to Regulation (EU) 2015/848 on insolvency proceedings (COM/2016/0317 final - 2016/0159 (COD))
- Regulation (EU) 2015/848 of the European Parliament and of the Council of May 20 2015 on insolvency proceedings
- Tamošiūnienė, E., Bolzanas, D., & Augytė-Kamarauskienė, L. (2017). Evidence in Civil law-Lithuania. *Institute for Local Self-Government and Public Procurement, Lex localis, Maribor*.
- The Constitutional Court of the Republic Of Lithuania, April 9 2003 ruling on the protection of the rights of the creditor.
- The Implementation of the New Insolvency Regulation. Recommendations and Guidelines. JUST/2013/JCIV/AG/467, <<http://insreg.mpi.lu/Guidelines.pdf>>
- The Insolvency Service. *Phoenix companies and the role of the Insolvency Service*. 24 March 2017, [accessed 2020-03-30] <<https://www.gov.uk/government/publications/phoenix-companies-and-the-role-of-the-insolvency-service>>

The Supreme Court of Lithuania, Civil Division, December 28 2017 ruling of the board of judges in the civil case “Vevira” v. R. S. (case No. 3K-3-479-687/2017)

The Supreme Court of Lithuania, Civil Division, January 30 2014 ruling of the board of judges in the civil case “Accuratus” v. “Aquabaltia Group Latvia” (case No. 3K-3-142/2014)

The Supreme Court of Lithuania, Civil Division, March 27 2020 ruling of the board of judges in the civil case “Euronika” v. “Munck Islandi ehf” (case No. e3K-3-82-684/2020)

The Supreme Court of Lithuania, Civil Division, October 19 2018 ruling of the board of judges in the civil case “Snoras” v. “East-West United Bank S.A.” and “Multiasset S.A.” (case No. 3K-3-367-969/2018)

Voskuil, CC Cornelis Carel Albert, and Mathilde Sumampouw, eds. *Law and Reality: Essays on National and International Procedural Law in Honour of Cornelis Carrel Albert Voskuil*. Martinus Nijhoff Publishers, 1992.



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