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REFLECTIONS ON THE HISTORICAL AND COMPARATIVE ASPECTS OF BANKRUPTCY LAW

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Resumen:
El autor del estudio destaca la influencia de la *actio Pauliana* del derecho civil /privado/ romano en el derecho concursal, regulado en el/los código/s civil/es de muchos países europeos y extraeuropeos. También ofrece una visión general de la doctrina jurídica, así como de la práctica jurídica arraigada en el concepto de la *actio Pauliana*. El autor toma en consideración la (segunda) *Sale of Goods Act* aprobada por el Parlamento del Reino Unido en 1979, así como el *European Convention on Certain International Aspects of Bankruptcy*, aprobado en 1990, en relación con la *actio Pauliana*. En la parte final de este estudio, el autor señala que la aproximación o armonización del Derecho concursal debe basarse tanto en la doctrina jurídica como en la historia jurídica comparada. En su opinión, los medios jurídicos más importantes del largo proceso de armonización del Derecho concursal son los convenios internacionales multilaterales.

Abstract:
The author of the study emphasizes the influence of the *actio Pauliana* of Roman civil /private/ law on bankruptcy law, regulated in the civil code/s/ of many European and extra-European countries. He also gives an overview on legal doctrine as well as legal practice rooted in the concept of the *actio Pauliana.* The author takes into consideration the (second) *Sale of Goods Act* adopted by the Parliament of the United Kingdom in 1979 as well as the *European Convention on Certain International Aspects of Bankruptcy*, adopted in 1990, with regard to the *actio Pauliana*. In the final part of the study the author points out that the approximation or harmonisation of bankruptcy law should be based on legal doctrine as well as on comparative legal history. The most important legal means of the lenghty harmonisation process of bankruptcy law are, in his view, the multilateral international conventions.

I.

1. Regulation with regard to bankruptcy has played a significant role during the transitional period (in German: *Übergangsperiode*) to a market economy (in German: *Marktwirtschaft*) in the countries of Central and Eastern Europe.

We deem necessary to point out that in the field of bankruptcy regulation the legal institution (in German: *Rechtsinstitut*) of *actio Pauliana* of Roman (civil) law was throughout centuries, including the age of codification of private (civil) law, of considerable significance.

The *actio Pauliana* is, with no doubt, substantially in compliance with article 1167 of the French *Code Civil*: "Ils peuvent aussi, en leur nom personnel, attaquer les actes faits par leur débiteur en fraude de leurs droits."). We have to point out, however, that the four drafters of the French *Code Civil* (*Code Napoléon*) among them the two Roman law specialists, Jean-Etienne-Marie Portalis (1745-1807) and Jacques de Maleville (1741-1824), in drafting the *Code Civil*, did not deem necessary to provide a detailed i.e. "comprehensive" regulation of the *actio Pauliana*.

It is worth mentioning - we are in the age of the *École de l'Exégèse* (in English: Exegetic School) in France - that the jurists interpreting the *Code Civil*, for example, the renowned jurists Raymond Théodore Troplong (1795-1869) and Jean Charles Florent Demolombe (1804-1887) had interpreted article 1167 of the *Code Civil*

availed themselves of the interpretation of the sources of Roman private law. By means of interpretation of the *fontes iuris Romani,* the *action paulienne* found reception in French private law, in spite of the absence of a detailed regulation in the text of the *Code Civil des Français* put into effect on March 21st, 1804.

In the context of the *action paulienne*, we think, it is appropriate to make a short analysis of the French legal doctrine (in French: *jurisprudence*). In this regard we refer to the work of the noted French civil law specialist Georges Ripert (1880-1958) titled „La règle morale dans les obligations civiles". We have to point out that in the view of Georges Ripert[1], the *action paulienne* is one of the examples of the close relationship existing between law and morals. ("L'action paulienne suffirait à démontrer que l'obligation ne crée pas seulement un rapport entre deux patrimoines, mais qu'elle est un véritable lien entre deux personnes dont l'une est désormais tenue vis-à-vis de l'autre part le devoir, moral tout autant que juridique, d'acquitter sa dette".).

2. The significance of the *action paulienne* is, in our view, not diminished by the fact that in the French judicial practice (*pratique judiciaire*) this legal institution i.e. article 1167 of the *Code Civil* is not often referred to. The rather limited number of reference to this article is mainly due difficulties related to evidences i.e. proofs

[1] See A. ROVAST: *L'œuvre civiliste de Georges Ripert.* Revue trimestrielle de droit civil 1959. p. 1. The memorial study of Rovast is an excellent analysis of the contemporary significance of the civil law (*droit civil*) related oeuvre of Georges Ripert.

(*preuves*). This is referred to, for instance, in the work of fundamental importance of Marcel Ferdinand Planiol (1853-1931) and Georges Ripert (1880-1958) titled "Traité élémentaire de droit civil", often cited and referred to even in the third decade of the 21st century.

We find the legal institution of the *actio Pauliana* in compliance with article 1167 of the French *Code Civil* in the civil code of a number of countries both in Europe and outside Europe, that were promulgated after 1804. This is holding true, to mention just one country's civil code, for the Greek Civil Code of 1946. The bankruptcy related articles of the Greek Civil Code are based on the concept of the *actio Pauliana*.

The law i.e. legal order (system) of other countries, this is holding true, for instance, for Switzerland as well as for Italy, regulates this legal institution in a separate bankruptcy act.

Mentioning deserves in this regard the *European Convention on Certain International Aspects of Bankruptcy*, adopted in 1990. In the *European Convention on Certain International Aspects of Bankruptcy* the influence of the *actio Pauliana* can also be observed.

3. The *actio Pauliana* is a living legal institution referred to in the judicial practice of the Court of Justice of the European Union in Luxembourg. The *actio Pauliana*, according to our perception, can be regarded as one of the "pillars" of community law (European law)

having an increasing trend towards harmonization, approximation or unification.

Attention deserves, however, that the Greek Civil Code (*Astikos Kodix*) referred to above, that entered into force in Greece in February 1946, unlike the French *Code Civil*, regulates the *actio Pauliana* in a more detailed way - namely in as many as eight articles.

We point out that the provisions of the Greek Civil Code sanctioning malicious (fraudulent) behavior of the debtors (in Latin: *debitores*) toward creditors (in Latin: *creditores*) reflect the strong influence of both classical Roman (*ius civile Romanorum*) law and Romano-Byzantine legal tradition (*ius Graeco-Romanum* or *ius Byzantinum*).

II.

4. In the German legal doctrine i.e. legal science (in German: *Rechtsdoktrin* or *Rechtswissenschaft*), a number of authors took into consideration the *actio Pauliana*. Attention deserves in this regard the fact that that this interest existed primarily during the first half of the 19th century. Franke's work titled „Über die Zulässigkeit der actio Pauliana bei Zahlungen, Pfandbestellung, Hingabe an Zahlungsstatt (Archiv für die civilistische Praxis, 1833) is one of the works whose author avails himself of the concept of the *actio Pauliana*.

With regard to the Italian legal doctrine, mentioning deserves the name of Mario Stolfi. In the Spanish legal doctrine, the *actio Pauliana* similarly found much attention.

Special mentioning deserves the fact that bankruptcy law related regulation based on the *actio Pauliana* is primarily creditor-oriented. Characteristic feature of the *actio Pauliana* is, however, that this *action* does exclude the taking into consideration the protection of the debtor and of „saving" in a legal way the debtor's enterprise/s/.

In our view, this is one of the characteristic features of the Austrian bankruptcy law. We find the "fundamental elements" of Austrian bankruptcy law in several laws (decrees) and regulations. We mention with regard to the Austrian bankruptcy law the *Konkursordnung* and *Ausgleichsordnung*, put into effect in 1914 in the form of an Imperial Decree (in German: *Hofdekret*), as amended many times, the *Bankwesengesetz* promulgated in 1993 and the *Versicherungsaufsichtsgesetz* [abridged as VAG] on insurance companies.

5. Regulation dating back to ancient Roman law in the Classical i.e. Graeco-Roman Antiquity had a paradigmatic significance in the context of the harmonization, approximation and unification of both procedural and substantive law. Even today the *cessio bonorum extra ius*, known in Roman law, which means the transfer of the debtor's assets to the creditor or creditors without a legal proceeding, is in existence.

It is likely that the transfer of assets originally did not involve the participation of the judge (*iudex*). The transfer of assets initially was conceived as a simple agreement (*pactum*), requiring no formality, between the debtor and the creditor. The *praetor* sanctioned the agreement not bound to any formal requirements.

Several hundred years later, however, probably at the end of the 4th century AD, namely during the reign of emperor Theodosius the Great (380-395), participation of a judge (*iudex*) became a necessary, unavoidable element of the transfer process.

6. In our view, the regulation related to bankruptcy law in Switzerland deserves particular attention. This is true despite the fact that the regulation slightly differs from canton to canton.

Special attention deserves the *Bundesgesetz über Schuldbetreibung und Konkurs* (in French: *Loi sur les poursuites et faillites*), which was adopted in 1889 and put into force three years later, on January 1, 1892. We emphasize that the *Bundesgesetz über Schuldbetreibung und Konkurs* (*Loi fédérale sur les poursuites et faillites*) since its promulgation was several times amended.

The above mentioned federal law was drafted by Louis Ruchonnet (1834-1893) – similarly to the Swiss Civil Code put into force in 1912 and the Swiss Code of Obligations put into force almost three decades earlier, in 1883 – can be viewed as an amalgamation of different i.e. French, Austrian and German legal

traditions. In this context, the Swiss federal law was with no doubt the product at legislative level of legal comparison.

7. The role of maritime commerce (*commercium*) in the development of bankruptcy law. Let us here recall the pioneer role of the most important Hanseatic cities, Hamburg, in the area of the comprehensive reform of the "*gemeines deutsches Konkursrecht*". As far as its significance is concerned, in our view, the „*hanseatisches Konkursrecht*" should be a subject of substantial analysis.

Subject of discussion is, however, to what extent the German bankruptcy law was rooted in the legal practice of the Hanseatic cities. Some legal historians assume that the origin of the bankruptcy law has its roots in the law of the cities (communities) geographically located in Northern Italy. It is a fact, however, that starting with the 17th century, the bankruptcy law of a number of German cities (in German: "*Konkurs*- or *Fallitenordnung*") shows a tendency towards unification. In the lenghty process of the development during which the German *„gemeines Recht"* (in English: "common law") plays a decisive role. This generally applies to bankruptcy law during the Middle Ages.

The work of Salgado de Samoza titled *Labyrinthus creditorum concurrentium*, published first in 1653 in Antwerp and edited later several times reflects a rather exemplary and factual situation, pointing out several difficulties in exploring the characteristic features of bankruptcy law.

A few decades earlier, Benvenuto Stracca (1509-1578), the highly prestigious specialist of commercial law (in Latin: *lex mercatoria* or *ius mercatorum*), regarded also "father of commercial law", was born in Ancona and studied at the University of Bologna, pointed out in his extensive discussions (in Latin: *discussiones*) of banktrupcy in 1553 (*De mercatura sive de Mercatore*), the significant differences in relation to the bankruptcy law of different cities i.e. city-States of the Italian peninsula. We find this analysis in comprehensive way in his work titled *Tractatus de mercatura*, called also "handbook of commercial law, published in 1575, and reprinted later several times.

Special mentioning deserve the statutes (in Latin: *statuta*) of Genova, adopted in 1588 and 1589. In these statutes emphasis is being laid on the fact that the purchaser does not acquire a right (in Latin: *ius*) to a thing sold by the seller until the payment of the purchase price (*pretium*) had been paid.

The statutes (in Latin: *statuta*) of Genova had influenced the English doctrine of *right of stoppage in transit*. The influence of the statutes of Genova is reflected in a number of English *Bankruptcy Acts*.

8. The *pactum reservati dominii*, can be regarded as an effective tool in the protection of creditors. We can rules of the protection of creditors in numerous bankruptcy laws. This is holding true for the Austrian „*josefinische Konkursordnung*," promulgated in 1781 as well as for the Prussian *Allgemeine Gerichtsordnung* promulgated a few

years later, in 1793. The protection of property rights (in French: *clause de réserve de propriété*) can also be found in quite a few legislative acts promulgated in the 20th century. A good example for this is the law promulgated in France on May 12, 1980.

The comparison of laws in the field of bankruptcy is greatly simplified by the fact of a historically demonstrated reception. The institution of maintaining property – in the form of the so-called *Verfolgungsrecht* – was adopted by par. 44 of the German *Konkursordnung*, adopted in 1898 as well as by art. 576 of the French *Code de commerce* adopted in 1807 and put into force the following year.

The art. 576 of the French Commercial Code, however, is the adoption of the *right of stoppage*, existing since 1690, which is known to this date as a legal construction in Anglo-Saxon law (such as in the (second) *Sale of Goods Act* adopted in 1979 (*stoppage in transit*). The *right of stoppage in transitu* is also recognized by art. 118 of the French act regulating the bankruptcy proceeding of companies, promulgated on January 25, 1985.

Unfortunately, to this date we do not have a comprehensive work. i.e. monography – this is a with no doubt a debt of the specialists of legal history – on the transformation and development of bankruptcy law. A work of this type could be the result of an intensive international cooperation based on coordinated research work.

We have to mention, that the *Bankruptcy Code of the United States of America* (*USA*), divided into two parts and thirteen chapters, making no difference between the regulation of companies and private persons i.e. individuals, did not find appropriate attention among legal scholars and practitioners in Europe.

9. The undoubted lack of an appropriate historical analysis does not simplify the harmonization, approximation or unification of bankruptcy law or at least of some bankruptcy laws and regulations. In the international scholarly literature, authors as Bogdan, Hans Hanisch and Flessner first refer to the need for the unification or at least harmonization of bankruptcy laws and regulations. As early as 1960, within the framework of the European Economic Community (EEC), there had been serious attempts to adopt a convention to regulate bankruptcy law. At the same time, the draft of this convention is the source of numerous criticisms.

With no doubt the European Council's 1990 *European Convention on Certain International Aspects of Bankruptcy*, in French: *Convention Européenne sur Certains Aspects Internationaux de la Faillite*, meant to advance international cooperation in the area of bankruptcy law, is noteworthy. The German *Referentenentwurf zum Internationalen Insolvenzrecht* also requires comprehensive analysis in the area of bankruptcy regulation. An outstanding merit of the conventions or convention drafts is that they account for the legal traditions of styles of public administration of individual countries.

In our view, when performing a comparative analysis of bankruptcy law – on this occasion, we are not talking about a historical study – Italian legal literature and the comments of the Italian *Legge fallimentare* may play an outstanding role. For example, we are thinking of the important bankruptcy law commentary of Maffei Alberti, widely respected to this day.[2]

10. We would like to emphasize that in a European context it is a general phenomenon to see a strong motivation of bankruptcy law through economic policy. This approach is particularly characteristic with regard to France, where this phenomenon is the source of numerous polemics.

It is worth comparing the French liquidation proceeding with the one taking place in Germany. The German legal scholar, Zierau made more than thirty years ago a comparison between the French and German regulation in this regard, in his work titled „Die Stellung der Gläubiger im französischen Sanierungsverfahren im Hinblick auf die Entwicklung des deutschen Insolvenzrechts." (Dissertation, Frankfurt am Main, 1990.).

In the context of the Italian law, the so-called *amministrazione straordinaria* (in English: "extraordinary public administrative proceeding") deserves attention. The Italian *amministrazione straordinaria* shows striking similarities with the regulation of the English *common law*.

[2] See Commentario breve alla legge fallimentare, Padova, 1986[2].

The British *Insolvency Act*, adopted and put into effect in 1986, regulating the insolvency and liquidation of companies and private individuals alike, deserves in our view particular attention. With regard to companies, the British *Insolvency Act* introduces the institution of *administration order*, which means a reorganization proceeding and regulates – in a strongly renovated form – the two versions of the debt settlement procedure (*company voluntary arrangements*). With regard to natural persons, the *Insolvency Act* abolished the institution of the *act of bankruptcy* and brought into being an automatic indemnification.

The further development of international bankruptcy law is undoubtedly the task of both judicial i.e. court practice and legal theory i.e. doctrine. With regard to bankruptcy law, we emphasize, is a necessary requirement to take into serious consideration both history and comparative law related aspects.

11. In our view, in the conditions and prerequisits of the market economy the primary mission of the „Insolvenzrecht", using a terminus technicus in German, is to set forth when and in what specific manner a bankrupt enterprise has to exit the market and to determine such exit and to terminate operations – keeping the interest of the creditors appropriately in mind.

This phenomenon, named in German "Konkurs des Konkurses", by no means limited to the Hungarian legal system (order) or more generally to the legal system of the countries

geographically located in Central and Eastern Europe, whereby the role as well as necessity of legal comparison is obvious.

We point out that an appropriate solution has be realized by means of law in the framework of a comprehensive regulation, not taking into consideration in other words putting aside political considerations.

III.

12. Based on the historical-comparative analysis with particular regard to Roman private law, it is obvious, that it is no easy task to draft i.e. prepare bankruptcy regulation that would be both adequate for the needs of economic life as well as appropriate in all cases. Undoubtedly, it is also a difficult task to make harmonization, approximation (*approximation, rapprochement, approssimazione, Rechtsangleichung*) and legal unification (*unification, unificazione, Rechtsvereinheitlichung*) with regard to a large number of countries having different legal traditions.

However, a well-thought dynamic and continued progress in the harmonisation or at least approximation will most likely provide the necessary degree of predictability and legal certainty (in Latin: *certitudo iuris*) in the field of bankruptcy law.

It is obvious that the harmonisation of bankruptcy law and the application of the various instruments of carrying out harmonisation are very complex. The most important means of

harmonisation are with no doubt the multilateral international conventions.

These difficulties are well shown by the bankruptcy convention concluded between the Federal Republic of Germany (in German: *Bundesrepublik Deutschland*) and Austria in 1977 (in German: *Konkursvertrag*) is the result of an extremely lengthy period of preparatory work, as Hans Arnold pointed out in his work titled „*Der deutsch-österreichische Konkursvertrag*", published in 1987.

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