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Freezing injunctions against third parties in the Polish legal system

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Freezing injunctions against third parties in the Polish legal system (comparison with the Chabra case)

The problem of a **debtor absconding with assets** and disposing of them to third parties is a universal problem for every jurisdiction. It often takes on an international character, making it difficult to effectively enforce court judgments and arbitral awards. In the event of a freezing injunction or enforcement from the assets of a contractual counterparty fails (asset protection by the so-called **Mareva injunctions** – *Mareva Compania Naviera SA v International Bulkcarriers SA [1980] 1 All ER 213*), it is necessary to formulate claims and seek enforcement from assets of third parties to which the debtor has transferred its assets, despite the lack of a formal creditor-debtor relationship with this additional entity. Moreover, it may sometimes be not the first but a second or subsequent purchaser of the asset in question.

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This solution is also available under Polish law. If you are from outside of Poland and you wish to bring a claim to prevent the effects of divestment and concealment of assets by a debtor in the Polish courts, you need to understand the process involved. We take a look at the litigation procedure and key points to be aware of as well as present solutions to efficiently prevent further runaway with the assets.

In the Polish legal system, the pauliana complaint may be used when the following conditions are met:

- 1) a claim against the debtor exists;
- 2) a legal act was performed by the debtor [the contractual counterparty] with a third party [defendant under the pauliana complaint] (it does not matter whether it is a natural or legal person, e.g. a company);
- 3) the third party obtained a financial benefit;
- 4) a legal act to the detriment of a creditor was performed;
- 5) the debtor was aware of the performance of a legal act to the detriment of a creditor;
- 6) the third party acted in bad faith.

The pauliana complaint seeks to protect the existing claim at the time the debtor performed a legal act with a third party, as well as at the time the action was brought and the hearing closed. In addition, the contestability of the existing claim must be proved. However, there is no requirement that the claim must be demonstrated by an enforceable judgment against the debtor. The claim must also be pecuniary in nature (a pecuniary claim is understood in the broad sense of the term, namely, it also includes obligations such as i.a. compensation benefits).

The prerequisite for the legitimacy of the pauliana complaint is that the creditor has suffered harm (creditors' detriment) as a result of a legal act performed by the debtor with a third party. The **creditors' detriment** is manifested by the insolvency or worsening of the insolvency of the debtor. The assessment of the insolvency of the debtor involves examining the market value of the debtor's assets (*Judgment of the Polish Supreme Court of 14.03.2019, IV CSK 182/18*).

The legal doctrine emphasizes that the debtor's insolvency occurs when the debtor admittedly has assets sufficient for satisfying the creditor, but remains unattainable for the creditor (e.g. a situation in which the debtor has hidden money) (*M. Bławat [in:] the Civil Code. Commentary, Art. 527, ed. By K. Osajda, Warsaw 2022*).

Under Polish law, the equivalent of the freezing injunction is the possibility of filing, together with the pauliana complaint or even before it is filed, an **application to secure the claim (interim injunction proceedings) against the purchaser of the assets** by making the claim and the legal interest in granting the injunction plausible. In this context, of key importance is the **proper determination of the injunction method**, which must be in an actual connection with the secured claim. When filing the pauliana complaint, a creditor may request that the claim be secured by, for example, establishing a prohibition to sell or encumber the object of the property interest or prohibiting the transfer of the property for use on any basis. The prevailing view in the case law is that in order to secure the pauliana complaint, it is not permissible to establish a forced mortgage on the real estate of a third party (*Order of the Polish Supreme Court of 18.5.2012, IV CSK 560/11*).

The request for an **injunctive relief** is crucial for the pauliana complaint because the mere filing of the pauliana complaint against the purchaser of an advantage from the debtor does not deprive the former of the right to further dispose of this advantage (sell/donate).

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We will be happy to help.

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