

Notes about the Italian system of clawback actions

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- A)** When bankruptcy is declared , there is a specific and relevant **set of tools** that can be used by the liquidator **appointed by the Court** in order to make ineffective, in regards to the mass of creditors, acts and payments, made by the debtor before the opening of the bankruptcy proceeding; these tools find their discipline in the bankruptcy law.
- B)** Furthermore, the liquidator is entitled to commence (or prosecute, if already pending) an ordinary avoidance action as it is disciplined by the civil code. The civil code contains a general discipline of ***actio pauliana*** (art. 2901 civil code), that allows any creditor, under certain conditions, to obtain a declaration of ineffectiveness of act of the debtor, in regards of that claimant creditor.

- Question: when brought by the liquidator, can *actio pauliana* be considered included in actions ***deriving directly from the insolvency proceedings and which are closely linked with them?*** We will come to this point later on, giving some details about an Italian judgment by the Supreme Court and a more recent recent judgment by the Court Of Justice (C-535/17, about "Peeters/Gatzen" case).

A) Clawback actions under Insolvency Law

A.I) gratuitous acts.

- According to Article 64 of the Legge Fallimentare (i.e. the bankruptcy Law; it will be referred to as LF), the following acts are automatically ineffective against creditors if performed **in the two years preceding the date of the opening of the bankruptcy proceeding**: (i) gratuitous acts, except small donations and actions executed in performance of a moral obligation or a public necessity, provided that they are proportional to the value of debtor's assets
- When gratuitous acts are stipulated by an entrepreneur to the advantage of its spouse, they are ineffective also if performed **earlier than two years** prior to the declaration of insolvency of the entrepreneur, if the spouse does not prove its unawareness of the insolvency (art. 69 LF).

A.II) payments of debts before they fall due.

- The same discipline applies for payments executed by the debtor before they fall due, if the payment is done in the period **of two years before the date of bankruptcy** (art. 65 LF).

What is to be done?

- How the clawback effect is obtained in case of gratuitous acts?
- Assets/payments

Avoidance actions under article 67 LF

A.III) Avoidance action in bankruptcy (azione revocatoria fallimentare) art. 67 LF

- Upon the liquidator's application, the Court may void a series of acts for a consideration. This needs an ordinary civil proceeding.
- The discipline can be described as divided **into two main groups**.
- **A first group** includes acts that are generally **unusual** in the ordinary conduct of an entrepreneur; the other party has the burden of proving its being unaware of the debtor's insolvency at the time the act was performed

Avoidance actions under art. 67 LF:

first group

This discipline applies to:

- I. acts performed by the debtor for a consideration, where the obligation undertaken or performed by the debtor exceeds by more than 25 percent the value of the consideration received or expected to be received in exchange
 - II. payments of matured monetary debts, performed by means of payment other than money or other usual means of payment
 - III. pledges, voluntary mortgages granted by the debtor for preexisting non due debt at the date of the bankruptcy order.
- In these cases the avoidance period is of **one year**.

Follows: avoidance actions under art. 67 LF – first group

- To the same group belong also other acts, under the same regime as to burden of proof, but with an avoidance period reduced **to six months**. They are:
IV. pledges and voluntary mortgages given by a debtor, or judicial mortgages obtained by creditors for matured debts.
- How the avoidance effect is obtained? Some comments.

Avoidance actions under art. 67 LF: second group

- To a **second group** belongs a series of acts performed during **the six months** preceding the bankruptcy, that can be voided if the liquidator proves that the third party was aware of the insolvency of the debtor:
- Voluntary or forced payments made by the debtor against liquid and payable claims;
- Onerous acts performed by the debtor (*atti a titolo oneroso*);
- Securities granted by the debtor, including debts undertaken by third parties, simultaneously with the creation of the debt.

Rule of backdating applicable to actions under art. 64,65,67 69 LF

- "backdating" of the avoidance period (art. 69 bis LF). This happens when a proceeding of *concordato preventivo* (judicial composition with creditors ruled by art. 160 LF) is followed by a declaration of bankruptcy.

Exemptions to avoidance actions

- These is also a relevant **set of exemptions to avoidance actions**, some of which are not easy to interpret, because the rules are not clearly written. Briefly, they include (the following list is not exhaustive):
- payments for goods and services made in the ordinary course of business;
- payments made on a bank account as long as they did not significantly reduce the debtor's exposure towards the bank;
- sales and presales agreements concluded for a fair price and involving a residential property destined to be the principal residence of the buyer or the buyer's family, or the principal place of business of the buyer itself under certain conditions;
- acts, payments or guarantees made to perform a certified rescue plan (*piano attestato*), a rescue agreement confirmed by the Court (*accordo di ristrutturazione dei debiti*), a preventive composition with creditors confirmed by the Court (*concordato preventivo*); the new Code of Crisis (in force next year, as said) clarifies that this exemption protects these acts and payments also against actio pauliana filed by the liquidator of the judicial liquidation that may follow the failure of these proceedings.
- payments made for services carried out by employees and other associates of the bankrupt;
- payments of debts of a fixed amount and due that are related to services necessary to access the afore mentioned judicial proceeding of preventive composition with creditor confirmed by the Court (i.e. payments to accountants, legal advisor, etc.)

Time for filing- effects of Court's ruling

- The liquidator must file for a bankruptcy avoidance action **in three year's time** since the opening of the bankruptcy proceeding.
- The effects of a favourable judgment of the Court on the clawback action are to the benefit of all the creditors whose claims have been admitted in the list of creditors by the judge

B) Ordinary avoidance action

- The bankruptcy liquidator is explicitly entitled to act under the civil code 's actio pauliana by the provision of article 66 LF, that recalls art. 2901 of the Civil Code.
- The actio pauliana regards acts that were made by the debtor in a **five year period prior to the commencement of the action**.
- This is valid for single creditors as well as for the bankruptcy liquidator.
- In addition to that, however, the liquidator must file the action not later than **three years** since the opening of the insolvency proceeding.
- If the liquidator commences, or prosecutes an already pending actions of this kind, single creditors are no longer entitled to begin or prosecute the action.
- If the liquidator is successful, the effects of the judgment go **to the entire mass of creditors** admitted in the assessment of debts; whereas, when the same action is conducted by a single creditor, this single creditor is the only one who takes advantage of the avoidance effect.

Follows: *actio pauliana*

- The main conditions for the action are:
- an act by which the debtor disposes of its assets causing prejudice to the rights of a creditor;
- evidence that the debtor was aware of the prejudice to the creditor caused by his action; or, if the act was performed before the claim arose, that the debtor acted purposely, in order to hinder the fulfillment of the creditor's rights;
- if the act was made for a consideration, the claimant proves that also the third party was aware of the prejudice to creditors or, if the act was performed before the claim arose, he intentionally took part in the fraud.
- The burden of proof lies entirely with the creditor.
- The payment of a debt that has already fallen due is exempted.

Follows: *actio pauliana* in bankruptcy proceedings

...seems to be easy, but it is not, and liquidators tend to underestimate their burden of proof.

Jurisdiction for all the aforementioned actions in bankruptcy proceedings

- **The internal jurisdiction** for all the actions above mentioned (actio pauliana included) belongs to the Court where the bankruptcy proceedings has been opened (vis attractiva concursus).

One example. A cross border case about *actio pauliana* filed by a bankruptcy liquidator

- Italian Supreme Court (n. 10233/2017 Deiulemar vs. Bank of Valletta, 26th Apr. 2017) stated the **international jurisdiction** of the Italian Court in a case of an ordinary avoidance action filed by an Italian bankruptcy liquidator versus a Maltese Bank.
- The case was obviously ruled under the Reg. 1346/2000

Deiulemar vs. Bank of Valletta

The Italian liquidator filed against Bank of Valletta before the Italian Court where the insolvency proceeding had been opened. The Bank retorted that the international jurisdiction of the Italian Court was to be denied, as the case should be ruled by the Court where the obligation has been or is due to be fulfilled, under Reg. CE 44/2001 (Bruxelles 1, applicable at the case *ratione temporis*).

Deiulemar vs. Bank of Valletta

The Supreme Court has stated that the case is to be ruled in the path traced by Seagon case (C-339/07), and has recognized the international jurisdiction of the Italian Court where the insolvency proceeding has been opened. The court underlined that when the actio pauliana under art. 2901 of the Civil Code is filed by the bankruptcy liquidator, it is subject to so relevant changes that it must be qualified as attracted in the area of actions which **derive directly from the insolvency proceedings and are closely linked with them.**

Deiulemar vs. Bank of Valletta

- The Court underlined some aspects that we have formerly mentioned, and in particular:
- if the liquidator begins or prosecutes a pending *actio pauliana*, no single creditor is entitled to act or even to intervene;
- the effects of a favourable judgment issued by the Court go to the benefit of all the enlisted creditors, whereas the *actio pauliana* has ordinarily no general effects in favour of creditors other than the one acting in court;
- the liquidator is entitled to sell the asset that is the object of the action (an effectual clawback) , whereas this is not the procedural mechanism that takes place when the single creditor acts;
- the bankruptcy liquidator is subject to an additional term of three years, and cannot file when it is expired.

Therefore, the Italian Supreme Court explicitly excluded the need for a request for a preliminary ruling by the European Court of Justice, being the interpretation evident and clear.

Judgment C-535/17, NK- BNP Paribas

Judgment C-535/17 about Peeters/Gatzen action (issued on 6th Feb. 2019), may raise new doubts about the vis attractiva of the Italian jurisdiction when a bankruptcy liquidator brings an actio pauliana against a third party whose seat is not in Italy.

The European Court stated that: “Article 1(1) and (2)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that an action, such as that at issue in the main proceedings, concerning a claim for damages arising from liability for a wrongful act, brought by the liquidator in insolvency proceedings and the proceeds of which, if the claim succeeds, accrue to the general body of creditors, is covered by the concept of ‘civil and commercial matters’ within the meaning of Article 1(1), and therefore falls within the material scope of that regulation”

Follows: C-535/17

After mentioning a certain number of elements that distinguish that action when brought by an insolvency representative, the Court concludes, that even if (35)" *the existence of a link with insolvency proceedings is undeniable, since an action brought by the liquidator in the interests of the creditors is concerned, the fact remains that, as is apparent from the documents before Court, such an action may be brought by the creditors individually, whether before, during or after the conduct of the insolvency proceeding*".

Reg. 848/15

Now we find in Reg 848/15 an explicit discipline of the *vis attractiva* concursus for avoidance actions in **recital 35** [*The courts of the Member State within the territory of which insolvency proceedings have been opened should also have jurisdiction for actions which derive directly from the insolvency proceedings and are closely linked with them. Such actions should include avoidance actions against defendants in other Member States and actions concerning obligations that arise in the course of the insolvency proceedings, such as advance payment for costs of the proceedings(...)*], **and in art. 6.1** [*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 linked with them, such as avoidance actions*].

Do the new rules make our cases clearer?

- The notion of actions "closely linked to an insolvency proceeding" still raises questions and need of clarifications that do not seem to be dissolved by this judgement of the European Court.
- Probably the Court is proceeding along a case -by case line, and has not intended to give explicit criteria that can orient the interpreters in the twilight zone between insolvency law and civil/commercial law where are located actions that pre-exist to the insolvency proceeding, but whose characteristics are affected, according to different degrees, when an insolvency proceeding is opened.

Thank you for your patience!!