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The Scope of the Pauline Action

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Abstract: The modernization of the Civil Code of the Republic of Moldova has brought with it several legislative innovations, among which is the Pauline action (revocation). The scope of Pauline's action covers, in principle, all civil legal acts, regardless of the category to which they belong. From a practical point of view, the determination of the Pauline action's application scope relies in the identification of exceptions to the general rule. The revocation action's application scope has limitations resulting from the methods and forms of defense of subjective civil rights and the competition between these methods. The object of the Pauline action can be only a valid and efficient legal act, which means that if there are grounds for nullity or inefficiency, applicable will be the methods of finding or declaring nullity, finding inefficiency, finding simulation. From the perspective of determining the Pauline action's application scope, it is relevant to address certain legal acts or facts that provoke doctrinal controversy - declaring the unenforceability of a payment made in the benefit of the creditor by the debtor; the possibility of challenging the court decision by prejudiced creditors through a Pauline action as a result of the debtor's fraudulent procedural behavior. The institution of Pauline action holds sufficient "elasticity" to ensure a veritable protection against various fraudulent legal acts to which the debtor may resort to.

Keywords: action; Pauline action; fraud; creditor; debtor; unenforceability

1. Introduction

The recent modernization of the Civil Code[2] has brought with it several legislative novelties, and some traditional institutions of continental law have been regulated for the first time. Among them, is the Pauline action (meaning "revocation" in the Code terminology), which is a very strong legal instrument of the creditor meant to

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[2] Law on modernizing the Civil Code and amending some legislative acts no. 133 of 15.11.2018. In: Official Journal no. 467-479 / 784 of 14.12.2018.

protect the right to enforce the obligation against legal acts concluded by the debtor to his detriment. The regulation's novelty requires the determination of the Pauline action's scope as a primary issue from a practical point of view.

The Pauline action is essentially a "duel" between two creditors, in which the claimant creditor fights for the possibility of exercising his right of claim by pursuing the service performed (due) to the third party contractor by the bad paying debtor, and the third party contractor, at his turn, struggles to keep (receive) that service. Therefore, the Pauline action defends the civil circuit, "represented" by the plaintiff creditor. Based on these fundamental premises, the correct determination of the Pauline action's scope aims also at the protection of bona fide third party contractors, who deserve legal protection as a matter of priority over the plaintiff creditor, such as in the situation of third party contractors in the case of synallagmatic contracts with equivalent services.

2. Legal Principle

The general rule is established in the art. 895 paragraph (1) Civil Code[1] - text that recognizes the creditor's right to request to be declared as unenforceable against him, *the legal acts* concluded by the debtor to the detriment of the creditor, manifested by preventing the full satisfaction of the creditor's rights towards the debtor. The legislator does not distinguish when it refers in the content of art. 895 para. (1) Civil Code to "legal acts concluded by the debtor", which means that any legal act can be challenged through the Pauline action, if the conditions for exercising this action are met.

In the doctrine is stated that the Pauline action's scope comprises, in principle, all civil legal acts, regardless of the category to which they belong (Dobrev, 2018, p. 57). It is therefore clear that the determination, from a practical point of view, of the scope of Pauline action *relies in the identification of the exceptions from the general rule*.

Additionally, the legal regulation of the Pauline action compared to other legal means of protection of creditors' rights, shows that the legislator also drew clear demarcation lines in this regard, which led to the legal shaping of the Pauline action's scope, or otherwise said - to the circle of legal acts that may be the subject of this action. The doctrine also uses this method. In addition however, the scope of the

[1] Official Journal no. 82-86 / 661 of 22.06.2002.

Pauline action also knows certain limits resulting from the methods and forms of the subjective civil rights' defense and of the competition between these methods, the Pauline action having here a pronounced subsidiary character. Following the logic of those mentioned, we emphasize the main legal limits of application of the Pauline action, as well as the exceptions from the general rule enunciated in art. 895 para. (1) Civil Code.

3. Boundaries Imposed by the Field of Public Law

As a matter of principle, we note that the first limitation of the Pauline action's scope - is public law. Public authorities are compulsorily imposed in relation to subjects of private law. From this point of view, it goes without saying that the documents issued by the public authorities in the regime of public power cannot be the object of the Pauline action. We also note that public authorities acting in public power cannot hold the status of debtors whose assets can be traced by creditors. On the contrary, the question of the applicability of the Pauline action could be raised in the sense of the possibility of resort to such means by the public authorities in a regime of public power. In this context, it is relevant to address the competition between the public law methods and forms of subjective civil rights' defence and the Pauline action as a private law method of defense[1]. Thus, the state, the administrative-territorial units, represented by the public authorities could in principle resort to the Pauline action only within the participation of these subjects as parties to civil legal relations - a hypothesis in which we are no longer in the field of public law. When acting in public power, the public authorities have specific legal means to protect the public interests, especially those of a patrimonial nature. The imposing of certain mandatory measures for the subjects concerned (e.g. issuance of an individual administrative act, extended confiscation) are acts of authority and are imposed by force, which allows a direct achievement of goals similar to those envisaged by the plaintiff creditors in the Pauline action, namely the possibility of pursuing the patrimonial assets of some individuals.

[1] Article 16 p(1) letter k) The Civil Code disposes that the protection of civil law is done, in accordance with the law, by other means provided by law. The declaration of the unenforceability of the fraudulent legal act and the unavailability of the asset that constitutes the object of such an act, undoubtedly represents „another way provided by law" for the defense of subjective rights.

4. Inapplicability of the Pauline action in the insolvency proceedings

Although the prototype of the Pauline action appeared precisely in the collective procedure for pursuing the patrimony of the insolvent debtor called in ancient Rome *venditio bonorum*, at present time it has been strictly delimited by the field of insolvency. Evocative in this respect is the German approach, manifested through the regulation by separate normative acts of the Pauline action within the insolvency procedure and in individual appeals (Koziol, 2017, p. 224-230). This distinction was also implemented in the civil law of the Republic of Moldova by regulating for the first time the Pauline action in the Civil Code, without any interference with the Paulian action of the insolvency law regulated in art. 104 - 106 of the Insolvency Law[1].

Although it is an obvious issue, we nevertheless considered it necessary to review this limitation, which is important in terms of application. The insolvency procedure is a collective and egalitarian procedure aimed at satisfying creditors' claims. The essence of the insolvency procedure is the principle of equality between creditors - *par conditio creditorum*. At the same time, the third party contractor of the insolvent debtor, in case of annulment of the fraudulent act, will have the possibility to validate his claim. This fact indicates a much more favorable position of the third contractor in the insolvency procedure in relation to the third contractor within the civil law Pauline action. In the first case, the benefit reimbursed by the third party contractor will increase the patrimonial value of the debtor mass, which will be distributed proportionally among the creditors, therefore also for the benefit of the third party contractor. In the case of civil law Pauline action, the third party contractor will reimburse the benefit received from the debtor specifically for the exclusive benefit of the plaintiff creditor[2], remaining only with a claim grafted on the rules of eviction against the debtor who lacks patrimonial assets.

The reasons set out *above* explain the much wider "*legal arsenal*" of creditors in the insolvency proceedings, which can challenge a wider range of acts and deeds of the debtor over a much longer period. The need to ensure the egalitarian character of the insolvency proceedings determines and conditions the subsidiarity of any individual pursuits outside this procedure. In order not to admit dangerous confusions in practice, the legislator expressly provided in art. 900 of the Civil Code that the

[1] Official Journal No. 193-197 from 14.09.2012.

[2] According to art. 898 paragraph (1) of the Civil Code, as an effect of declaring the fraudulent legal act unenforceable, the creditors will have the right to be paid from the amounts obtained from the money obtained from pursuing the service received by the contracting third party or beneficiary.

provisions of art. 895-899 does not affect the legal provisions regarding the action of the insolvency administrator or the liquidator, to contest the acts and benefits committed by the debtor before declaring his insolvency.

In conclusion, the declaration of the unenforceability of fraudulent legal acts of the debtor, and as an effect, the unavailability of the asset, represents a method of defending the right to enforce the obligation available exclusively to individual creditors outside insolvency proceedings.

5. Subsidiarity of Pauline Action in Relation to Other Methods of Defending the Rights

The Pauline action's scope is to be outlined not only by the reference to the object of this action (ex. legal acts that harm creditors), but also by reporting to the hierarchy of methods of subjective civil rights' defence. Even in relation to the "purely civil" methods of protection of the subjective rights provided or admitted by art. 16 of the Civil Code, the "paulian" unenforceability, as we stated, has a *pronounced subsidiary character*. This clearly results from the conditions required by law for the application of the Pauline action.

Thus, the object of Pauline action can be only a legal act that is valid and effective in relation to third parties, which means that in the existance of nullity grounds or absolute inefficiency, applicable will be the appropriate defense methods, namely - finding or declaring nullity, finding of inefficiency, finding the simulation, regardless of whether the use of these methods of defense is done by *way of action* or by *way of exception*. The inapplicability of the legal act referred to in art. 898 paragraph (1) Civil Code is in fact a case of *relative inefficiency*, only in relation to the "paulian" creditor. Therefore, in the case of competition between the Pauline action and the other actions mentioned, the latter are to be admitted, obviously with the condition of appropriate grounds' existance. In procedural terms, such a situation would end with a solution of rejection on the grounds that the Pauline action holds a subsidiary nature. In practical terms, the advantage of the Pauline action for the plaintiff creditor relies in avoiding the competition of the other creditors, a fact that obviously results from the content of art.898 paragraph (1) of the Civil Code. In other words, the inapplicability of the harmful legal act operates only towards the creditor who filed the revocation action, as well as towards all the other creditors who, being able to file a revocation action, intervened in the case.

On the contrary, the harmful act will be opposable to all other creditors, even after the admission of the Pauline action. In contrast to the Pauline action, the effects of nullity, absolute inefficiency benefit all creditors, or the debtor's performance for the benefit of a third party are subject to restitution according to the rules of unjustified enrichment.

Also in the context of the competition between the subjective civil rights' defense methods, we notice the existence of special regulations designed to defend the creditors against some harmful legal acts of the debtors. In matters of succession, the creditor injured by the renunciation of his debtor to succession does not need to resort at declaring the unenforceability of the legal act of renunciation. According to art. 2401 paragraph (1) of the Civil Code, the creditor may request that the obligations towards him incumbent on the debtor who renounced the inheritance and who, on the date of renunciation, is in an incapacity of payment be extinguished at the expense of the succession mass within the succession quota, which the debtor renounced upon the inheritance although he was entitled to it. Art. 2401 paragraph (1) Civil Code represents a case of legal unenforceability[1], and the Pauline action remains to be without interest[2] in this situation.

6. The Matter of Partition in General and the Succession Partition in Particular

Another case of limitation of the Pauline action's scope due to the competition of methods for the defense of subjective civil rights is that of parition in general and the succession partition in particular. In addition to the possibility of pursuing the ideal share or requesting the property partition, the co-owner's creditors, in accordance with art. 553 paragraph (5) of the Civil Code, may intervene at their expense in the division requested by the co-owners or by another creditor. However, they will not be able to attack a committed partition (including through Pauline action), unless it took place in their absence, without taking into account the opposition they made and if the partition is simulated or it is carried out in such a way that the creditors cannot oppose it. Therefore, the legal mean for creditor's protection against a fraudulent partition is the right of opposition (of intervention) and only in the cases provided by art. 553 paragraph (5), second sentence of the Civil Code, the Pauline action will be admissible. The same solution is agreed by the doctrine (Deak, 2002,

[1] The qualification results from the efficiency of renouncing the succession in relation to the accepting heirs.

[2] The interest is a condition for the exercise of the civil action and passing the test of admissibility of the action. Lack of interest equates to lack of action.

p. 515). Through the effect of the art. 2498 paragraph (5) Civil Code, the exposed solution is also relevant to the succession partition. However, *mutatis mutandis* the legal provisions relating to the division of the asset which is the object of the common property rights based on shares, shall apply accordingly to the division of the estate in so far as they do not conflict with the provisions of this book.

7. Payment Made by the Debtor to the Benefit of One of the Creditors

From the perspective of determining the scope of Pauline action, it is relevant to address certain legal acts or legal facts that raise doctrinal controversies. The resolution of these controversies determines the widening or, on the contrary, the limitation of the Pauline action's applicability. In this context, a key issue is the possibility of declaring unenforceable a payment made by the debtor to the benefit of one of the creditors. The controversy has arisen more in connection with the principle of equality between creditors, or it is obvious that the payment made in favor of one of the creditors lacks the other creditors, to some extent, the possibility of making claims in the conditions of insufficient assets in the debtor's assets (Dobrev, 2018, pp. 66-69).

In the insolvency procedure, the cancellation of the payment made for the benefit of a creditor in the conditions in which the debtor's patrimonial asset is not sufficient for the payment of all receivables (the so-called preferential payment), is expressly allowed by the legislator. The explanation of this solution can be deduced from the principle *par conditio creditorum*. On the contrary, the principle of priority applies in common law, which allows the creditor to exercise his rights independently, without taking into account the interests of other creditors.

In our view, the settlement of the controversy regarding the admissibility of contesting the preferential payment by way of the Pauline civil law action, depends first of all on the qualification of the payment as a fact or as a legal act, because art. 895 paragraph (1) of the Civil Code refers to legal acts as the object of the Pauline action exclusively. Art. 966 paragraph (1) Civil Code disposes that the execution extinguishes the obligation only if it is performed in the appropriate manner. Therefore, the payment always consists of the actions (inactions) of the debtor (or of a third party instead of the debtor) through which is fulfilled the object of the service obliged toward the creditor. Even in the case of a pre-contract, the payment also consists of certain actions, namely the actions required to conclude the final contract. In other words, the payment consists in the material actions or inactions of effective

realization of those patrimonial (or non-patrimonial) advantages that constitute the object of the debtor's obligation towards the creditor.

In the light of those mentioned, we consider that the payment is not a legal act but a legal fact[1], which cannot be declared unenforceable through the Pauline action[2]. In the case of preferential payments, creditors may have only the option to challenge, through Pauline action, the legal act under which the payment was made.

8. Contesting the Court Judgment by Way of Pauline Action

The possibility of challenging the court judgment through the Pauline action represents also a practical interest for the injured creditors as a result of the debtor's fraudulent procedural behavior. Whether it is a simulated trial or an inadequate defense of the debtor in the process with the aim to avoid the pursuit of his assets, creditors will be interested in annihilating in one way or another the effects of such a judgment. Percisely these are the reasons why the applicability issue of the Pauline action is raised. We note from the beginning that the court decision is not a legal act within the meaning of art. 308 Civil Code, either, in our view, percisely this is the meaning of "legal act" notion in the art. 895 para. (1) Civil Code. However, there are certain judgments that are given not as a result of judicial debates, but as a result of acts of parties' disposition such as the conclusion of the transaction, the recognition of the action or the waiver of action. In these situations, the court judgment represents only a confirmation of that legal act[3]. The solution we opt for is the possibility to challenge by Paulian action only the legal acts through which the rights of disposition of the parties in the civil process are exercised, the court decision pronounced accordingly "borrowing" the effects of the court decision through which the Paulian action is admitted.

In the case of the transaction, this solution is legally enshrined. Thus, art. 1921 paragraph (1) Civil Code disposes that the transaction may be declared null for the general grounds of legal acts' nullity. It can also be challenged through revocation

[1] The principle of abstraction deriving from § 929 of the German Civil Code exceeds the limits of this paper.
[2] Unlike payment, giving in payment is already a bilateral (multilateral) legal act that can be declared unenforceable „through the Pauline way", under the law.
[3] Art. 212 paragraph (5) The CPC orders that in case of admitting the plaintiff's waiver of the action or confirming the transaction, the court judgement pronounces a conclusion by which it orders the termination of the process. The conclusion must contain the terms of the transaction, confirmed by the court. In the case of recognition of the action by the defendant and its admission by the court, is pronounced a decision to admit the plaintiff's claims.

or by acting in the simulation statement. In the hypothesis of transaction's nullity, art. 1921 paragraph (4) of the Civil Code disposes that the court judgements though which the nullity of the transaction is ascertained or declared, cancel any effect the court judgements by which the judicial transaction was confirmed. In the silence of the Code, we consider that in the case of declaring the non-enforceability of the transaction, the solution is to be similar, namely the non-enforceability of the expedient decision against the Pauline creditor. The same logic is to be applied as well to legal acts through which the action is waived or the action is recognized in the detriment of creditors. In the same context, the issue of extending the scope of the Pauline action to other procedural acts can be raised.

9. Legal Acts without Interest for Creditors

Another category of legal acts that remain intangible for the Pauline action are those acts that have as object unsustainable goods of forced execution in order to realize the claims against the debtor. Article 88 paragraph (2) of the Enforcement Code[1] stipulates that any tangible asset or universality of debtor's goods, which is in civil circuit, may be pursued, regardless of who is in possession of it, as well as any patrimonial right or monetary claim except for those who are not liable to a forced pursuit. It is therefore clear that legal acts in regards of non-property rights (e.g. recognition of paternity), those relating to intangible assets and rights[2] or legal acts in regards of the inalienable and non-transferable goods and rights[3] of the debtor, do not fall within the scope of the Pauline action. Public domain goods may also be included in this chapter. According to art. 10 of the Law on the administration and denationalization of public property[4], the goods of the public domain are the exclusive object of public property. The civil circuit of these goods is forbidden, except for the cases provided by law. The goods of the public domain are inalienable, imperceptible and imprescriptible. In such cases, the Pauline action is of no interest and is to be rejected as unfounded.

[1] Published in the Official Journal no. 214-220 from 05.11.2010.
[2] Mainly they are listed in art. 89 Execution code.
[3] Usually, the inalienability and unavailability are protected with the help of the action of nullity.
[4] Official Journal No. 90-93 from 29.06.2007.

10. Conclusions

Of course that our brief scientific foray into the general scope of Pauline action is far from addressing and resolving all possible hypotheses and controversies, especially in the case when the new regulation of this institution represents a combination of the French and German tradition[1]. But the general conclusion that can be drawn is that the legal regulation of the Pauline action has sufficient "elasticity" to ensure true protection against the various fraudulent legal acts that the debtor may resort to. At the same time, we notice the subsidiarity of this mean of defense, which, depending on the situation, can be both at the advantage as well as at the disadvantage of the creditors.

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[1] As it results from the Informative Note of the draft Law on amending and supplementing some legislative acts (modernization of the Civil Code), the new regulation of the Draft is based on the provisions of art. 3:45-3:48 Dutch Civil Code, art. 2901-2904 Italian Civil Code and art. 1562-1565 Romanian Civil Code.

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