

Motion for ban on conducting economic activity or on serving as a member of supervisory board, representative or proxy of a commercial company or partnership, state enterprise, cooperative, foundation or association in Polish insolvency law.

Motion for ban on conducting economic activity or serving as a member of supervisory board, representative or proxy of a commercial company or partnership, state enterprise, cooperative, foundation or association is special civil procedure included in Polish act on bankruptcy and composition. One of main goals of this proceeding is to encourage members of companies boards to act in accordance with the insolvency law, especially to file petition for bankruptcy on time.

According to justification for amendments to Polish act on bankruptcy and compensation from 31 July 1997 the institution of the ban was implemented to discipline entrepreneurs to reliably work and carry on the obligation imposed on them by insolvency law. Therefore it's role is *inter alia* to increase effectiveness of bankruptcy proceedings. Polish juridical doctrine points out that person that wants to carry on economic activity should have certain skills and ethical predispositions¹. During the bankruptcy proceeding those abilities and dispositions may be checked². The role of ban is to eliminate persons that don't possess them from economical activity.

Motion for ban is processed by the insolvency court. If the petition for bankruptcy was not filed, court dismissed the case or bankruptcy proceedings were discontinued the court competent to examine the case concerning declaration of bankruptcy is adequate to adjudicate as regards the ban. If two or more courts were examining petitions for bankruptcy the court which announced bankruptcy will rule in case of filing motion for the ban³. The court adjudicating consists of one judge⁴. The ruling is issued after conducting a hearing. Non-litigious proceeding rules applies. Cassation complaint may be filed on the rulling of the court of the second instance.

The court may not decide as regards the ban *ex officio* – the petition for ban must be filed. According to the act on bankruptcy and compensation the following persons may come

¹ A. Jakubecki, F. Zedler, *Prawo upadłościowe i naprawcze. Komentarz.*, Lex/El., Warsaw 2011, Commentary on art. 373 point I.1

² Ibidem

³ A. Jakubecki, F. Zedler, *Prawo upadłościowe i naprawcze. Komentarz.*, Lex/El., Warsaw 2011, Commentary on art. 375 point I

⁴ Ruling of the Supreme Court from 24 May 2005 (III CZP 87/04) and ruling of the Supreme Court from 17 June 2005 (III CZP 30/05)

forward with the motion: creditor, temporary court supervisor, compulsory receiver, trustee, court supervisor or receiver, as well as the President of the Office for Protection of Competition and Consumers and the Chairperson of the Financial Supervision Commission. The Polish supreme court stated that also prosecutor may initialize a ban proceeding⁵. The petition for the ban may be filed regardless of the fact that motion for bankruptcy was filed⁶. That may create problems as regards the relation between the bankruptcy and ban proceedings. The Polish juridical doctrine points out especially that:

- 1) the discrepancy between rulings may occur – for example even if the ban would be adjudicated the court considering the bankruptcy motion may find out that there were no grounds for insolvency⁷,
- 2) possibility of banning the company management from conducting economical activity may cause debtors management not to fill petition for bankruptcy at all or to fill it with large time delay (as to benefit from statute of limitations)⁸.

The motion for ban should contain all elements of statement of claim defined in article 510 of civil proceeding procedure act. The petition should define the person against which the ban should be adjudicated and state argumentation for ruling the ban.

The court may adjudicate the ban for a period from three to ten year. The deprivation may be imposed over the person, who through his fault failed to meet his obligation in bankruptcy proceeding. Person against whom the ban is going to be imposed must meet at least one of the following conditions:

- 1) being obliged to do so, did not file a petition for bankruptcy within two weeks from day of arising grounds of bankruptcy⁹,
- 2) after declaration of bankruptcy did not release or indicate assets, commercial books, correspondence or other documents of the bankrupt, which he was obliged to release or indicate,
- 3) after declaration of bankruptcy hid destroyed or encumbered assets which formed bankruptcy fund,

⁵ Ruling of the Supreme Court from 14 September 2005 (III CZP 58/05)

⁶ A. Jakubecki, F. Zedler, *Prawo upadłościowe i naprawcze. Komentarz.*, Lex/El., Warsaw 2011, Commentary on art. 375 point 7

⁷ S. Gurgul, *Prawo upadłościowe i naprawcze. Komentarz*, Legalis/El., Warsaw 2011, Commentary on art. 375 point 1.1

⁸ Ibidem

⁹ More about grounds for bankruptcy in Polish law: M. Kondej, *Grounds for insolvency in Polish law*, Law&Economy Journal 3/2012, p. 5

- 4) as the bankrupt during bankruptcy proceeding did not perform other duties imposed by law, court ruling or the judge-commissioner, or in the other manner trammeling the insolvency proceeding,
- 5) was declared bankrupt before and had been relieved from debts,
- 6) was declared bankrupt not longer than five years ago.

While considering whether to apply ban in circumstances listed in points 1-4 the court should take into account the degree of fault and the results of undertaken actions. Assessing the degree of fault in respect of circumstances enlisted in point 1 the court should take into account not the fault in bringing the company to bankruptcy but fault in filing petition on time¹⁰. In particular the reduction of the economic value of the bankrupt's enterprise and the measure of detriment to the creditors should be considered. In circumstance enlisted in points 5-6 fault of bankrupt is not required to rule a ban. The court may forgo adjudicating the ban if the bankruptcy petition was dismissed due to implementing rehabilitation proceeding. Also it must be noted that the petition for bankruptcy rejected because of formal errors doesn't count as properly filed motion and therefore may be a cause of ban being imposed¹¹.

The court may adjudicate the ban also in respect of a debtor or authorities representing debtor if the insolvency was a result of their purposeful actions or gross negligence. There are no grounds for ban when the insolvency occurred because of actions which may not be qualified as gross negligence.

Analysis of the above mentioned ground for implementing a ban leads to conclusion that the ban may be adjudicated over:

- 1) persons that were obliged by law to declare insolvency, that is mainly: the debtor and representatives of debtor being a legal person or another organizational unit without legal personality upon which a separate act confers legal capacity.
- 2) natural persons and representative of legal persons as well as another organizational unit without legal personality upon which a separate act confers legal capacity against which a bankruptcy was adjudicated,
- 3) another person's spoiling the bankruptcy proceeding¹².

It must be noted that the term "representatives" in polish law excludes proxies of the company. Also analysis of bankruptcy and recovery proceeding act lead to conclusion that

¹⁰ P. Zimmerman, *Prawo upadłościowe i naprawcze. Komentarz.*, Legalis/El., Warszawa 2012 Commentary on art. 373 point 10

¹¹ Ruling of the Supreme Court from 12 April 2006 r. (III CSK 47/06)

¹² A. Jakubecki, F. Zedler, *Prawo upadłościowe i naprawcze. Komentarz.*, Lex/El., Warsaw 2011, Commentary on art. 375 point II.3

proxies of the company may not be banned under circumstances enlisted in points 1 and 2. The term representatives embrace for example members of board of limited liability companies, stock-offering companies as well as partners of general partnerships and liable partners in limited partnerships and partnerships limited by shares.

The sanction scope is multi-faceted. It consists of deprivation of the right to carry on economic activity on own account and to perform the function of a supervisory board member, representative or attorney in a commercial company or partnership, State enterprise, cooperative, foundation or association. The term of carrying on economic activity on own accounts should be understood as running individual economical activity of natural person based on freedom of economic activity act¹³. Also being partner in general partnership and as liable partner in limited partnership may be seen as carrying own economic activity¹⁴. The sanction does not stay in force as regard membership in limited liability companies and stock offering companies. The banned person may not also be representative, as well as proxy (of any kind) of a commercial company or partnership, State enterprise, cooperative, foundation or association. The sanction stays in force also as regards the control authorities of those entities.

In Polish juridical doctrine there is a discussion about consequences of the ban. Some says that actions taken by persons which will break the ban are null and void¹⁵. To support such a thesis article 58 of Polish Civil Code is quoted which states that an act in law which is inconsistent with statutory law or is designed to circumvent statutory law shall be null and void unless the appropriate provision envisages a different effect, in particular that those provisions of the act in law which are null and void are replaced by the appropriate provisions of statutory law. Some author states that even though the ban constitutes new legal state it may not be seen as normative act¹⁶. In their opinion the sanction will result in obligation for courts to take it into account. Such an argument is based on article 365 of Polish Civil Procedure Act.

To my mind the sanction from article 58 of Polish Civil Code may not be taken into account. Disposition of that article includes only act's that are against the law and not actions that are against the rulings of the court. Therefore it seems to me that the second presented

¹³ S. Gurgul, *Prawo upadłościowe i naprawcze. Komentarz*, Legalis/El., Warsaw 2011, Commentary on art. 373 point III.1

¹⁴ Ibidem

¹⁵ A. Jakubecki, F. Zedler, *Prawo upadłościowe i naprawcze. Komentarz.*, Lex/El., Warsaw 2011, Commentary on art. 373 point V.18

¹⁶ S. Gurgul, *Prawo upadłościowe i naprawcze. Komentarz*, Legalis/El., Warsaw 2011, Commentary on art. 373 point III.1

thesis is correct. All of the courts considering cases in which action against the ban was undertaken should take into account that those actions were carried against the law.

The Polish bankruptcy and recovery proceeding act defines statute of limitations for motion for the ban. According to the article 373 of the act the ban shall not be adjudicated if proceedings in the given case were not initiated within one year from the day of discontinuance or completion of the bankruptcy proceedings or dismissal of the bankruptcy petition pursuant to Article 13, and if no bankruptcy petition was filed, within three years from the day on which the debtor was obliged to file the said petition. Filing the motion after the statute of limitation date will result in demission of motion¹⁷.

Motion for the ban may be effective way for creditors in case of debtors economical problems. Often even a threat of being banned encourage company managers to pay debts of companies they manage. In addition it may be useful institution to bankruptcy court and trustee in bankruptcy to encourage debtor to act in accordance with the insolvency procedure. Therefore the existence of such a civil procedure must be positively evaluated.

At the same time *de lege ferenda* some improvements may be proposed. First of all it should be considered whether judge-commissioner shouldn't be granted right to initiate the procedure of ban. At the current state during the bankruptcy proceeding trustee in bankruptcy has such possibility. Though often he may not have any profits from filing motion for ban as it would drag him in long proceeding. At the same time judge-commissioner as a supervisor of bankruptcy proceeding may have enough information to asses that some persons engaged in bankruptcy does not present either ethical values or skills that are required to carry on economic activity. In such a circumstances the social interest militate for carrying the ban proceeding by court *ex officio*.

Secondly it might be worth to regulate validity of actions taken against the ban. To my mind such actions should generally be valid but the penal sanctions for breaking the ban should be introduced. Because there is no register of banned person invalidity of all actions taken against the ban might result in violation of security of trading. For example people unaware of the ban would bear consequences of illegal actions of banned person. At the same time in my opinion conscious breaking of the ban should result in further sanctions to ensure effectiveness of the ban.

¹⁷ S. Gurgul, *Prawo upadłościowe i naprawcze. Komentarz*, Legalis/El., Warsaw 2011, Commentary on art. 377 point III.2