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Procedures for Preventing the Insolvency of Professionals

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ABSTRACT: Insolvency procedures are constituted as measures aimed for the debtor and/or creditor(s) either to help the former to recover from its financial duress or the later to recover as much debt as is possible without prejudice to others. The insolvency decision must be taken in due time in order to be able to find financing and reorganization solutions for the activity, so as to avoid the bankruptcy of the professional. Most legal systems integrate certain warning-procedures (pre-insolvency procedures) for the debtor or creditor to start so as the former is not subjected to the implications of the more serious insolvency procedure when, in most cases, is too late to recover. The professional is defined by art. 3 par. (2) Civil Code as anyone that is operating an enterprise. The procedures provided by this law apply to these professionals with the exception of those exercising liberal professions, as well as those in respect of which special provisions are provided regarding their insolvency regime (e.g. banks, insurance companies). Insolvency legislation is based on guiding principles, which are found in the Law no 85/2014 regarding prevention procedures of insolvency and insolvency. Starting from my opinion that some of these principles on which the prevention of insolvency of professionals in Law no 85/2014 is based, are sufficiently artificial and rigid, broken by practical applicability, I will address in this article the exclusion of the true basic rules that are disregarded or omitted from a written point of view and especially from the point of view of applicability in practical reality.

KEYWORDS: insolvency, bankruptcy, professional, company, legal person, contract, procedure, administrator, judicial administrator, syndic judge, creditor, debtor, creditors

Introduction

Insolvency procedures are constituted as measures aimed for the debtor and/or creditor(s) either to help the former to recover from its financial duress or the later to recover as much debt as is possible without prejudice to others. The insolvency decision must be taken in due time in order to be able to find financing and reorganization solutions for the activity, as to avoid the bankruptcy of the professional.

We came a long way from an era when scholars like Baker (1981, 706) called transnational insolvency procedures "rare birds." Nowadays, national or transnational insolvency proceedings have multiplied in number (Radu 2018, 150).

Most legal systems integrate certain warning-procedures (pre-insolvency procedures) for the debtor (a private person/entity or a professional) or creditor to start so as the former is not subjected to the implications of the more serious insolvency procedure when, in most cases, is too late to recover. Impossibility of recovery leads to a specific sanction: liquidation of assets and debt and finally, the winding-up of the company (Birchall 2010, 235). We must underline that this, however, is the most common consequence even though there is one exception – in the case of insolvency of the administrative – territorial units – where due to the nature of the debtor it cannot be wound-up, any modification of the territorially-administrative units being possible only by law. Similar solutions have been adopted in the Hungarian legislation (Filip & Radu 2014, 33).

The present law is providing the categories of professionals to whom it the insolvency law applies:

– The procedures provided by this law apply to professionals, as defined in art. 3 para. (2) of the Civil Code, except for those exercising liberal professions, as well as those for which special provisions are provided regarding their insolvency regime.

– The procedure provided by this law also applies to autonomous utilities companies.
And the civil code defines the term professionals as being ”considered all professionals operating an enterprise”.

These procedures of insolvency are applicable for debtor which are in financial difficulty and even if are able to perform the obligations dues, have a degree of liquidity on within or a short cut of indebtedness amounted actually that affect the fulfillment of contractual obligations commitments in relation to third parties either the operational or financial way.

According to art. 3 of Law no. 85/2014 (Pre-insolvency and insolvency law), the provided procedures will be applied to the professionals defined in art. 3 para. (2) Civil Code, excepting those who exercise liberal professions, as well as those regarding which there are special provisions regarding their insolvency regime. Therefore, analyzing the text and corroborating art.3 par. (2) Civil Code with art. 8 of Law no. 71/2011 for the implementation of Law no. 287/2009 regarding the Civil Code, it can be concluded that the normative act applies to professional natural or legal persons, without distinguishing whether they carry out activities aimed at obtaining profit or not, therefore regardless of the nature of their activity, civil or commercial, except here the holders of liberal activities.

There are substantial differences between the insolvency proceedings and the pre-insolvency proceedings. First, the insolvency proceedings are compulsory in opposition to the optional nature of the ad-hoc mandate and the preventive composition. Second, the egalitarian nature of the insolvency proceedings is not present in the case of the ad-hoc mandate. Lastly, in contract with the transparent procedure of bankruptcy proceedings stands the confidential proceedings of ad-hoc mandate (Radu 2011, 11).

The ways in which the insolvency procedure is performed are:

1. The general procedure is the insolvency procedure through which a debtor enters, after the observation period, successively, in the judicial reorganization procedure and in the bankruptcy procedure or separately, only in judicial reorganization, or only in the bankruptcy procedure.
2. Simplified procedure is insolvency procedure stipulated by Law no. 85/2014 by which the debtor who meets the conditions provided in art. 38 para. (2) what would be the fact they do not have any good in patrimonial their documents accounting can not be found, the administrator does not can be found, registered social or professional not may corresponds to the address in the register of commerce etc ... enter directly in the bankruptcy proceedings or once the insolvency procedure is opened, or after an observation period of maximum 20 days;

For a more detailed explanation, the judicial reorganization procedure is that way of carrying out the insolvency procedure that is applied to the debtor, the legal person, in order to pay his debts, respecting the debt payment schedule, and the bankruptcy procedure is that insolvency procedure that applies to the debtor in order to liquidate his property to cover the liabilities, being followed by the deletion of the debtor from the register in which he is registered.

The insolvency procedure is attributed several characters that are deduced from its very definition: “The insolvency procedure is a set of legal norms, which seeks to obtain funds to pay the debts of the insolvent debtor to its creditors, under the conditions established differently by categories of debtors, by judicial reorganization based on a reorganization plan or bankruptcy.”

These characters are: personal character, judicial character, collective character, remedy character or enforcement character.

1. Personal character is defined by applying the general procedure of insolvency or simplified procedure of insolvency according to the category of persons of which the debtor;

2. Judicial character is the procedure which is subject to the debtor located in insolvency, all their acts and transactions they are appropriate under insolvency proceedings are governed by law and is carried out under judicial supervision and control of the courts and by other bodies designated by law with the application of the procedure, in this case, the syndic judge, the judicial

administrator and the liquidator. The character itself is a way of protection for lenders and for borrowers .

3. The collective character pursues the satisfaction of all the receivables of the creditors of the debtor in a state of insolvency. There will be a contest of creditors in those proceedings, their economic interests are satisfied in a certain order that the law of a stable is.

4. The remedial character resides from the pursuit of covering the liabilities of the insolvent debtor either through the reorganization procedure or through the bankruptcy procedure. Reorganization procedure the debtor is a remedy which maintain their existence, on time in case the procedure bankruptcy, the liquidation of assets of the debtor, it is gone forever.

The law establishes that participant in the process of insolvency are:

1. The courts

2. Syndic judge

3. Judicial administrator – compatible natural or legal person, insolvency practitioner, authorized under the law, appointed to exercise the duties provided by law during the observation period and during the reorganization procedure;

4. Liquidator – legal person, insolvency practitioner, appointed to lead the debtor's activity and to exercise the attributions provided by law within the bankruptcy procedure.

Art. 4 of the Pre-insolvency and Insolvency Law says that revising the law is based on the following principles:

1. Maximizing the recovery of assets and the recovery of receivables;

2. Giving debtors a chance to recover their business efficiently and effectively, either through insolvency prevention proceedings or through judicial reorganization proceedings;

3. Ensuring an efficient procedure, including through appropriate mechanisms for communicating and conducting the procedure in a timely and reasonable manner, in an objective and impartial manner, at minimum cost;

4. Ensuring equal treatment of creditors of the same rank;

5. Ensuring a high degree of transparency and predictability in the procedure;

6. Recognition of existing creditors' rights and compliance with the order of priority of claims, based on a clearly defined and uniformly applicable set of rules;

7. Limitation of credit risk and systemic risk associated with transactions in derivative financial instruments by recognizing the compensation immediately due in the event of insolvency or a procedure to prevent the insolvency of a co-contractor, with the effect of reducing credit risk to a net amount due between the parties or even zero when financial guarantees have been transferred to cover the net exposure;

8. Ensuring access to sources of financing in insolvency prevention proceedings, during the observation and reorganization period, with the creation of an appropriate regime for the protection of these claims;

9. Substantiation of the vote for the approval of the reorganization plan on clear criteria, ensuring equal treatment between creditors of the same rank, recognition of comparative priorities and acceptance of a majority decision, and other creditors will be paid equal or greater than they would receive bankrupt;

10. Favoring, in insolvency prevention procedures, the amicable negotiation/renegotiation of claims and the conclusion of a preventive arrangement;

11. Capitalization of assets in a timely and efficient manner;

12. In the case of a group of companies, the coordination of insolvency proceedings, with a view to their integrated approach;

13. The administration of insolvency prevention and insolvency proceedings by insolvency practitioners and their conduct under the control of the court.

Maximizing the recovery of assets and the recovery of receivables

According to Radu (2014, 190): "*Felix qui nihil debet (happy is the one who owes nothing) – Beside the fact that it seems to be a Latin truism, in the current economical state of society, the absence of debt remains a desideratum.*" Of course, debt has its inherent place in the economical life of every legal subject, because it is not debt that is the cause of legal troubles, but the accumulation of too much debt.

On the first fundamental principle: "maximize the recovery of assets and recovery of debts", have cleared the first of all the notion "asset recovery." Although there was reference to the liquidation or sale of assets, this concept takes on a connotation much wider. Starting even from the explanation in that harness means putting in value the highlights value of something, we can speak here of legal meanings as putting into use or rent free contracts (even free of rent), leasing assets etc., this of course in addition to liquidation and sale of the assets. Because in certain situations, even putting them into use for free can be beneficial to the debtor and even to the creditors if we talk about certain assets that require very high expenses with their storage, conservation or maintenance.

The capitalization of the debtor's assets, however, is usually done by liquidating and selling them, the procedure that is specific to the bankruptcy procedure being rare in the observation period or in the reorganization procedure. Although the list of principles is for bankruptcy prevention, the first principle is more applicable in the case of bankruptcy and less in the case of prevention that we want to talk about here.

Giving debtors a chance to recover their business efficiently and effectively, either through insolvency prevention procedures or through the judicial reorganization procedure

Pre-insolvency and insolvency procedure are not the only instruments a debtor has in order to minimize the impact of an unwanted event upon its finances. The Romanian Civil code (Civ. C) permits for a debtor to invoke the institution of unpredictability (art. 1271 Civ C). Through the mechanism of unpredictability, "the legislator wants to avoid unjust consequences due to exceptional circumstances that can put the debtor in a difficult situation to fulfill his obligations" (Radu 2014, 289).

We, however, ask ourselves if this principle of pre-insolvency and insolvency is only ways priority for covering debts or indeed "gives a chance to the debtors for recovery efficiency and effective of business". Because not arise who would have to give it a chance. Clearly, we can only look at the actors involved in the procedure and I am referring here to creditors, the judicial administrator, the judge, etc. not involved and directly in a case individual insolvency although all, at least generically, have interests that professionals are in difficulty to be rescued from bankruptcy, here were but no obligations concrete commitments. Otherwise that is less credible to be took seriously this principle, and we can say we find this principle more as a slogan and not granting a likely borrower. We have to look with attention, to find a way to clear the obligations of implementing the application of this principle and which would be the sanction of violation. The penalty for "the abuse of right of vote" in the meeting of creditors or for abuse of dominating position the judiciary administrator that ignore paths of recovery and lead to a bankruptcy unjustified. And I say this, because in reality over 90% of cases of insolvency are those of the following cases of bankruptcy. Or with such statistics it is clear that this principle is dysfunctional.

Ensuring an efficient procedure, including through adequate mechanisms for communication and conduct of the procedure in a timely and reasonable manner, in an objective and impartial manner, with a minimum of costs

In this principle "on which" the insolvency law is based, the judicial, procedural aspect of the insolvency is taken into account. A judicial procedure is effective if it produces its effect, if it is useful.

Statements practical, concrete denies the principle of efficiency of proceedings insolvency by the fact that the division procedure for confirmation of the plan of reorganization in two parts, the first to vote the validation meeting of creditors to vote plan and the second dedicated to validation plan itself and because of this is delaying de facto this procedure. In accordance with the principle of celerity and efficiency, the syndic judge would have to settle in - one session for legality as and possibility of realization of the plan proposed, which should be made within 15 days of the decision for approval of the plan by the creditors, but in reality it formulates appeals against the decision of the meeting of creditors and to the court final decision (considering appeals in appeals) of these appeals took in for real at least a year in simple cases and up to three years in more complexes cases. In all this period confirmation plan recovery is suspended, and that means that the extension of the period of observation, during which according to the law would have to take up to 12 months from the date of opening proceedings, in reality can take up to 3 years.

But the procedure of insolvency, took that and a civil case or that form special of execution forced involves oriented manner of civil procedure and even if some of them are provided by the Law of Insolvency, most of them are provided though the Code of Civil Procedure and, breach thereof could lead to sacrifice area social rights or trial of the participants in the procedure and the parties in the multitude of processes.

The relationship between the Insolvency Law and the Code of Civil Procedure should be a simple one, of the special law type - general law. But, in reality, in accordance with art. 342 para. (1) of the Insolvency Law, its provisions are completed "in so far as they do not contravene", with those of the Civil Code and with those of the Code of Civil Procedure. Starting from here, we ask the question whether the performance requirement of the insolvency procedure in a "timely and reasonable" imposed by Principle 3, removes the requirement of fair trial, judged a suitable time and predictable.

The two principles that seem to overlap of, is to be interpreted as meaning that apply in a coordinated manner, and not in the sense that not apply or be mutually exclusive. Therefore, the conduct of the procedure in a "useful and reasonable time" will not be able to limit the fairness of the process nor the independence and impartiality of the court, and the notion of "useful and reasonable time" will be interpreted in the sense given by the civil procedure optimal and reasonable term", the speed cannot defeat the procedural rights of the parties, including the one to the defense.

Some procedures of insolvency are by design more prone to be efficient in the sense that a debtor cannot hide his assets and income so easily. Due to the limitations on the nature of payment (mostly through banks, only in local currency) imposed to the professional entities they are less likely to keep from the creditors any income they receive. It is not the case with debtors in personal insolvency proceedings (Radu 2019, 206).

Conclusions

It is necessary to modify these principles of insolvency prevention, so that they do not exist only theoretically but they even have the role of "guiding" the insolvency procedure in practice and can be applied so as to streamline the prevention of bankruptcy of professionals. We recognize that many theoretical legal procedures are very different in practice, but if most of them can be combated in practice, then a change or adjustment of them as close as possible is justified.

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