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Management Guidelines in Insolvency Situations

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ABSTRACT: Insolvency at the international level has been for hundreds of years an essential issue of commercial law in general and of international law in particular. There has been a constant attempt to find the appropriate legal instruments to solve creditors' problems in order to obtain the goodwill that belongs to them, but at the same time to protect the debtor. Along with the economic, social and financial development, there have been several changes in insolvency legislation both domestically and internationally. These legislative changes have become an essential pillar in the economic legislation of a state.

KEYWORDS: insolvency, laws, managers, management, company

Introduction

Insolvency in Romania has had a permanent development, from Phanariots to the contemporary period.

The Caragea code was the first to address this topic of insolvency. It was promulgated in 1818 during the reign of the Phanariot ruler Ioan Gheorghe Caragea. It entered into force on 01.09.1818 and was applied until 30.06.1865, when it was replaced by the Civil Code (1864). In Chapter VIII - For loans and debt, the insolvency was also discussed:

"Art. 15 If a debtor becomes bankrupt, they shall file a lawsuit, and if they prove their damages, their creditors shall exonerate them; otherwise, they shall accept their responsibility for false bankruptcy" (Civil Code, 1818)

Also, in the Calimach Code, the application of which became more consistent after 1833, the aim was to regulate the situation of the natural person who is obliged to go into insolvency.

"(…) The legal action based on which the creditors of a bankrupt are summoned together, by decision, to clarify and prove their claims, so that after this, they can divide the bankrupt's assets between them according to the classification analogy. The procedure against the bankrupt was opened by a court decision, subject to publicity both at the place of ruling and in other counties, the main effect of this act of jurisdiction being the dismissal of the bankrupt and the unenforceability in relation to the statements of assets and liabilities of the acts subsequently concluded by the debtor" (Bufan, Deli-Diaconescu, Moțiu 2014, 29).

"These regulations began to be dealt with later, in 1831, 1832 and in some organic Regulations, so the institution of insolvency became more and more regulated and later in 1887, the first Romanian Commercial Code came into force. This issue of bankruptcy has been addressed in two hundred and fifty articles. It should be mentioned that, by repealing the Commercial Code and by the taking over by the Civil Code of the title of common law in this matter, the legislator thus favoring the monistic conception, the classic distinction between civil and commercial relations also disappeared" (Urda 2016, 11).

In 1995, Law no. 64/1995, the first law on the procedure of judicial reorganization and bankruptcy, published in the Official Gazette no. 1066 of November 17, 2004, enters into force.

Due to social and commercial development at a national and international level, the need for legislative changes was felt. Thus, in 2006, Law 85 on insolvency prevention and insolvency proceedings, which includes judicial reorganization and bankruptcy under the name of judicial insolvency, enters into force.

The last legislative amendment in Romania regarding insolvency took place in 2014, when Law no. 85 on insolvency prevention and insolvency proceedings came into force. It also currently regulates the insolvency of professionals, dealing in depth with all existing practical issues, including and clarifying current legislative procedures and provisions, new situations that were encountered in the procedure and which the previous legislation was not prepared to cover.

Management guidelines in insolvency situations

The purpose of the insolvency laws was to create a procedure by which the manager of a company, in a situation of fiscal deadlock, is helped to reorganize the company, in order to extinguish the obligations thereof in relation to third parties natural or legal persons and to return to the operating situation.

Thus, by the last legislative amendment provided by Law no. 85/2014 on insolvency prevention and insolvency proceedings, several basic principles have been established in order to help and support the actions of a manager when the company is in a crisis situation:

- "maximizing the degree of asset capitalization and debt recovery;
- giving debtors a chance for an efficient and effective recovery of the business, either through insolvency prevention procedures or through the judicial reorganization procedure;
- ensuring efficient proceedings, including through appropriate mechanisms for communicating and conducting the proceedings in a timely and reasonable manner, in an objective and impartial manner, with minimum costs;
- ensuring the equal treatment of creditors of the same rank;
- ensuring a high degree of transparency and predictability in the procedure;
- admitting existing creditors' rights and compliance with the order of priority of claims, based on a clearly defined and uniformly applicable set of rules;
- limiting the credit risk and the systemic risk associated with transactions in derivative financial instruments by recognizing the close-out netting in the event of insolvency or in case of a proceeding destined to prevent the insolvency of a co-contractor, resulting in the reduction of the credit risk to a net amount due between the parties or even to zero when financial collaterals have been transferred to cover the net exposure;
- ensuring access to sources of financing in insolvency prevention proceedings, during the observation and reorganization period, with the establishment of an appropriate regime for the protection of these claims;
- substantiation of the vote for the approval of the reorganization plan based on clear criteria, ensuring equal treatment between creditors of the same rank, recognizing comparative priorities and accepting a majority decision, while the other creditors shall be offered equal or higher payments than they would receive in bankruptcy;
- favoring, in insolvency prevention proceedings, the amicable negotiation/ renegotiation of claims and the conclusion of an arrangement with creditors;
- capitalization of assets in a timely and efficient manner;
- in the case of the group of companies, coordinating insolvency proceedings, with a view to an integrated approach thereof;
- the management of the insolvency prevention and insolvency proceedings by insolvency practitioners and the development thereof under the control of the court." (S. 4, Law no. 85/2014).

The manager is the one who has the most critical role in the recovery of the company. If he/she has the necessary training and skills, he/she will be the one who will be able to make

the transition easier for all participants in this process, and therefore all the people involved will not suffer or will suffer less from this situation.

The management of a company in a crisis is the management that develops concrete tools that are specific to each field, which will allow the manager to implement and apply the management he/she will consider necessary and appropriate at that stage. Thus, there are situations in which:

"Ongoing contracts shall be deemed to be maintained at the date of the opening of the proceedings. (…) Any contractual clauses terminating the ongoing contracts, breaching the term or declaring an anticipated maturity date for the reason of the opening of the proceedings shall be null and void. The provisions relating to the maintenance of ongoing contracts and the nullity of clauses of termination or acceleration of obligations shall not apply to qualified financial contracts and bilateral clearing operations under a qualified financial contract or a bilateral clearing agreement (…). In order to maximize the value of the debtor's assets, within a 3-month limitation period from the date of the start of proceedings, the insolvency administrator/liquidator may terminate any contract, unexpired leases, other long-term contracts, as long as these contracts have not been performed in full or substantially by all parties involved" (S. 123, Law no. 85/2014).

"If a movable asset sold to the debtor and not paid by it, was in transit at the time of the opening of the proceedings and the asset is not yet available to the debtor, and no other parties have acquired rights over it, then the seller can take back the asset. In this case, all expenses will be borne by the seller, and it will have to return to the debtor any price pre-payment. If the seller allows for the asset to be delivered, it will be able to recover the price by entering his claim in the consolidated list of creditors. If the insolvency administrator/liquidator requests that the asset be delivered, it will have to take measures so that the full price due under the contract is paid from the debtor's property" (S. 124, Law no. 85/2014).

"If the debtor is a party to a contract contained in a master netting agreement, which provides the transfer of certain goods, securities representing goods or financial assets listed on a regulated market for goods, services and financial derivative instruments, on a particular date or in a specified period of time, and the maturity occurs or the period expires after the date of the opening of the proceedings, a bilateral clearing operation of all contracts included in the respective netting master agreement will be carried out, and the resulting difference will have to be paid to the debtor's property, if it is a creditor, and will be entered in the list of creditors, if it is a liability of the debtor's property" (S. 123, Law no. 85/2014).

"(…) owner of a leased property and debtor in the present proceedings shall not terminate the lease agreement unless the lease is lower than the market lease. However, the insolvency administrator/liquidator may refuse to provide any services owed by the lessor to the lessee during the lease. In this case, the lessee can evacuate the building and request the registration of its claim (…) or can still own the property, deducting from the lease it pays the cost of services owed by the lessor" (S. 128, Law no. 85/2014).

We exemplified some situations in which the companies' managers, in accordance with the legal provisions, have to take some decisions on the assets existing in the company's patrimony in order to recover it.

Although in Romanian society, the onset of insolvency is seen as a failure, because it comes along with financial difficulties, financial blockage, lack of money to pay the debts resulting from service, banking agreements etc., the insolvency of a company can also have beneficial results if the manager chooses to reorganize the company at the right time. This makes the difference between strategic management and underperforming management.

Usually, a manager who is under pressure considers that once the insolvency proceedings are started, the company will automatically go bankrupt and will have to close the business that he/she built for years. If the economic and financial context results, not infrequently, in the impossibility of covering the company's debts, this does not mean that the

management offered was not a quality management. There are situations when the management has been influenced by external factors, the clients no longer pay their contractual debts, the financing sources become less numerous or no longer exist, making it impossible for the company to continue.

By reorganizing the company, it will be sheltered, under the protection of legislation, giving the manager the opportunity to draft a reorganization plan, structured over a period of time, through which the company can recover. It is a good time for the company to change its business strategy. If you want to reorganize the company, in order to have a clear work image, it is recommended to have an assessment of the company from an economic but also legal point of view, starting from the check of the company's accounting documents and up to the check of the ongoing service, trade agreements.

In order to start the insolvency proceedings, in addition to being a good organizer and visionary, the manager must also be a good negotiator and in terms of the relationships with creditors, he/she must build or maintain a business relationship based on trust and transparency. In the end, the company can manage to resume its activity, and the creditors to recover their receivables or even to continue their activity, namely to conclude new contracts with the same partners.

At the international level, management is a reflection of the process of internationalization of economic life. Some differences in management occur due to the different contexts in which it is performed, due to the cultural diversity of the participants in transactions, as well as due to different managerial concepts and practices. While from a legislative point of view, the regulations at the international level are different, from a managerial point of view, the decisions depend on the manager's capacity to lead the company, to make decisions capable of achieving the set objectives through good coordination and efficient use of resources.

During the insolvency period of a company located on the territory of Romania, there are cases when the manager is forced to take the necessary steps to protect the company in terms of the enforcement of court decisions. The company is involved in this lawsuit, and the contracting parties come from two different states with different legislation. In this situation, in addition to his/her administration and negotiation skills, the manager must know the legislation governing his/her decisions at that time.

"While from a legislative point of view, there are inconsistencies between the provisions of Romanian legislation and those arising from treaties, conventions or any other form of international agreement, bi- or multilateral, to which Romania is a party, the provisions of the treaty, convention or international agreement shall apply with priority" (S. 275, Law 85/2014).

"Romanian courts have the possibility to refuse the recognition of a foreign procedure, the enforcement of a foreign court decision adopted within an insolvency proceeding if they find that a) the decision is the result of a fraud committed in the procedure observed abroad; b) if the decision breaches the provisions of public order under Romanian private international law" (S. 278, Law no. 85/2014).

"Within the forms of cooperation, the Romanian courts cooperate with the foreign courts and representatives by:

a) Coordinating the administration and supervision of the assets and activities of the companies belonging to the group of companies;

b) Coordinating the conduct of court hearings, including the possibility of establishing joint hearings;

c) Coordinating the approval and implementation of the reorganization plan;

d) Communicating information or procedural documents regarding the Romanian insolvency proceedings of one of the members of the group of companies;

e) The possibility to approve a cross-border insolvency agreement having as object the coordination of insolvency proceedings;

f) The possibility of appointing a typical representative in insolvency proceedings, with the check of the non-existence of a conflict of interests" (S. 308, Law no. 85/2014).

"Therefore, the manager must be aware that (…) the cooperation procedure between the Romanian courts, on the one hand, and the foreign courts and representatives, on the other hand, will not affect the principles of independence and impartiality under which the court authority operates or the legitimate rights and interests of the participants in the insolvency proceedings" (S. 309, Law no. 85/2014).

Conclusions

The management at both national and international level represents the totality of concepts, methods and tools that are necessary to identify business opportunities and the importance of the qualities of a manager for his/her actions of management, organization, promotion and negotiation of contracts.

It is vital for a manager to have managerial skills, the ability to make quick decisions and take risks in crisis situations, such as the period of insolvency. However, at the same time, he/she must have the ability to acquire additional information obtained from other related fields, such as the economic, legal and social ones, etc.

The bigger and more developed the company, the higher the capacity to select and hire more staff, setting up specialized departments, in order to support its activity. The specialized departments will be more and more diversified in terms of the established duties, but what happens when the company is small, with limited resources but needs to operate and grow? I believe that in this situation, the manager's effort will be much greater. In addition to technical, decision-making, conceptual and communication skills, he/she will always have to supplement his/her knowledge with economic, social and legislative information, which will enable him/her to accumulate extensive and in-depth specialized knowledge, becoming a successful multidisciplinary manager.

Successful managers are those who want to constantly progress, and in this respect, they will gather all the information, identify problems and establish business strategies not limited to their area of professional training. They will always try to scale the information frontier and obtain new information to achieve their goals.

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