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DOCTORAL THESIS

THEORETICAL AND PRACTICAL ANALYSIS OF THE INSOLVENCY PROCEDURE IN THE ROMANIAN LAW

Abstract

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(doctoral thesis_ Abstract)

Key words: insolvency, bankruptcy, insolvency judge, court, court of appeal, practitioner, UNPIR chart, trustee, liquidator, creditors' assembly, creditor, debtor, special administrator, ad-hoc mandate, prevention concordat, organisation plan, passive mass, status

Actuality of the investigated theme

The interhuman relationships have been regulated by juridical norms since time immemorial.

The sanctioning provision for the infringed relationship aimed strictly at the person and not at their possessions, irrespective of the fact that they referred to a non patrimonial right or material possessions. Thus, by *The retaliation Law,* it was intended the punishment of the person and not the recovery of the damage of the prejudiced person. In that period of formation of society/state, the interpersonal aspect of relationships was prioritary.

In the Roman law, during *Legis actiones,* the creditor had the right of retaining the debtor, of selling him as a slave, or even the right of life or death over him.

In the pretorian law, the regime of obligations was changed, generally speaking, in the sense that the recovery of debts could be achieved also by executing the debtor's goods.

By applying the formulated procedures, the creditors could obtain the the debtor's asset, that was exercised in their interest. After this the necessary publicity followed in order to let know all the creditors that the goods would be sold. The procedure was a real collective procedure of the creditors in order to recover the debts from the debtor. The sale of the creditor's goods used to attract infamy upon him. The debtor's goods were the general pledge of the creditors. The debtor used to abandon his goods in favour of the debtor in order to get rid of prison.

During the Republic, the foreclosure was accomplished by the state authorities "manu militari", that put on sale the goods from the debtor's patrimony.

During the Middle Ages, the trade was flourishing, it was a moment when "missio in possessionem" and "vendito bonorum" were taken over and developed from the Roman law. In that period, it was proceeded to the collective and egalitarian organisation of the creditors against the debtor found in cessation of payments. There was a distinction between the debtor of good faith and bad faith.

The trade activity was accompanied by inherent risks, that led to the cessation of payments. In such situations, juridical institutions appeared such as the **concordat**, through which the honest debtor could manage his activities, the creditors approving the reduction of the amount of debts and the **moratorium**, which permitted the suspension of any prosecution of the debtor, in an interval of time.

Justice was involved in the completion of the creditors' action having as purpose the liquidation of the debtor's patrimony in case of bankruptcy.

The development of capitalist economy on basis of request and offer had as consequence the development of the trade, with the capital as promotor, which led to the development of bankruptcy law. The bankruptcy procedure was based on recovering the creditors' debts with efficiency and celerity, pursuing the

sanctioning of the persons under the patrimonial aspect and not personally, excepting the fact of accomplishing criminal facts by the debtors (fraudulent bankruptcy).

The professional problems appeared in solving the causes in the procedures of insolvency prevention and insolvency are generated by:

- the jump from the antique procedure of bankruptcy to insolvency;
- the economic and competitivity increase;
- prevention, resolution or alleviating the financial and economic crises;
- acomplishment of the debtors' liability and creditors' insurance in the crediting extension;
- activities of enterprises which have more often transboundary effects and these effects are regulated more and more by the communitary or/and international law.

  The thorough knowldge of law in insolvency helps to identify the adequate procedures for the treatment of natural or/and legal persons that are in difficulty /cessation of payments.

Aim and objectives of the thesis

The purpose of the paper is to treat the applicable procedures in this domain such as the ad-hoc mandate, the preventive concordat, the enterprise saveguarding, the debtor's reorganisation, the general procedure, the special procedure, the simplified procedure. Within the frame of the procedure of insolvency the following will be discussed: the domain of application and its object; the aim and its principles; the participants at the procedure; compatibility of the norms of the Code of civil procedure with the specific of the insolvency procedure; procedure of

judiciary reorganisation by respecting a plan; the actual procedure of bankruptcy; the plan of distribution among creditors, prophylactic measures at the creditors' disposal, procedure of establishing the liability of the governing body – judiciary practice in this domain, closure of the procedure. These stages – procedures will be analysed through the requirements of the Romanian law as well as comparative law.

The law of privatization in Romania has undergone many modifications, and among these Law 64/1994, applicable from 28.08.1995 concerning the procedure of reorganisation and judiciary liquidation has been considered the first major reform of the procedure of the traders' insolvency. The modifications brought to the law no. 64/1995, through Law no. 99/1999 led from liquidation to bankruptcy, from the trustee bankruptcy judge to the magistrate bankruptcy judge, and the trustee acts in the procedure as a representative of the justice.

The report of the European Commission concerning the progress registered by Romania along 2004, in the process of adherence comprises the following conclusion: "*The Romanian law system does not provide adequate and efficient mechanisms for the getting out of the market of the economic agents in cessation of payments".* This conclusion was determined by seeing the complexity of the existing procedure, the nonuniform application of the law in this domain, the reduced protection the creditors benefit from.

Consequently, starting from the communitary acquis in this domain, the Government completed the law taking into account also:

the Regulation of the Council no. 1346/2000, concerning the insolvency procedure;

The Directive 2002/74 for the modification of the Directive 80/97/EEC concerning the protection of the employees in case of insolvency initiated Law

86/2006 with the subsequent modifications and completions. As an effect, the secondary laws had to be modified too: Law 31_1990 concerning the chapter with voluntary liquidation and Law 26_1990, concering the chapter with registerings.

The Directive DALEC 2001/24/CE inspired the issue of the Government Ordinance no. 10/2004 concerning the procedure of judiciary reorganisation and the bankruptcy of credit institutions.

Both in the case of the other traders and the credit institutions, the phenomenon of insolvency must be primarily approached under the aspect of prevention and only in case that these measures/means do not give satisfaction to analyse the treatment called „sanitation".

The judicial argument refers to the fact that the law in the respect of insolvency procedure must observe the European law. It is noticed that Regulation no. 1346/2000 of the European Council imposes to the member states, deliberately, the extension of the insolvency procedures to the natural persons too.

Thus, point 9 from the Regulation EC NO 1346/2000 shows that "The present regulation should be applied to the insolvency procedures, irrespective of the fact that the debtor is a natural or a legal person, a trader or a private person."

The commission of United Nations for International Commercial Law prepared in 1997 the model of law UNCIRAL, without compulsory character, whose aims are the solving of the problems of cooperation and coordination of concurrency procedures, of recognition of a foreign decision of international judicial assistance in the problems of bankruptcy. In the domestic law, this law was incorporated in a Guide, that served as a source of inspiration for law no.637/2002 concerning the regulation of the relations in private international law in the domain of insolvency.

Insolvency has a preventive role, or depending on the case, an extinctive one concerning the financial or economic crises, role that is manifested concretely by the prevention of the appearance or removal of elements of insolvency, insolvency that interrupts the process of crediting-enterprise-profit.

On the globe, actually, the vast majority of the regulations in this domain are grouped in categories of law, comprises both norms of procedure order and of substantial law referring to the effects of insolvency.

These laws are more or less similar from one system to another. They aim both at the debtor's recovery and the liquidation of his fortune, the possibility of attracting the civil/penal liability of the statutory organs of the debtor for causing the state of insolvency for certain facts, having as an effect the supporting of a part from his passive by this one.

In this period of crisis, the word insolvency received particular visibility, an almost privileged status in everyday language.

Considering the situation and reasons presented above, it is absolutely natural that the entire activity of insolvency should be comprised in an insolvency code.

Romania's government, taking into consideration that the actual economic context imposes taking rapid measures for the creation of the law and administrative premises that lead to the growth of economic operators' efficiency, and at the safety of the economic circuit and the investment attractivity of the Romanian market, emits the emergency Ordinance no. 91/2013 from 2nd October 2013 concerning the procedures of prevention insolvency and of insolvency. Subsequently, it was adopted the Law concerning the procedures of prevention of insolvency and insolvency (acronym LPPI_I) no.85/25.06.2014. LPPI_I has an integrating vision, including in a single normative corpus the general law,

applicable to all the economic operators, the special law, incident to the institutions of credit companies of insurance/re-insurance, regulation of the insolvency of groups of companies, regulation of transboundary insolvency. In the new law, are also regulated the instruments for prevention of insolvency/preinsolvency.

Besides the objective of codification, the project of the new law has two main elements, which constitute also the main objectives of the law intervention: assurance of the balance for creditors' interests and debtor's in the procedure and making efficient the procedure, that should implicitly lead to the reduction of the procedure duration and the increase of the degree of recovery of the credits.

It is introduced the idea of granting of a term of payment for the creditor's debt triggering - until the remaining in pronunciation over the request of opening the procedure formulated by the creditor.

In order to improve the chances of reorganising in the advantage both of the debtor and creditor, it is proposed to introduce a super-priority for the fundings granted during the procedure, inclusively in the period of observation.

These fundings will be guaranteed, mainly, by affecting some goods and rights that do not form the object of some preferential causes, and in subsidiary, if such goods or available rights do not exist, with the creditors' agreement who are beneficiary of the respective causes of preference. In the hypothesis in which the agreement of these creditors will not be obtained, the priority at restitution present in this paragraph will diminish the regime of satiety of the creditors beneficiary of the causes of preference, proportionally by reporting to the entire value of the goods or rights that form the object of these causes of preference.

In order to avoid the approval of some plans of organisation upheld by a small number of creditors, a possible situation in the old regulation by „manipulating" the voting groups could be voted, a plan without correspondent in

the value of debts, it is introduced now an additional criterium for the approval of the plan, respectively 30% from the statement of affairs.

In order to achieve the second objective, making the procedure efficient, we signal only a few of the provisions of the Code.

The incidental actions (merits and appeal) are judged in conformity with the provisions of the new Code of civil procedure with regard to the judgement in the first instance, with the mentioning that the term for filing the answer is of maximum 10 days from the communication, the answer to the communication is not compulsory and the insolvency judge establishes, by resolution, in a term of maximum 3 days from the date of filing the answer, the first term of judgment, which will be of at most 30 days from the date of the resolution.

The term of continuance of procedure is replaced with an administrative term of control, which will permit to the insolvency judge to manage more efficiently the insolvency file, not being necessary to organise public meetings of judgement if there are no requests in the litigation or nonlitigation procedure, but making possible to give tasks in the charge of the trustee/judiciary liquidator.

It is possible for the insolvency judge to unblock certain situations, when the creditors are not active in the procedure.Thus, if a decision cannot be taken in the creditors' assembly or committee, the trustee/judiciary liquidator can notify the court so that they can take a decision.

It is expressly shown the obligation of the insolvency judge of taking a decision over the viability of the reorganisation plan, proposed by the debtor or creditors and approved by the creditors' assembly.

It is proposed to make efficient the creditors' assembly activity, its meetings taking place as often as necessary (not necessarily monthly, like in the actual law), and the vote can be expressed by any means that assure the

transmission of the text and the confirmation of its receival, thus it is not compulsory anymore to be physically present.

It is eliminated the possibility of contesting the creditors'committee decisions at the creditors' assembly, taking into account that the decision given like this by the assembly can be contested at the insolvency judge.

Express provisions are introduced concerning the treatment of the leasing agreements an the debts coming from the leasing agreements.

In order to assure the creditors' protection and the procedure transparency, the sale of the assets will be achieved according to a sale regulation, approved by the creditors.

The paper with the theme on the insolvency procedure also offers the possibility of identification of certain law flaws or the existence of some inadvertences, generating diverse interpretations in the application of judicial norms and consequently the formulation of some proposals *de lege ferenda*.

Also, in this paper, can be identified how much the domestic regulations are compatible with those in the international normative acts at which Romania is part.

Eventually, the paper contributes at the intimation of nonunitarian aspects in the practice of judgement instances for the solutioning of different stages referring to insolvency and the grounding of some relevant proposals in this respect.

Methodology of scientific research

In order to achieve the objectives presented above many methods specific

to the juridic research were approached such as: the historic method, the logic method, the comparative method and quantitative methods.

The doctoral thesis is structured in 8 chapters and 306 footnotes.

The *first chapter* discusses the interhuman relationships that have been regulated since time immemorial by judicial norms.

The sanctioning disposition for the infringed relationship aimed at the person and or his goods. Thus, by means of *The retalion law* the aim was to punish the person and not to recover the damage of the prejudiced person and nowadays there exists the Law of procedures of insolvency prevention and insolvency, case in which is pursued the prevention of insolvency, reorganisation, recovery of the prejudice of the damaged person by the debtor and the laws that regulate this domain.

In the *second chapter,* the features, principles, domain, object, aim and participants at the insolvency procedure in the Romanian law system and comparative law were analysed.

In the *third chapter*, the procedures of prevention insolvency were described both in voluntary extrajudiciary negotiations and in judiciary formal ones. The ad-hoc mandate procedures were also approached as well as the procedure of the preventive concordat, inclusively judiciary practice.

The *fourth chapter* comprises the general procedure of insolvency, where are analysed the opening of the procedure of insolvency, its effects and the competent instances in cause. The effects of opening the procedure of insolvency in France, Austria, Italy and Sweden are also described.

The phase of the procedure of reorganisation by plan is approached in the *fifth chapter* of the doctoral thesis, both in the domestic law in force as well as in France and Germany.

The *Sixth chapter* is consacrated to the stage of the debtor's bankruptcy. The opening of the bankruptcy procedure is analysed as well as the types of bankruptcy, its effects and consecutive measures, the liquidation of the debtor's fortune, the final report of liquidation and the final distribution.

In the *Seventh chapter* is analysed the patrimony liability of the persons who caused/contributed to the state of insolvency of the debtor. The facts, conditions, guiltiness, prejudice and limits for which can be involved the patrimony liability of the persons that contributed to the state of insolvency are approached. The procedure of attraction the liability is also presented by indicating to the holders the request of investment of the insolvency judge.

The *Last chapter* of the doctoral thesis is reserved to the closing of the insolvency procedure. All the hypotheses connected to the closing procedure are analysed and its effects too. From the jurisprudence are presented in synthesis some decisions of the Constitutional Court of Romania and the High Court of Cassation and Justice in Romania.

The research ends with a series of conclusions, legislative proposals of de lege ferenda, selective bibliography, articles, communications and laws.

The doctoral thesis is the result of an experience lived by the author through practice (to notice the causes adminstered by the author and quoted in the footnotes, that sustained the conclusions concerning the legal provisions) done before writing it, in which my aim was to approach the procedures concerning the insolvency prevention and insolvency, so that in the actual economic context it should have as a consequence the growth of:

- economic operators' efficiency
- safety of the economic circuit

- efficiency of the procedure, in the plan of duration and degree of coverage of the debtor’s passive
- number of companies that succeed in the prevention of insolvency
- number of companies in insolvency that succeed in avoiding becoming bankrupt by the procedure of judicial reorganisation
- harmonization of the laws that regulate the domain of insolvency prevention and insolvency
- the investment attractivity of the Romanian market

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