Control of the Administration of Insolvency Proceedings

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ABSTRACT: This material presents an analysis of the control exercised by the courts over insolvency practitioners for the conduct of insolvency proceedings. Depending on the legal systems and the choice of the legislator, the Member States of the European Union have chosen differently on the way of how the court intervenes in the conduct of insolvency proceedings. Thus, there are opinions according to which the insolvency procedure must be carried out entirely outside the court, but also opinions according to which the court must have a significant control within the insolvency procedure. The Romanian legislator combined the two opinions, totally opposite, establishing that the court, through judges specialized in insolvency, should have legal control over the conduct of insolvency proceedings, and only in cases expressly provided by law, to exercise control over opportunity.

KEYWORDS: insolvency, principle, court, control, judicial administrator, judicial liquidator, syndic judge

The principle of the administration of insolvency proceedings by insolvency practitioners under the control of the court

Modern insolvency law regulates the principle of administration of this procedure by insolvency practitioners, under the control of the court where the syndic judge operates. This principle was adopted to avoid those situations in which insolvency proceedings were at a standstill, due to lack or insufficiency of regulation, due to the passivity of creditors or due to the failure of insolvency practitioners to perform their duties under the law (Adam 2016, 117).

The regulations on the organization of the work of insolvency practitioners for insolvency proceedings provide that voluntary winding-up proceedings, as well as insolvency prevention proceedings, including financial supervision or special administration measures, are conducted by insolvency practitioners.

Consequently, the decisive role in insolvency proceedings belongs to the insolvency practitioners. Although they represent a liberal profession, the insolvency practitioners administer such procedures and perform a public function (Dinu 2015, 182), being subject to a control of the activity carried out by the syndic judge.

From this perspective, we find that the regulations on insolvency establish for insolvency practitioners a series of attributions, in the sense of legal obligations, being entitled to remuneration for the activity carried out.

A controversial issue and approached differently in state law is the designation of the insolvency practitioner. The legal possibilities verified in the legislative and judicial practice in insolvency are three, namely: the appointment to be made by the creditors, by the debtor or by the syndic judge. The legislator of the Insolvency Code opted for a mixed option, in the sense that the creditors have the priority of appointing the insolvency practitioner, and if they omit the appointment, the debtor will do it, and if he omits the appointment, the syndic judge will do it (Sărăcuț 2013, 20).

The judicial administrator

The judicial administrator is the compatible insolvency practitioner, authorized under the law, appointed to exercise the duties provided by law or established by the court, in the insolvency proceedings, during the observation period and during the reorganization proceedings.

The main attributions of the judicial administrator, within the insolvency procedure, are regulated by art. 58 of Law no. 85/2014 on insolvency prevention and insolvency procedures, and these are the following: examination of the debtor's economic situation and preparation of a report by proposing either entry into the simplified procedure or the continuation of the observation period in the general procedure; examining the debtor's activity and drawing up a detailed report on the causes and circumstances that led to the state of insolvency, mentioning any indications or preliminary elements regarding the persons to whom it would be imputable and on the existence of the premises for engaging their liability, as well as on the possibility real reorganization of the debtor's activity or of the reasons that do not allow the reorganization; drawing up the debtor's documents, in case the debtor has not fulfilled his obligation to submit them within the legal deadlines, as well as verifying, correcting and completing the information contained in the respective documents, when they were presented by the debtor; elaboration of the reorganization plan of the debtor's activity; supervision of the debtor's patrimony management operations; the full management, respectively in part, of the debtor's activity, in the latter case with the observance of the express specifications of the syndic judge regarding his attributions and the conditions for making payments from the debtor's property account; convening, chairing and ensuring the secretariat of the meetings of the creditors' meeting or of the shareholders, associates or members of the debtor legal entity; the introduction of actions for the annulment of fraudulent acts or operations of the debtor, concluded to the detriment of the creditors 'rights, as well as of some patrimonial transfers, of some commercial operations concluded by the debtor and of the establishment of some guarantees granted by him, likely to prejudice the creditors' rights; the emergency notification of the syndic judge in case he finds that there are no goods in the debtor's property or that they are insufficient to cover the procedural expenses; termination of contracts concluded by the debtor; verification of receivables and, where appropriate, objections to them, notification of creditors in case of non-registration or partial registration of receivables, as well as preparation of tables of receivables; the collection of receivables, the pursuit of the collection of receivables related to the debtor's assets or the amounts of money transferred by the debtor before opening the procedure, the formulation and support of actions in claims for the collection of the debtor's receivables, for which he may hire lawyers; concluding transactions, discharging debts, discharging guarantors, waiving real guarantees, provided that the confirmation of these operations by the syndic judge; notifying the syndic judge in connection with any issue that would require a solution by him; inventory of the debtor's assets; ordering the valuation of the debtor's assets, so that it is carried out by the date set for the submission of the final table of claims; submission for publication in the Insolvency Proceedings Bulletin of an announcement regarding the submission of the evaluation report to the file, within two days from the submission. The syndic judge may establish in charge of the judicial administrator, by conclusion, any other attributions besides those mentioned previously except those provided by law in his exclusive competence.

The Romanian insolvency code brought as an element of novelty, compared to the old regulation (Law no. 85/2006 on insolvency procedure), the detailing of the attribution regarding the supervision of the debtor's activity, this being defined distinctly from art. 5 paragraph 1 point 66 of the Law no. 85/2014 (Clopotari 2016).

Thus, the supervision exercised by the judicial administrator, in the conditions in which the debtor's right of administration has not been lifted, consists in the permanent analysis of his activity and the prior approval of both the measures involving the debtor's patrimony and those meant to lead to restructuring/reorganization; the endorsement shall be made on the basis of a report prepared by the special administrator, which shall also state that the conditions regarding the reality and timeliness of the legal operations subject to the endorsement have been verified and met.

The supervision of the debtor's assets management operations is performed by the prior notice granted at least regarding the following operations: the payments made by the debtor; concluding contracts during the observation period and during the reorganization period; legal transactions in disputes involving the debtor, endorsement of proposed measures for the recovery of claims; operations involving the diminution of assets, such as scrapping, revaluations, etc.; the transactions proposed by the debtor; the financial statements and the activity report attached to them; restructuring measures or amendments to the collective labor agreement; the mandates for the meetings and committees of the creditors of the insolvent companies in which the debtor company holds the status of creditor, as well as in the general meetings of shareholders in the companies in which the debtor holds shares; the alienation of fixed assets from the patrimony of the company in which the debtor holds shares or the encumbrance of their tasks.

It is found that this legal provision is likely to increase the liability of the judicial administrator (Oancea 2013, 61).

As far as we are concerned, we appreciate that this legal provision is welcome, even if it is contested by some insolvency practitioners, given the previously verified non-unitary judicial practice and the fact that in the Romanian private law system the judicial precedent is not a source of law.

Insolvency good practice manuals and initial or continuing professional training for insolvency practitioners have failed to provide a uniform interpretation and application of the concept of supervising the debtor's business during the insolvency proceedings insolvency and can continue its activity.

The legislator of the Insolvency Code understood to offer a protection for the insolvency practitioner establishing in art. 57 par.11 that he, as a body that applies the insolvency procedure, will not be able to be sanctioned or obliged to pay any court costs, fines, damages or any other amounts, by the court or other authority, for facts or omissions attributable to the debtor.

Prior to the adoption of the Insolvency Code, there were situations in jurisprudence in which insolvency practitioners were sanctioned for non-compliance with obligations by insolvent debtors, such as the imposition of fines for failure to submit mandatory financial statements to the competent tax authority of the debtor, for not fulfilling some obligations imposed by law on the debtor for environmental protection, for not fulfilling the legal obligation of the debtor regarding the protection of the objectives etc.

Also, in the jurisprudence prior to the Insolvency Code, the question arose whether the judicial administrator, respectively the judicial liquidator, can be ordered to pay the court costs, according to the provisions of the Code of Civil Procedure, when promoting legal proceedings in his own name or as legal representative of the debtor.

We consider that the insolvency practitioner does not bear responsibility for the debtor's omissions or actions this is because the civil liability is subjective and personal, in which case there is no liability for the deed of another.

As regards the payment of costs, when the insolvency plaintiff falls into claims, we must distinguish between the situation in which the judicial administrator/liquidator promotes a legal action in his own name, such as an action for annulment of fraudulent acts of the debtor or the action in engaging the personal patrimonial responsibility of the debtor's management bodies or the situation in which the judicial administrator/judicial liquidator promotes an action as a representative of the debtor, such as the action for recovering the debtor's claims from his own debtors.

In the first case, we consider that even under the insolvency Code the insolvency practitioner who has fallen into claims will have to bear the costs, because the provision of art. 57 para.11 does not exempt him from paying the costs only if we are in the presence "facts or omissions attributable to the debtor".

In the second case compared to the mentioned legal provision, if the debtor represented by the judicial administrator / liquidator falls in the claims, the court costs will be borne by the debtor's property, being unfair for the defendant who won the lawsuit to bear these costs.

In the literature (Bufan 2014, 85) it has been emphasized on this issue that a distinction must be made between the legal will of the debtor and that of the insolvency practitioner, between the debtor's patrimony and the insolvency practitioner's patrimony, between the debtor's liability and the insolvency practitioner's liability. Thus, it has been shown that the actions and measures of the judicial administrator or the judicial liquidator are exercised in the name and on behalf of the debtor, being that *legitimatio ad causam* which gives the insolvency practitioner the right to act in the interest of the procedure.

The judicial liquidator

The liquidator is the compatible insolvency practitioner, authorized by law, appointed to lead the debtor's activity in the bankruptcy procedure, both in the general procedure and in the simplified procedure, and to exercise the duties provided by law or those established by the court.

The main attributions of the liquidator are regulated by art. 64 paragraph 1 of Law no. 85/ 2014 and consist in the following: examination of the debtor's activity on which the simplified procedure is initiated in relation to the factual situation and preparation of a detailed report on the causes and circumstances led to insolvency, mentioning the persons to whom it would be imputable and the existence of the premises for engaging their liability, if a report with this object had not been previously drawn up by the judicial administrator; management of the debtor's activity; the introduction of actions for the annulment of fraudulent acts and operations concluded by the debtor to the detriment of the creditors 'rights, as well as of some patrimonial transfers, of some commercial operations concluded by the debtor and of the establishment of some preferential causes, susceptible to prejudice the creditors' rights; the application of seals, the inventory of goods and the taking of appropriate measures for their preservation; termination of contracts concluded by the debtor; verification of receivables and, where appropriate, objections to them, notification of creditors in case of non-registration or partial registration of receivables, as well as preparation of tables of receivables; following the collection of receivables from the debtor's assets, resulting from the transfer of goods or sums of money made by him before the opening of the procedure, collection of receivables, formulation and support of actions in claims for collection of receivables of the debtor, for which he may hire lawyers; receiving payments on behalf of the debtor and recording them in the debtor's property account; the sale of the debtor's assets, according to the provisions of the present law; under the condition of confirmation by the syndic judge, conclusion of transactions, discharge of debts, discharge of guarantors, waiver of collateral; notifying the syndic judge with any problem that would require a solution by him.

The control of the Court

The legislator regulated separately the institution of the bodies that apply the insolvency procedure.

Thus, according to art. 40 paragraph 1 of Law no. 85/2014, the bodies that apply the insolvency procedure are the courts, the syndic judge, the judicial administrator and the judicial liquidator.

The insolvency code provided for the first time, expressly, that the activity of the insolvency practitioner is carried out under the control of the court.

Regarding the notion of court in insolvency proceedings, we must consider on the one hand the jurisdiction of the first instance which belongs to the syndic judge, who is considered a body that applies this procedure.

However, the syndic judge is a judge, a magistrate, who is appointed to the tribunal or specialized tribunal to perform this task. The appeal can be declared against the decisions of the syndic judge, and it is resolved by the court hierarchically superior to the court, respectively the court of appeal. The syndic judge and the court of judicial control are the judicial bodies that apply the insolvency procedure.

The insolvency code did not provide the right of the court of judicial control, respectively the court of appeal, to establish attributions in charge of the judicial administrator or the judicial liquidator, this being provided only in favor of the syndic judge. It was also not provided that the duties of the syndic judge could be exercised by the court of judicial review.

It follows that the powers of the judicial bodies applying the insolvency proceedings are distinct. By way of example, art. 43 para. 7 of Law no. 85/2014 establishes that the court of appeal invested with resolving the appeal declared against the decision of the syndic judge rejecting the request to open insolvency proceedings, admitting the appeal, will annul the decision and will send the case to the syndic judge, for the opening of the insolvency procedure. It follows that the attribution of opening the insolvency procedure, established by art. 45 paragraph 1 letter a) of Law no.85/2014 belongs exclusively to the syndic judge, and the court of judicial control does not have the right to exercise this attribution.

The control of the court over the activity of the insolvency practitioner is exercised only by the syndic judge who works in the court or the specialized court, and the court of judicial control, which is the court of appeal, exercises control over the judgments pronounced by the syndic judge. In this sense, the decisions of the court of judicial control are binding on the syndic judge.

The Insolvency Code contains a series of legal provisions that give effectiveness to the principle of ensuring the control of the syndic judge over the insolvency practitioner, among which we mention: art. 45 paragraph 2 which establishes that the duties of the syndic judge are limited to judicial control or the judicial liquidator; art. 48 paragraph 7 which establishes that the decision of the creditors' meeting may be annulled by the syndic judge for illegality; art. 59 par. 5-7 the measures of the judicial administrator / judicial liquidator may be abolished by the syndic judge for reasons of illegality etc.

The syndic judge

The syndic judge has the obligation to verify his competence, according to art. 131 of the Code of Civil Procedure, the exception of incompetence can be invoked ex officio by the syndic judge, not only by the interested party (Cărpenaru 2014, 117).

Also, under the rule of Law no. 85/2006 in judicial practice (Sărăcuț 2015, 36) it was established that in order to determine the competence of the court to investigate an insolvency procedure, the debtor's registered office will be taken into account from the date of notifying the court the territorial district of another court.

Within the courts, specialized tribunals, or specialized insolvency sections of the specialized courts or tribunals, there are syndic judges, who make up the specialized insolvency panels and who are appointed by the management of the courts to carry out this activity.

According to art. 45 paragraph 1 of Law no. 85/2014, the main attributions of the syndic judge are the following: the motivated pronouncement of the decision to open the insolvency procedure and, as the case may be, to go bankrupt, both by the general procedure and by the procedure simplified; judging the debtor's appeal against the creditors' introductory request for initiating the procedure; judging the creditors' opposition to the opening of the procedure;

the motivated designation, after verifying the possible incompatibilities, by the sentence of opening the procedure, as the case may be, of the provisional judicial administrator/provisional judicial liquidator, requested by the creditor who submitted the request to open the procedure or by the debtor, if the request belongs to him; the confirmation, by conclusion, of the judicial administrator or of the judicial liquidator appointed by the creditors' meeting or by the creditor who holds more than 50% of the value of the receivables; the replacement, for good reasons, by conclusion, of the judicial administrator or of the judicial liquidator, according to the provisions of art. 57 par. (4); judging the requests to lift the debtor's right to continue his activity; judging the requests for attracting the liability of the members of the management bodies who contributed to the debtor's insolvency, according to art. 169, or the notification of the criminal investigation bodies when there are data regarding the commission of a crime; judging the actions introduced by the judicial administrator or by the judicial liquidator for the annulment of some fraudulent acts or operations, according to the provisions of art. 117-122 and of the actions in nullity of the payments or operations performed by the debtor, without right, after the opening of the procedure; judging the appeals of the debtor, of the creditors' committee or of any interested person against the measures taken by the judicial administrator or by the judicial liquidator; solving the request of the judicial administrator or of the creditors to interrupt the judicial reorganization procedure and to go bankrupt; resolving the appeals formulated to the reports of the judicial administrator or of the judicial liquidator; judging the action in annulment of the decision of the creditors' meeting; judging the requests of the judicial administrator/liquidator in situations where a decision cannot be taken in the meetings of the creditors 'committee or in the meetings of the creditors' meeting due to lack of quorum, caused by the absence of legally summoned creditors, at least two of their meetings; ordering the convening of the creditors' meeting, with a certain agenda; pronouncing the decision to close the procedure; any other duties provided by law.

Analyzing the attributions of the syndic judge, we can conclude that the legislator gave a very important role to him, in carrying out the insolvency procedure, increasing his attributions compared to those regulated by the former insolvency law.

According to art. 45 paragraph 2 of Law no. 85/2014, the attributions of the syndic judge are limited to the judicial control of the activity of the judicial administrator and/or of the judicial liquidator and to the judicial processes and requests related to the insolvency procedure (Dinu 2014, 734).

The managerial attributions belong to the judicial administrator or to the judicial liquidator or, exceptionally, to the debtor, if he has not been deprived of the right to manage his property.

The managerial decisions of the judicial administrator, the judicial liquidator or of the debtor who has retained his right of administration can be controlled in terms of opportunity by the creditors, through their bodies. In terms of legality, the acts and operations undertaken by the judicial administrator/judicial liquidator are subject to verification by the syndic judge, through the legal means (appeals) expressly provided by law.

However, there are situations in which the legislator has expressly provided attributions for the syndic judge in the sense of taking measures of opportunity, or the control of legality implies an interference with the control of legality, and in these situations the syndic judge, according to his specialization, will have to make a judgment in equity.

According to art. 342 paragraph 1 of the Insolvency Code, its provisions are completed with the provisions of the Code of Civil Procedure and of the Civil Code, insofar as they do not contradict.

In principle, the court implements an application of the law to the case brought before the court, from which it results that the Romanian judge does justice by achieving the conformity of the factual state with the rule of law.

Regarding the regulation of the civil process by the Romanian Code of Civil Procedure, we do not criticize the extension of the role of the syndic judge, given that the legislative solutions chosen took into account practical considerations, the insolvency law is a special law, and the legislator of the new Romanian Civil Code, but also that of the new Romanian Code of Civil Procedure, sometimes attributed to the judge the right to judge in fairness and to establish reasonable situations.

In this context, we appreciate that the attributions of the bodies that apply the insolvency procedure, including here the syndic judge, are limited to those expressly regulated by law, their legal enumeration being limiting and not enunciative (Turcu 2015, 145).

Conclusions

Another important principle for the insolvency procedure is its timely and reasonable conduct. From this perspective, the harmonization of the powers of the bodies applying the insolvency procedure is extremely important.

The specialization, professionalism and honesty of those called upon to apply the insolvency procedure are the key to success in ensuring another principle of this procedure, namely ensuring an efficient procedure.

In our opinion, the control of the courts should not be excessive, as it has the role of guidance, coordination and correction in order to apply the mandatory legal rules.

The specialization of courts and judges is an increasingly important requirement in the field of insolvency.

The achievement of the purpose of insolvency proceedings is also reflected in the manner in which the participants in this proceeding perform their duties.

I believe that the formation of a fair mindset for the successful administration of insolvency proceedings requires ongoing legal and economic training and ongoing cooperation between the bodies applying the insolvency proceedings, through joint training, the drafting of good practice manuals and the follow-up of uniform application the rules applicable to identical or similar factual situations.

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