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CRITICAL ANALYSIS OF SPECIFIC METHODS TO PROTECT COMPANY ASSETS IN INSOLVENCY PROCEEDINGS

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Abstract

This article aims to identify and describe some of the advantages that a debtor would have during insolvency proceedings. Thus we argue that firms in default entered in insolvency can enjoy certain facilities which may finally transform in a successful plan of reorganization. The three heritage protection mechanisms considered are: (i) suspension of all judicial and extrajudicial actions in order to establish a claim against the debtor or its assets, (ii) prohibit vital service providers (electricity, gas, water, telephone etc.) the suspension of services to captive consumer debtor, (iii) immediately cease any enhancement calculation of amounts due.

1. INTRODUCTION

Significant increase in the number of insolvencies due to the current economic situation and especially the sounds of some of the names of firms that have entered into insolvency proceedings have made insolvency to be a favorite topic for specialists from several fields as accounting, law etc. ..

In a time when insolvency procedure raises more interest than ever, amending Law no. 85/2006 aims to answer the needs that have proved necessary in practice in this area, by redefining notions and completion of procedural provisions or introduce new essentials.

The statistics presented by the Union of Insolvency Practitioners in Romania refer to an increase by 70% in the number of insolvencies, growth manifested especially in areas such as trade, investment real estate, construction and textiles.

However, the entry into insolvency of major national retailers in consumer electronics and appliances, but also in food has been recently announced.

Such an increase in the number of insolvent firms has to be seen from different perspectives: on the one hand, some cases are artificial situations the insolvency proceedings being open by the courts at the request of some creditors holding the minimum legal claim the debtor company's assets not being in a real impasse, on the other hand, many companies that face real economic and financial difficulties asserting claims for opening insolvency proceedings to protect, aiming at the reorganization, the purpose being actually to avoid entering into bankruptcy, opening of the insolvency procedure not constituting insolvency bankruptcy. In this respect, the risk of bankruptcy refers to the probability that an entity to enter insolvent or be declared bankrupt. Naturally, any investor knows that when placing capital he implicitly assumes that risk.

Besides the problems caused by the economic crisis, it is worthy to note several aspects pertaining to undue legal debt recovery procedures (which brings to a standstill even companies that are not in insolvency, forced to register the unrecovered claims as loss). As follows:

- Recovery through insolvency proceedings is not a solution, given the period of time the insolvency disputes are resolved, and the risks posed by participation in collective procedure (distribution of liquidation proceeds according to rank creditors);
- There are major difficulties in valuing assets in insolvency firms, given the economic crisis, the interest for the purchase of major assets (land, buildings) is diminushing. In such a situation, the recovery of the creditors' participants to such proceedings is becoming increasingly difficult.

2. SUSPENSION OF ALL THE JUDICIAL AND EXTRAJUDICIAL ACTIONS BROUGHT TO ESTABLISH A CLAIM AGAINST THE DEBTOR OR ITS ASSETS

The regulation of 85 of 2006 Act provides that at the date of opening of insolvency proceedings shall be all judicial and extrajudicial introduced to establish a claim against the debtor or its assets (Law 85/2006: Article 36) are suspended.

Expressing the fact that the suspension is operating as sufficient for opening of insolvency proceedings, any action to recover debts from insolvent becomes inadmissible. This is nothing but a protection of the assets, which (by judgment) enter in insolvency proceedings to be used exclusively in this purpose. In this way they do not give creditors the possibility to choose between enrolling in mass or to assert common law claims on procedures (or worse, to take both options). It thus protects creditors because they will apply the same procedure for all by determining the order in which they will cover these claims.

By using the phrase "all judicial and extrajudicial actions", the legislature intended to include the whole range of mechanisms of recovery or settlement of a claim. So here are included the appeals brought before the ordinary courts and arbitration actions and exercise any remedies against them (for a period of several months after the entry into force of Law no. 277/2009 and up the entry into force of Law no. 169/2010, suspension excluded the above mentioned procedures). Any enforcement provisions concerning the debtor's assets are also to be suspended. Regarding the joint responsibility it continues to have effect, co-debtors insolvency may still be liable in respect of claim jointly responsible of it (having further the option to join the list of creditors as unsecured creditors) This suspension should not be regarded as legal immunity of the debtor, referring only to actions brought to establish a claim, other actions such as, for example, the action or annulment of acts or prosecution for acts, falling outside the scope of these provisions.

To give efficacy of this measure, the Law 85/2006 establishes that the bankruptcy judge is obliged to communicate the decision to initiate the procedure to a number of institutions (courts and banks under the rules of the Law 85/2006: Article 37) which in turn have to stop their proceedings or refuse to perform operations on insolvency accounts.

By exception to the suspension of all actions for recovery of debts a particular class of creditors can ask the court to lift the suspension in limited circumstances provided by law.

So for there to be such a derogation, all the following conditions must be fulfilled:

1) An application must be filed by a creditor that is the holder of a claim secured by mortgage, pledge or other security interest or lien of any kind.

2) Use the recovery procedure specific to insolvency proceedings and endeavor shall be made by the liquidator. So law regulates that:

2.1) liquidation of the debtor's assets will be made by the liquidator under syndic control. To maximize the value of the debtor's assets, the liquidator will arrange market exposure in their proper form, advertising costs are borne by the debtor.

2.2) the liquidation will begin immediately after the inventory of the debtor's assets by the liquidator. Goods will be sold in bulk as a whole in running, or individually. Method of sale of goods, ie public auction, direct negotiation or a combination of both, will be approved by the creditors, based on the liquidator's proposal and on the creditors' committee recommendation. The liquidator will also present corresponding rules for sales.

2.3) In the assessment of the debtor's assets, the liquidator can either hire an appraiser on behalf of the debtor or, with the consent of the creditors' committee can use its assessor. Assessors must be members of the National Association of Valuers in Romania and evaluation should be carried out in accordance with international valuation standards.

2.4) property of the debtor will be evaluated both as whole and individually. Bulk assessment intends to either evaluate all the assets of the debtor or to evaluate the functional subassemblies.

A functional unit consists of those assets of the debtor which together ensure the achievement of a final product, by itself, or conducive to an independent business. A functional unit is considered only if it has secured access to the public road and utility use.

2.5) The liquidator shall submit a report to the creditors' committee which will include property evaluation and method of selling. In this state, the sale can be made in bulk or individually or a combination thereof, by public auction or direct negotiation or by both methods.

2.6) If the proposed sale of the block through direct negotiation is an option, the liquidator will propose, based on tenders received, start negotiations with one or more buyers identified, will specify payment terms and minimum starting price of negotiation, which might not be less than the valuation price.

2.7) The liquidator shall convene the general meeting of creditors no later than 20 days from the date of the meeting of the committee of creditors, notifying them about the possibility of studying the report and the minutes of the meeting of the creditors' committee on the report.

2.8) The buildings will be sold directly, following the liquidator proposal approved by the creditors.

2.9) in the liquidator proposal he has to identify the property, the situation on the ground and real estate publicity records data to show tasks that are encumbered and show up for overbidding and the date by which, in case of approval of the sale, the overbidding is accepted

2.10) The liquidator shall convene the creditors 'meeting no later than 20 days from the date of proposal, notifying the special administrator, creditors with collateral of the property, holders of liens of any kind and the creditors' committee, the creditors vote by submitting a proposal to sell .

2.11) after approval by the creditors, the sale, (subject to cancellation) should be made only after 30 days from the date of last publication made by the liquidator in the newspaper about the conditions of overbidding.

3) To satisfy the requirement of payment of the price of certain expenses (fees, postage and other expenses related to the sale of such property, including expenses necessary for the preservation and management of these assets and payment of salaries of employees under Article 10, Article 19 par. (2), Article 23 and 24 reported to Law 85/2006: art. 121 par. 1, point 1.).

4) The existence of one of the following:

4.1) When the value of the collateral as determined by an appraiser according to international valuation standards, is fully

covered by the total amount of claims of secured creditors and parties with the object:
a) the forfeit has no importance to the success of the reorganization plan proposed.
b) under warranty is part of a functional assembly and the separation and sale of it separate, do not diminish the value of the assets.
4.2) When there is no adequate protection of the debt relative to the forfeit because:
a) decreasing the value of the security object or existence of a real danger that it might suffer appreciable reduction;
b) reduce the value of a claim secured party with inferior due to accumulation of interest charges, and penalties of any kind to the senior secured debt;
c) lack of insurance against the risk of forfeit destruction or damage.

As an exception to the rule set out in 4.2, the syndic judge may reject the request for waiver of suspension made by the creditor, if the insolvency administrator / debtor proposes instead adopting one or more measures to provide adequate protection of the creditor's secured claim as :
- Periodic payments for the creditor to cover or reduce the value of the collateral subject to the value of a claim secured by junior;
- Periodic payments for the creditor to satisfy the increasing interest charges and penalties of any kind increases, respectively, to reduce the capital debt claim under the warranty or the object value to the value of a claim secured by junior;
- Innovation obligation of warranty by establishing a collateral security, real or personal, or by substitution of collateral with another object.

However holders of individual actions of debt recovery are protected by the suspension of limitation of actions fact regulated in both the Civil Code (prescription is interrupted by an application of a lawsuit or arbitration claim by adding to the list of creditors in the proceedings insolvency, by a request to intervene in the prosecution of other creditors or by started forced by invoking, by way of exception, a right whose action is prescribed) and insolvency law (Initiation of insolvency procedure suspend any of limitation of actions under Article .36.).

3. PROVIDERS OF VITAL SERVICES (ELECTRICITY GAS WATER TELEPHONE ETC) ARE REQUIRED NOT TO INTERRUPT THE DELIVERIES TO THE DEBTOR – CAPTIVE CUSTOMER

Vital service providers (electricity, gas, water, telephone, etc…)are not allowed in the observation and reorganization period to cease services to captive debtor (Art. 38). Any provider of services - electricity, gas, water, telephone service or similar is not allowed in the observation period and during the reorganization, to change, deny or temporarily discontinue such service to the debtor or property debtor, where it acts as captive under the law.

According to article 38 of the Act, any service provider (electricity, gas, water, telephone, etc.) has no right during the procedure (whether it is during the period of observation or reorganization) to change the terms of service to deny or temporarily discontinue such service to the debtor or to operate any contractual changes that could have any repercussions on the debtor if it is a consumer captive. This regulation allows the lender to carry out the work even if they are in default on payments. The legislator assumes that certain activities under the direction of the judicial administrator, it would be possible to increase assets, which would lead directly to better coverage of claims in the list of creditors.

Article 104 of the Act provides that, notwithstanding the provisions of art. 38, reorganizing itself can claim a debtor to the bank bail as a condition for the supplier to provide services, which may not exceed 30% of the cost of services and unpaid debtor after the opening of proceedings. The need to deposit bail shall be decide by the syndic.

4. IMMEDIATE CESSATION OF ANY FURTHER ADDITIONS TO THE AMOUNT OWED

According to the Insolvency Act any interest, additions or penalties of any kind or

expense, called generic accessories will not be added to claims arising prior to initiation.

Initiation results in immediate suspension of calculation of any amounts owed enhancement. Suspension operates as like in case of property action suspension and takes effect immediately after the initiation of the procedure, either the general procedure or the simplified procedure.

Since the legislature did not distinguish statutory interest, this will cease both conventional as well as legal interests for non-performance of an obligation at maturity, although there are related interests , default interest or late payment penalties.

Accessories do not include the interest of credit or loan agreements because these interests are not accessory, (damages for non-payment at maturity of the debt), but are civil fruits, interest is a claim in itself and not an accessory. To the extent that these contracts also provide accessories for paying the loan maturity, the text will be applicable to them.

Suspension of calculation of accessories targeting all categories of debt claims including the fiscal debts, born before the opening of proceedings, regardless of the name under which they appear: penalties, updates, etc. damages. The exception to this rule under par. 2 of the text, is only the secured debt with collateral claims on property of the debtor.

Suspension of the calculation of the accessories operates only for unsecured claims of the debtor's goods. (the exception to par. 1), secured debts are part of the final table and / or consolidated final table, where applicable, collateral value, measured in accordance with art. Paragraph 39 (1).A, but no more than the total amount of the claim secured by the guarantee.

Distribution price to guarantee the secured creditor shall be entitled to calculate the debt accessories guaranteed until the date of sale at most good, provided that the property price is higher than the corresponding initial evaluated. If the price is below assessed value, the distribution will properly adjust the ratio between the guaranteed and non-guaranteed debt).

As an exception, the legislature provided in par. 2 of the text as amended by Law no. 169 of 14 July 2010, that the calculation of the accessories will flow after initiation date until the date that the asset sale was granted, accessories collateralized debt movable or immovable property of the debtor. For a better interpretation would correlate with art. 121: proceeds from the sale of property of the debtor, encumbered in favor of the creditor, mortgages, pledges or pledge or retention of any rights will be distributed in the following order:

1. Fees, stamp duty and any other expenses related to the sale of such goods, including expenses necessary for the preservation and management of these assets and payment of wages of employees under Article 10, Article 19. (2), 23 and 24;

2. Claims of secured creditors, including all principal, interest, and penalties of any kind and cost.

a) If the proceeds from the sale of these assets would be insufficient to pay all such claims secured creditors, the difference will be covered by the unsecured claims that will come in competition with those in the corresponding category according to their nature, provided in Article 123, and shall be subject to the provisions of art. 41. If after payment of the amounts referred to in par. (1) a difference in addition, it will be made by the liquidator, on behalf of the debtor.

b) A creditor with a secured claim is entitled to participate in any distribution of amounts, made prior to the sale of the secured asset. Amounts received from such distributions will be subtracted from the creditor would be entitled to receive from the price obtained by selling the secured asset if it is necessary to prevent such creditor to receive more than it would might received if the secured asset would have been sold prior to distribution.

Although the text does not expressly provide accessories guaranteed, claims may be made only on the proceeds of sale of goods by guaranteeing debt after deducting sale costs according to Art. 121 par. 1, point 1 and of capital. If the sale proceeds are not sufficient to cover capital and accessories will be satisfied first capital, interests until the amount is depleted, then the flow of accessories will be suspended.

Accessories will not be charged on unsecured mass, thus avoiding prejudice to the

unsecured creditors. Obviously, for creditors with guarantees of different ranks of the same asset, payment will be made in order of rank. Assuming several mortgage lenders with different ranks will pay the lender with higher rank - actual debt plus accessories - and from the rest of the amount remaining creditors of inferior rank in the same order.

CONCLUSIONS

Law no. 85/2006 on insolvency proceedings, as following the approval of Government Emergency Ordinance no. 173/2008 by Law. 277/2009 published in Official Gazette no. 486/14.07.2009 has introduced new issues in accordance to new socio-economic conditions as follows:

Updates brought nuances additions and specifications to the definition of concepts such as insolvency, and clarification of the duties of some of the participants in insolvency - as special administrator, elected representative of the members / shareholders in insolvency, whose mandate consists, on the one hand, in performing acts of management of the company (where the right of the management was not lifted) or, on the other hand, in representing the interests of members / shareholders in the proceedings (whether the administrative right is lifted by the bankruptcy judge, supervision being exercised by the judicial administrator / liquidator).

In addition, the threshold value of the debt was increased, this allowing a creditor to request the opening of insolvency proceedings against one of its debtors, this value is 30,000 EURO. Even if it has a radical character, such a change is welcome, given that a large number of applications for opening of insolvency proceedings were formulated by some lenders in order to intimidate the debtor.

It was outlined an alternative role of insolvency proceedings, that to protect borrowers in difficulty, introducing a new Article on solving urgent, within 5 days, calls for opening insolvency proceedings brought by the companies that are in such situation, companies pursuing a protection of their property and finding solutions for willing reorganization.

In the same legislative measure to protect companies which pursue economic difficulties resuscitation activity, a new provision of the law refers to the nullity of any contractual clause regarding the cessation of contracts in progress on the suspension proceeding initiation.

There were also introduced new regulations regarding the possibility of the liquidator to sell assets of the debtor's patrimony in emergency, in public auction, without the approval of creditors, where the insolvent company's property did not find sufficient liquidity. What can be a support to streamline the process of liquidation of assets may be, in fact, in the absence of clear legal provisions, a reason to hinder the proceedings, some of the problems raised in reality by the dissatisfied creditors having the possibility to formulate objections to measures taken by the liquidator.

This new regulations represent an answer to reality insolvency processes, Courts facing with many situations where it is not a committee of creditors that are authorized to make application to attract personal liability (individual creditors without possibility of such authorization under the old wording of law).

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