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The rights of creditors and the purpose of insolvency proceedings in Romanian law

Luminița TULEAȘCĂ

Faculty of Law, Romanian-American University, luminita.tuleasca@tuleasca.com

Abstract: The insolvency approach and the protection of the creditors' rights are regulated in all the national laws and the general policies promoted in this matter are in accordance with the international trends. In all the cases, the insolvency is "treated" by means of a special procedure, the main differences consisting in the purpose targeted by this procedure, by the means used for reaching the purpose and by the main features of the procedure. Undoubtedly, the rights of the creditors are protected and achieved as far as the insolvency law contains objectives suitable to their interests. By this paper we intend to determine whether the purpose of the insolvency procedure is only the one of accomplishing the rights of the creditors of the „bankrupted" entrepreneur, by the collective and equalitarian payment of the same, or, if the case, of a secondary and implicit purpose of the insolvency procedure: financial recovery of the debtor's activity.

Keywords: bankruptcy; debts payment; financial recovery

1 Introduction

In the case of any business failure we encounter a common issue: the debtor cannot fully pay all its creditors. The creditors, without a proper legal regulation of insolvency, would react to this problems fighting for the creditor's assets and trying to obtain what is payable to them before the other credits proceed in the same manner. In this type of battle, some of the creditors would win, and some would lose (Davis, 2011).

On the other hand, the traders, facing the current or the imminent financial crisis, try to place themselves under the protection of the tribunal blocking the enforcements (writs of enforcement) introduced by the creditors, the increase of debts by interests and/or additional penalties, trying a new start-up, by judicial reorganization of their activity.

The recovery of the insolvent debtors' activity may be of interest for their creditors, too, if they would not be able to obtain the cover of their debts from the liquidation of the debtor's assets.

This point of view does not include the aggressive creditors using the insolvency procedure as means of constraint for obtaining a rapid pay off of their debts from the solvable debtors threaten and panicked by the introduction of a request for opening the „bankruptcy" procedure.

In this context, basically, the purpose of any insolvency procedure is the payment of the creditors, *pari passu*, according to the equality of treatment of such creditors (Goode, 2005, p.56) by any of the means provided by the law (Turcu, 2005, p.287; Schiau, 2001, p.81).

Moreover, the insolvency procedure has the nature of a remedy and, only in the last instance, it represents a collective enforcement procedure against the debtor's fortune. This main feature is perfectly compatible with the purpose of the procedure, considering that only a recovery of the

debtor's activity by the improvement of its financial situation might provide for the payment of all the amounts of money payable to the creditors.

As above indicated, we will analyze and determine whether the purpose of the insolvency law is solely the collective providing for all the creditors of the „bankrupted" entrepreneur or if there is also a secondary and implicit purpose of the insolvency procedure: financial recovery of the debtor's activity.

Firstly, we will consider the fundamental principles of the insolvency procedure as they have been created by the efforts of the international institutions and bodies concerned by this issue.

The tendency and the content of the European laws in the matter of insolvency will represent another pillar of our analysis considering the need to harmonize the concepts and ideas but also the adoption of the most adequate approaches for the handling of business failure.

And last, but not least, the most important analyses and conclusions of our survey shall consider the Romanian law provisions on insolvency.

2 The global policies regarding the creditors' protection and the purpose of the insolvency procedure

After the Asian crisis of the 1990s, the international efforts focused on the uniformization of the insolvency approach differences, determining major international authorities to draft guidelines meant to coordinate and to guide the domestic and European laws (Tomasic, 2006, p.5).

As one of the major international institutions, the World Bank has an important position when it comes to imposing a global policy regarding the protection of the creditors in the insolvency procedure and, by assuming this status, it has drafted in April 2001 "Principles and Guidelines for Effective Insolvency and Creditor Rights Systems".

The document, revised in 2005, is based on the most advanced international practice in the matter of ideas regarding the insolvency approach (Uttamchandani, 2006).

In the context of maintaining the diversity of the legislative formulas regarding the treatment of insolvency, the Principles of the World Bank are indicating the coordinates of a truly effective legal framework, coordinates that should represent the main objectives of any legal provisions regarding insolvency.

In its principles, the World Bank considers that each state has its own different approaches and methods in regulating the insolvency, but, for being effective, an insolvency system should consider the following objectives: (i) maximizing the assets value of a company and granting the possibility for the company to reorganize; (ii) finding a balance between the liquidation and the reorganization of the companies; (iii) granting a balanced and equal treatment to all the creditors of the same rank and, especially, to the national and foreign creditors; (iv) finding an adequate, effective and impartial regulation for the insolvency cases; (v) preventing a premature dismemberment of the debtor's patrimony by the private creditors of the same; (vi) adopting a transparent procedure that would encourage the information gathering and dissemination; (vii) recognizing the rights of the existing creditors and the compliance with the priority rank of the debts established based on a predictable and well-determined process; (viii) finding a balance between the liquidation and reorganization, allowing the rapid transformation of the procedures from a procedure to another; (ix) preventing the inadequate or abusive use of regulations on insolvency; (x) establishing a regulation for cross-border insolvencies inclusively, on the recognition of foreign procedures.

For the promotion and encouragement for adopting effective national systems in the matter of insolvency and, in particular, of the insolvency of the trade companies, systems that would allow the settlement of the financial difficulties of the debtors, the United Nations Commissions for the

international trade law (UNCITRAL) has drafted on July 25th, 2004, the legislative Guide on the insolvency law from July 25th, 2004.

In accordance with the UNCITRAL principles regarding the harmonization of the main regulations on the trade activity, the Legislative Guide on Insolvency offers a model, a possible base for any laws on insolvency, the national authorities and the legislative bodies further deciding between different possible options and to choose the adequate one to the national or local context.

According to the view of the UNCITRAL Legislative Guide on Insolvency Law, endorsed by the World Bank and by the International Monetary Fund, the main objectives of an effective regulation on insolvency are: (i) maximizing the debtor's assets value; (ii) establishing a balance between liquidation and reorganization; (iii) securing an fair treatment to the creditors facing the same situation; (iv) specifying a speedy, effective and impartial procedure for insolvency; (v) preserving the debtor's assets for a fair distribution of such assets among the creditors; (vi) recognizing the rights of the existing creditors and determining clear rules on the determination of the priority debts; (vii) establishing a set of measures that would allow the information gathering and dissemination; (viii) the law on insolvency must contain provisions on both the recovery as well as on the liquidation of the debtor.

The Principles of the World Bank and the Legislative Guide of UNCITRAL reflect the current conception according to which the reorganization is deemed to be the solution favourable for both the debtor's interests, as well as for the creditors' interests, and not only for the best interest of the unsecured and secured creditors.
In its turn, the European Bank for Reconstruction and Development (EBRD) identifies three possible purposes of the existing laws on bankruptcy: (i) The fresh start policy– allowing the unfortunate but honest debtor a fresh start free of the obligations and responsibilities consequent upon business misfortunes; (ii) the equity policy – fostering the equitable distribution of a troubled debtor's assets through the equal sharing of losses by creditors of equal rank; (iii) the rescue policy – the restructuring and rehabilitation of a business to preserve jobs, pay creditors, produce a return for owners, and obtain the fruits of the enterprise (Daianu, Pislaru, & Voinea, 2004, p.59).

In the EC Regulation no. 1346/2000 of the Council on the insolvency proceedings we find, first of all, general terminological specifications, sufficiently clear and precise, for determining the meaning of the term: "insolvency proceedings".

Thus, insolvency proceedings will be those collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator (art.1 para.1 and art.2 let. a) of the EC Regulation no.1346/2000).

In this foundation context, is beyond any doubt that, presently, the laws and principles on insolvency tend to value the judicial recovery of the debtor's activity, without affecting the creditors' best interests.

In this sense, the best actual example is the English *Enterprise Act 2002* that manages to make the distinction between the large majority of the insolvents that came to this state of financial failure, state that did not involved any unfair or indifferent conduct and a small minority of insolvents that have abused of their creditors in their faulty conduct.

Due to adopting new concepts on insolvency proceedings, in 2006 alone, in England, the number of mandatory liquidations decreased by 5% and the number of individual voluntary arrangements between the debtors and the creditors increased to 92% (The Insolvency Service, 2007).

Therefore, in approaching the insolvency in a modern and realistic manner, the central purpose of the laws of capitalist economies is to encourage the companies' reorganization (Carpenaru, 2011, p.708) considering, among others, that the bankruptcy affects not only the creditors and debtors, but also the company's employees and, in case of monopole or public utilities, the end consumers, also (Stiglitz, 2003).

3 The rights of the creditors and the purpose of the insolvency proceedings from the Romanian laws perspective

From the aspect of the meaning of the equivalent legal term for business failure, the Romanian law has been consistent for several decades, basically defining it as representing that state of the debtor's patrimony that is characterized by the insufficient funds available for the due debts payment.

On the other hand, according to the law: "The purpose (*a.n.* of insolvency proceedings) is the set up of a collective procedure for covering the liabilities of the insolvent debtor"- art.2 of the Law no. 85/2006 on the insolvency proceeding.

This purpose is reiterated by the legal finality of the procedure for judicial reorganization based on which, the procedure "that applies to the debtor (…) for paying the debts, according to the debts payment schedule" –art.3 para.1 pct.20 of the Insolvency Law as well as the finality of the bankruptcy procedure*:* "that applies to the debtor for the liquidation of its assets for covering its liabilities"- art.3 para.1 pct.23 of the Insolvency Law.

In such a terminological context, the priority of the insolvency proceedings is represented by the creditors' interests, by the payment of debtor's debts towards such creditors by any of the means used for achieving such purpose, "liabilities covering" representing, as rule, the full payment of the debts declared by the debtor (Cărpenaru, Nemeș, & Hotca, 2008, p.24-25; Piperea, 2007, p.147; Turcu & Stan, 2005, p.12)..

By this purpose of the insolvency proceedings, it is obvious that our modern law does not have the ability to adapt to the concepts existing in most of the European countries regarding the system applied to the troubled debtors.

Firstly, the insolvency proceedings cannot have a single purpose, considering that, in fact, there are two types of insolvency proceedings*:* the general insolvency proceedings, in which the debtor is basically subject to both the procedure of judicial reorganization and bankruptcy, and to the simplified insolvency proceedings in which the debtors is subject solely to bankruptcy procedure.

When the law establishes one purpose for both types of insolvency proceedings: the set up of a collective procedure for the cover of the liability of the insolvent debtor, it admits that, in reality, is completely under the influence of the traditional approach of insolvency and, on the other hand, it recognizes that it does not consider the inherent and related to the procedure of judicial reorganization: the facility of company reorganization thus as to allow the continuation of the commercial activity – the activity that is under judicial investigation -, the keeping of the employees and the careful examination of the debtor's liabilities.

The objective is to save the enterprise, the fundamental purpose of the judicial reorganization procedure, the essence of the judicial reorganization being the continuation of the debtor's activity, activity that will also result in covering the debtor's debts.

Only the liquidation procedure is the one "meant for eliminating the condemned economic enterprises" (Ripert, Roblot, Delebeque & Germain, 2000, p.787) meant for eliminating "off the market of the debtors undergoing the insolvency procedure" (Piperea, 2007; Andre, 2007), of the enterprises which - obviously – can no longer be saved, its objective being the liquidation of the debtor' assets in the best conditions and in the best interest of its creditors.

It is possible that by following a sole purpose: covering the debtor's liabilities (Moțiu, 2009, p.73) can only lead to the dramatic decrease of the cases of not proceeding with the reorganization procedure or to the failure of it by the lack of an adequate concentration on the debtor's activity recovery opportunity (for a different opinion: Piperea, 2008, p.36-37).
On the other hand, the name of the Romanian law itself: law on insolvency proceedings could might lead to the association to the laws considering that the main purpose of the collective procedure is the

payment of the debts to the creditors even this means the liquidation of the company (Guyon, 1999, p.20).

We find the same name in the EC Regulation no. 1346/2000 of the Council on the insolvency proceedings as well as in the German Insolvency Code became effective in 1999 (Insolvenzordnung, InsO) (Insol International, 2011, p.90) recently and significantly amended (Latham & Watking, 2011).

However, the European Regulation regarding the insolvency does not regulate and does not intend to regulate the procedure of company reorganization or recovery, applying only to the judicial liquidation procedure: "The collective procedures occurred in the context of debtor's insolvency which entails the partial or total divestment of a debtor and the appointment of a liquidator." – art. I paragraph 1 from the Regulation 1346/2000/EC.

The objective of the German regulation on insolvency is the collective cover of the debts to the creditors, by the liquidation of the debtor's assets and the distribution of the amounts thus obtained or, by finding an arrangement by means of an insolvency plan, the main focus being on the company preservation. An honest debtor shall be granted the possibility to be discharged and exempted from the rest of its debts (art.1 in the Insolvenzordnung, InsO).

The German law on insolvency grants priority to the debtor's reorganization – as far as the debtor's company is viable- by three means of reorganization: the reorganization contract concluded between the creditors and debtor, the reorganization based on the plan and the continuation of the company activity the parties reaching an agreement regarding the assets (the troubled company sells all the assets or a part of it to a buyer interested in carrying on with its activity).

Therefore, the main purpose of the German procedure of insolvency: the payment of the debts to the creditors shall have to always consider another main objective: the maintenance of the company activity (Remmert, 2002, p.427). Moreover, the recent amendment of the German law on insolvency is mainly focused, on the efficiency of the debtor's possibilities of reorganization.

The Spanish Regulation on insolvency is also centred on the insolvency proceedings, the enterprise maintenance (Olmeda, 2008).

The obvious influence of the French law on the Romanian law on insolvency is not that obvious when it comes to the purposes of this law.

The French law indicates the purpose of the judicial recovery procedure: to allow the follow-up of the company's activity, the keeping of the employees and the examination of the debtor's liabilities (art. L.631-1 French commercial code) while the judicial liquidation procedure applies to the debtors that are obviously impossible to recover financially and it is meant to establish the interruption of the activity and liquidation of the debtor's assets (art.L.640-1 French commercial code).

By the new regulations in the French law (Law no. 2005-845 / July 2nd, 2005 regarding the enterprise' saveguarding), the French law on the insolvent companies is reformed, however, such reformation does not amend the essence of the French law on collective procedures that aims to find solutions for the reorganization of such companies.

The declared purpose of the Romanian insolvency proceedings may still be completed with the objectives resulting from the analysis of the whole regime of insolvency, objectives that should have been expressly provided by the law, however we do not consider that this would be the best solution for completing major legislative gaps or for trying to amend the doctrine on the current conception regarding the insolvency proceedings purpose (Turcu, 2007, p.297-298; Adam & Savu, 2007, p.7 & p.79; Bufan, 2004, p.34).

The law on insolvency establishes two types of insolvency proceedings: the general procedure and the simplified procedure, applying one or another being further established in general lines, depending on the criteria provided by the law.

The general procedure represents the procedure provided by the Law no. 85/2006, by which a debtor complying with the conditions provided under the art. 1 para. (1) of the Law no. 85/2006, without complying simultaneously the ones under the art. 1 para. (2) of the Law no. 85/2006, either undergoes, after the passing of the observation period, first the judicial reorganization procedure and after that the bankruptcy procedure, or undergoes separately, either the judicial reorganization or the bankruptcy procedure - art.3 para.1 subsection 24 of the Law no. 85/2006.

The simplified procedure represents the procedure provided by the Law no. 85/2006, by which the debtor complying with the terms provided under the art. 1 para. (2) of the Law no. 85/2006 undergoes directly the bankruptcy procedure, either concurrently with the opening of the insolvency procedure, or after a maximum observation period of 60 days, when the elements illustrated under the art. 1 para. (2) let. c) and d) of the Law no. 85/2006 – art.3 para.1 subsection 25 of the Law no. 85/2006 are analyzed.

The observation period is the interval comprised between the date of opening the insolvency procedure and the date of confirming the reorganization plan or, as the case may be, of entering the bankruptcy procedure.
One of the major novelties of the Law no. 85/2006 is the set up of a simplified procedure on insolvency (Adam & Savu, 2007, p.21; Militaru & Voica, 2007, p.62) procedure by which the debtor is subjected solely to the bankruptcy procedure –its redress being considered by the law as inopportune due to the debtor's capacity or situation-.

The starting point of the Romanian law maker was again the French law; however it deviated significantly from such model.

In the French law on insolvency, the simplified procedure on insolvency is of interest for the small companies (Saint-Alary Houin, 2007, p.124) applying to the debtor whose patrimony does not include real estate properties and who has a number of employees and a turnover (excluding the taxes) for the last 6 months prior to opening the procedure, equal or lower to the threshold established by the decree of the State Council (art. 99 of the Law nr. 2005-945 on July 29th, 2005 reiterated in the art. L641-2(V) of the French commercial code).

The purpose of the insolvency procedure is accomplished by actual means represented by the procedure of judicial reorganization and of insolvency procedure, even if the current law on insolvency does not expressly indicate the achievement of its purpose by means of judicial reorganization procedure and by the means of bankruptcy procedure (for a different opinion, Nasz, 2009, p.144) as indicated in the Law no. 64/1995 (annuled by the Law no. 85/2006) regarding the judicial reorganization and bankruptcy procedures ("The purpose of the law is the set up of a procedure for covering the debtor's debts undergoing the insolvency proceedings, by either reorganizing its activity or by liquidating part of its assets up to covering the liabilities, or by bankruptcy"- art. 2 of the Law no. 64/1995).

The entire insolvency proceedings is a collective procedure in which the recognized creditors participate jointly for tracing and recovering their receivables, by the means legally provided: the judicial reorganization procedure and the bankruptcy procedure as the only actual methods (procedures) to be used for paying the debtor's debts and for covering its liabilities.

The judicial reorganization is the procedure to apply to the debtor, legal entity, for paying its debts, according to the debts payment schedule. The reorganization procedure presupposes the drafting, the approval, the implementation and following a plan, called reorganization plan, that can include, together or separately: the operational and /or financial restructuring of the debtor, the corporate restructuring by the amendment of the registered capital structure, the activity restructuring by the liquidation of some of the debtor's assets.

Therefore, the judicial reorganization involves the continuation and the redress of the debtor's activity.
The bankruptcy procedure represents the concursual, collective and fair insolvency proceedings that applies to the debtor for liquidating its assets for covering the liabilities, the next step being the debtor's removal from the registry it is registered in.

The provisions of the insolvency law do not offer any hierarchy in applying the two methods for achieving the purpose of the insolvency proceedings.

Obviously, in the case of applying the general procedure, as far as the official receiver determines that there is an actual possibility for the effective reorganization of the debtor's activity that would allow the payment of the debtor's debts, save for the approval and acceptance of a reorganization plan, the judicial reorganization procedure shall apply.

From this perspective, we can consider that the judicial reorganization has priority by reference to the bankruptcy procedure, the reimbursement of the creditors being secondary.

However, there is no legal impediment, if there are reasons due to which the debtor's reorganization and rescue is not an option, to enter the bankruptcy procedure without going through the judicial reorganization, in such case, the purpose of paying the debts to the creditors being the priority again, indissolubly connected to the company winding-up by means of liquidation (Jeantin & Le Cannu, 1999, p.355)

In the specialized literature there is also the opinion according to which, beyond the provisions of law, the purpose of the insolvency differs depending on the position occupied by the ones involved in the procedure. From this perspective, the purpose, for the creditors, is to quickly recover most or total of the debts they have to recover from the debtor; for the debtor the purpose is to redress it's activity and to pay the debts and, only in exceptional cases, to liquidate the business; for the business environment, the purpose is the trade revitalization by the transparency and predictability of the procedure (Nasz, 2009, p.145; Turcu, 2007, p.43).

4 Conclusions

In fact, from all the analyses above it results, from any perspective, that the purpose of the insolvency proceedings is the one of satisfying the creditors' rights by the payment of the debtor's debts either by means of activity reorganization or recovery, or by collective enforcement of its assets.

Thus, the debtor's recovery by the reorganization or restructuring of the bankrupted debtor's activity is not the main purpose of the insolvency proceedings but merely the means of satisfying the creditors' rights.

Considering that the operational and financial recovery of the debtor is the method that could provide best for the achievement of the insolvency proceedings objective we are of the opinion that the debtor's reorganizations represents the secondary purpose of any insolvency proceedings and all the participants in this procedure should keep in mind such purpose. In case that, according to the opinions of the experts involved in the insolvency procedure, this objective is not viable, the option for liquidating the debtor's assets remains the only one that can lead to the payment, at least partial, of the debtor's debts.

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