

Particular aspects on the cross-border insolvency procedure

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Abstract: The insolvency procedure is a collective procedure that takes into account the rights of all the creditors at the same time and takes place under the control and supervision of justice. The regulation concerning the insolvency procedures applies to the procedures determined by the debtor’s insolvency in which his total or partial discontinuance in the specific activity takes place and in which a liquidator is assigned. This community act does not apply to the insolvency procedures of insurance companies that provide services involving possession of funds or securities of third parties and collective investment organs. The titular of the request opening this procedure can be any creditor that has a certain liquid receivable that corresponds to the threshold established by law in the member state in which the judicial instance is referred to. The international competence of opening an insolvency procedure belongs to the state in which “the center of the debtor’s main interests is located” and the applicable law of the procedure is the member state’s law in which the procedure was open. In Romania, the law in this context is Law no.85/2006 on insolvency procedure, modified. In solving the possible competence conflicts that can appear related to the opening of the main procedure, “the center of the debtor’s main interests” criteria is used, as defined in the Statute. It regulates the opening of a single main procedure and several secondary procedures the latter on the condition that the debtor’s headquarter is located in the member state in which the opening of the secondary procedure is requested. Any decision of opening an insolvency procedure issued by a competent instance in a member state is recognized in all the other member states, as soon as it produces its effects (except the cases expressly mentioned in the community act, that has to be strictly interpreted and applied), even if the decision is final or not.

Keywords: center of main interests, main insolvency procedure, secondary procedures, creditor, competent instance.

1. Introduction

Trading, the oldest activity appeared when the term of propriety defined and marked the social difference. In Romania, after December 1989 the term propriety received the real content that couldn’t be used in the communist era. When the Law no.31/1990 on companies came into force, there has been a burst of companies without the associates or stockholders realizing that trading is an activity that involves not only satisfying the necessities of others by obtaining profit, but also, in case of insolvency, the patrimonial or criminal liability. A healthy society, from an economic point of view, depends to a great extent on a good legislation that regulates the companies’ activities. But, no matter how good the legislation in a business environment is, due to numerous reasons, the state on

insolvency of a company can have a domino effect, destabilizing or determining the bankruptcy¹ of other companies.

Since Romania is an EU member, Romanian traders, as well as all the traders in the business world, in case of bankruptcy or in case of opening an insolvency procedure, are tempted to transfer their assets pr procedures in another member state, in order o obtain a more favorable judicial treatment. But the European Union adopted, in May 29 2002 a European Insolvency Regulation (EC) no.1346/2000 that came into force in May 31st 2002, named in the present paper the Regulation. Through its dispositions, the Regulations does not contravene with the principle of free movement of goods that governs the development of trade in the EU. On the contrary, this community act is mandatory in all its elements and is applied to all debtors in the EU member states, except Denmark, that didn't participate at its elaboration. The Regulation contains norms of European civil procedure regarding the competence of the member states' instances, the recognitions of the decisions and the law applicable in this field in the member states, without the purpose of unifying the material law on insolvency.

The purpose of this paper is to analyze the legal frame of the cross-border insolvency, the forms of insolvency in the EU member states, with short referrals to Law no.85/2006 on the insolvency procedure, modified.

2. The European insolvency procedure

The Regulation (EC) no.1346/2006 applied to collective insolvency procedures determined by the debtor's insolvency, in which its partial or total discontinuance in conducting its activity and the assignment of a liquidator takes place.²

¹ Bankruptcy was regulated in The Romanian Commercial Code in 1887, in The 3rd Book, "On bankruptcy" Title I "On the declaration of bankruptcy and its effects" (art. 695-889) and in Title I of The 4th Book "On the exercise of commercial actions and their duration", in Chapter III named "Special dispositions of procedure in bankruptcy" (art. 936-944). These dispositions were applied between 1887 and 1948. Between 1949 and 1989 the bankruptcy of state companies and socialist organization couldn't have been brought into discussion, as the assets were part of the state's socialist propriety fund. Through Law no.64/1995 of judicial reorganization and bankruptcy, the dispositions of the Commercial Code on bankruptcy were abrogated. At the moment, the insolvency procedure is regulated by Law no.85/2006 on the insolvency procedure that abrogated Law no.64/1995. Bankruptcy was regulated in The Romanian Commercial Code in 1887, in The 3rd Book, "On bankruptcy" Title I "On the declaration of bankruptcy and its effects" (art. 695-889) and in Title I of The 4th Book "On the exercise of commercial actions and their duration", in Chapter III named "Special dispositions of procedure in bankruptcy" (art. 936-944). These dispositions were applied between 1887 and 1948. Between 1949 and 1989 the bankruptcy of state companies and socialist organization couldn't have been brought into discussion, as the assets were part of the state's socialist propriety fund. Through Law no.64/1995 of judicial reorganization and bankruptcy, the dispositions of the Commercial Code on bankruptcy were abrogated. At the moment, the insolvency procedure is regulated by Law no.85/2006 on the insolvency procedure that abrogated Law no.64/1995.

² The Regulation does not apply to the insolvency procedures of insurance companies, credit institutions, investment companies that provide services involving possession of funds or securities of third parties and collective investment organs.

In what concerns the territorial competence, in order to refer to the competent judicial instance for a cause, the residence or headquarter or the defendant must be known and correctly interpreted from a judicial perspective. Why? In order to avoid the delivery of a judgment of absolute nullity, in order to avoid the delivery of contradictory judgments in this procedure, with a negative effect on creditors, as well as in order to avoid negative or positive conflicts of competence assuring the conformation with the principle of solving a case in due time. The Regulation does not contain rules on solving conflicts of competence, as they are solved using the principle of mutual trust. In commercial matters, the Regulation defines “the center of main interests” as being the place in which the debtor is normally conducting his interests and can be verified by third parties and the “headquarter” is defined as being a place of carrying the operations, in which the debtor exerts, in a non-transitory manner, an economic activity using human resources and goods. In case of a company, until proven otherwise, it is presumed that the center of main interests is the place where the judicial person is officially registered. For a company, the debtor’s center of main interests is generally considered to be the company’s headquarter.

The general competence of European instances, according the Article 4, al.1 in the Regulation, is determined by the law of the member state in which the headquarter of the debtor involved in the insolvency procedure is located. In Romania, according to article 6, al.1 of Law no.85/2006 on insolvency procedure, “all the procedures regulated by this law, except the appeal, are in the competence of the court’s insolvency section, corresponding with the debtor’s headquarter, as mentioned in the commerce registry, agricultural societies’ registry or associations’ or foundations’ registry”. The abovementioned text summons both the material as well as the territorial competence.

The Regulation regulates the possibility of opening to types of procedure, namely the main insolvency procedure, which will be opened in the member state where the debtor has its center of main interests and the opening of secondary insolvency procedures in the member state the debtor has a seat. The secondary procedure applies to the debtor’s possessions, situated in the member state where this type of procedure is opened. In the main insolvency procedure as well as in the secondary one, the syndic-judge assigns a judicial liquidator.

Thus, only one main insolvency procedure and several secondary ones can be opened, the latter only if the debtor has one or several seats in member states and if the debtor has any possessions in that particular state/s. The argument consists in the fact that in the secondary insolvency procedures, called territorial (national) procedures, the liquidation of the debtor’s assets takes place, in order to recover the creditors’ receivables, listed in the definitive receivable table. In case the liquidation of assets in the secondary procedure meets the claims involved in the procedure, the assigned liquidator in this procedure has the obligation to transfer the remaining assets towards the liquidator in the main procedure.

From the moment the instance delivered a judgment on the opening of insolvency, the creditors cannot act individually against the specific form. The rules regarding the way and terms in which the receivables must be proved are established by the laws of the member state where the insolvency procedure was opened.

What happens if two main procedures are opened? This situation is not possible, as the Regulation has specific dispositions regarding the opening of the main insolvency procedure on one side, and on the other side, the judicial liquidator has the obligation to inform, through an individual notice, all the known creditors with residence or social seat in the other member states. But, in case two or even three main insolvency procedures are opened, the Regulation stipulated that any procedure opened after the opening of the main procedure represents a secondary procedure. Can several secondary procedures be opened? Taking into account the abovementioned, yes, on the condition that the debtor has its headquarter in the member state where the opening of the secondary procedure is requested and, of course, on condition that the debtor has possessions that can be used to recover the receivables. In the state member where the opening of a secondary procedure is requested, the competent instance does not analyze the debtor's insolvency, as this aspect has been cleared by the syndic-judge in the main insolvency procedure. The effects of the secondary procedure are limited, as mentioned above, to the debtor's possessions situated in the member state where the procedure is opened.

Who can be the holder of the request of opening a secondary procedure? The holders of the request can be: the judicial liquidator assigned in the main procedure as well as any person or authority empowered to solicit the opening of an insolvency procedure, in virtue of the law of the member state where the opening of the secondary procedure is requested.

The cross-border insolvency procedure is based on the active cooperation between the syndic-judges and the mutual briefing between the liquidator assigned in the main procedure and the liquidators of the secondary procedures, especially on the stage of submitting the application for the receivables' admission and their verification, as well as on all the measures meant to lead to the closure of the procedures.

Regarding the abovementioned the question related to which is the law applicable in the main insolvency procedure and the secondary procedures rises. Before answering this question, the next statement is necessary. The Regulation directly applies to the member states and does not have to be accompanied by implementing acts. But the law applicable³ is the law of the member state in which such procedures are opened. The Regulation is not meant to uniform the material law in insolvency matters but it contains the norms of European civil procedure in this matter, with the purpose of avoiding the opening of several main and secondary procedures, without the creditors' knowledge of their opening. In these cases, which are not desirable, the creditors could not sustain their cause in front of the national instances for the recovery of the receivables.

Accordingly, the Regulation establishes common norms regarding the competence of judicial instances, the recognition of judicial decisions and the applicable law in insolvency matters, as well as the mandatory coordination of the procedures opened in several member states. As the Regulation contains norms or European procedural law, it applies to the member states (except Denmark), the moment of coming into force of the norm of national civil procedure that comes into conflict with the

³ In case it opens the main procedure as well as in case it opens a secondary procedure, Romania applies the Law no.85/2006 on the insolvency procedure.

norm of civil community law not having any relevance. In the insolvency procedure matter, the Regulation is the community legislation “queen”.

In what concerns the material law in the insolvency field, we cannot talk about the harmonization of legislation. For example, this community act does not establish the receivable’s threshold⁴ in order to open the main insolvency procedure, the value of the bail, does not stipulate the conservation measures, the involvement of patrimonial liability of the management bodies of the bankrupt company etc. The Regulation stipulates that the law of the opening state determines the conditions of the opening, the deployment and the closure of the insolvency procedure. Thus, considering the 27 member states of the EU, for the equality of judicial treatment in insolvency matter we assert that a harmonization of the material law is necessary.

Regarding the insolvency procedure and the liquidator’s role, it has to be mentioned the fact that he has the mission to supervise in the first place the possibility of the debtor’s redress and not the forced liquidation of the company. In this case, it has to be mentioned that, unlike the old regulation (The Romanian Commercial Code), in the present regulation, inspired by the American Bankruptcy Code in 1978 the salvation of the economic agent is pursued (through reorganization), the liquidation taking place only in case the redress of the insolvent debtor is not possible. For example, if the debtor asserts and if there is evidence that he can be reinvigorated, as in “I am sick but I am following a treatment”, the liquidator has the duty to verify this statement in case it is possible to rescue the company⁵ and not follow the gain or the liquidation of that company. In other words, not every debtor that is submitted to such a procedure has to end in the liquidation of the company and disappear as judicial person from the business environment. In the economic crisis our country goes through, if the liquidation of all the economic agents involved in insolvency procedures would be liquidated, the effects would be devastating for the country’s population. The secondary procedure can be closed without the liquidation of the company. The Regulation expressly stipulated that if the law applicable to the secondary procedure allows the closure of the procedure without liquidation, based on a reorganization plan, harmonized or another similar measure, the liquidator in the main procedure is empowered to propose such a measure. But the secondary measure, closed through one of the measures abovementioned, does not acquire a definitive character, without the liquidator’s approval in the main procedure, in default of his approval, if the financial interests of the creditor’s in the main procedure are not affected.

⁴ According to Law no.85/2006 on the insolvency procedure, recently modified through Law no.277/2009, according to article 3, al.1.12, the minimum value of a receivable that can lead to the creditor’s request, is 30.000 lei, and for the employees the value is 6 average salaries. In the old regulation, the threshold was set at 10.000 lei and for the employees at 6 average salaries.

⁵ In practice, applying Law no.85/2006 on insolvency procedure, as a judge, I have observed that some liquidators, from the moment they are nominated by the syndic-judge, ignore the arguments of the company’s administrators that they don’t owe the debit of the receivable is not clear, liquid and due. They pursue the profit, which is represented by their payment after the liquidation. Sometimes and in isolated cases, even if the company’s administrator presents the payment order and the statement that proves the payment of the receivable to the creditor, arguing that the insolvency state is not real, the liquidator exigently solicits the continuation of the insolvency procedure. In other cases, although the debtor proves that based on a reorganization plan the bankruptcy can be avoided, the liquidator argues that the liquidation is necessary.

The judgment of the request related to the insolvency procedure is made in respecting the dispositions of Law no. 85/2006, completed, to the extent of its compatibility, by those of the Civil Procedure Code, Civil Code, Commercial Code and Regulation (CE) no.1346/2000 on the insolvency procedure, published in the Official Journal of the European Communities no. L 160 on June 30, 2000 (article 149 in Law no.85/2006). But indifferent if the Regulation's dispositions are compatible or not with the internal law, the national judge referred to with an insolvency request is forced to apply the Regulation, as well as the interpretation offered by the European Court of Justice.

In what concerns the language used in the deployment of these procedures, the Regulation stipulated that the creditor's briefing on the opening of an insolvency procedure in a member state is made in the official language or one of the official languages of the opening state. How is the creditor's briefing realized? ; by transmitting an individual notice to any creditor with the residence or social seat in a member state, other than the opening state. Any creditor can register the request on admitting a receivable in the official language or one of the official languages of the specific state. The creditor can be asked to provide the translation in the official language of the opening state or in one of its official languages.

In what concerns the recognition of the insolvency procedure, the Regulation stated that any decision to open an insolvency procedure issued by a competent instance of a member state is recognized in all the member states, as soon as it produces its effects in the opening state (article 16, 1, al.1). The decisions related to the opening and closing an insolvency procedure in regulating the insolvency procedure in the Regulation are recognized without any further formalities. The member states are not obliged to recognize or execute a decision in this matter that could lead to a limitation of individual freedom or the secrecy of correspondence. Likewise, any member state can refuse the recognition and execution of a decision on the insolvency procedure opened in another member state, if the recognition or the execution would contravene with the public order of the member state, especially its fundamental principles or individual rights and freedoms, guaranteed by the Constitution.

3. Conclusions

As an EU member state, in Romania, the judicial instances apply the Regulation (EC) no.1346/2000 on insolvency procedures in the requests related to cross-border insolvency procedures, the community act taking precedence over the internal law. The Regulation stipulates: the opening of a single main procedure and of one or several secondary procedures involving one debtor, establishes the international competence, nominating the member state in which the judicial instance opens the main insolvency procedure, based on the single criteria of "the debtor's center of main interests"; regulates the opening of secondary procedures; the language that has to be used; the costs and recognition of the decision in the member states, without the judicial instances exerting control over the decision leading to the opening of the main procedure. A good deployment of a cross-border insolvency procedure is based mainly on the active cooperation between the syndic-judges and the mutual briefing between the liquidator nominated in the main procedure and those nominated in the secondary procedures. The syndic-judges in the secondary insolvency procedure/s are not subordinated to the syndic-judge who opened the main insolvency procedure. The national judge is obliged to apply the community law, that takes precedence over internal law and in case the national

regulation is contrary to a community disposition, the community disposition will be applied. In the EU space, any decision to open an insolvency procedure issued by a competent instance of a member state is recognized in all the member states as soon as it produces its effects in the opening state. The legal decisions have a free movement based on the principles of mutual recognition, mutual trust with the purpose of consolidating the judicial security in the community space. In order to obtain an equal judicial treatment of the debtors involved in an insolvency procedure, the harmonization of the material law on insolvency matters in the member states is necessary.

4. References

- The Romanian Commercial Code, 1887
- Regulation (EC) no.1346/2000 on insolvency procedures
- Law no.85/2006 on insolvency procedure