

COMPOSITION WITH CREDITORS, SUPPORT FOR THE ROMANIAN COMPANIES DURING THE ECONOMIC CRISIS PERIOD

LAVINIA IANCU

"TIBISCUS" UNIVERSITY OF TIMIȘOARA, FACULTY OF ECONOMICS
1/A Daliei Street, Timișoara. 300558, relicons@yahoo.com

Abstract:

The ad hoc mandate is a confidential procedure initiated upon demand of the debtor by which an ad hoc agent appointed by the court of law negotiates with the creditors in order to reach an agreement between one or several creditors and the debtor with the purpose of surmounting the difficulties faced by the company of the latter.

The preventive composition with creditors is an agreement concluded between the debtor, on one hand, and the creditors that hold at least 2/3 of the value of claims accepted and unchallenged, on the other hand. By this agreement, the debtor proposes a plan for its company recovery and for covering the claims these creditors have against it, and the creditors consent to support the debtor's efforts for surpassing the difficulties faced by the debtor's company.

Key words: *insolvency prevention mechanism, ad hoc mandate, the preventive composition with creditors*

JEL classification: *K20*

For many years, the theoreticians and practitioners in the insolvency area have brought to attention the total lack of an insolvency prevention mechanism in the Romanian legislation. Actually, the debtors facing financial difficulties can opt for the classical means of solving litigations, such as conciliation, mediation, arbitration but none of them offers an organized framework that would be able to give a chance to the debtor facing a remediable financial crisis and to prevent that it enters the state of insolvency.

The world economic crisis that affected Romania also during 2008 – 2010 determined the commercial companies facing financial difficulties to look for solutions in order to avoid the insolvency procedure initiation provisioned by Law no. 85 / 2006 by negotiating the debts and drafting restructuring plans. Under these circumstances, the legal regulation of certain procedures meant to support the debtors facing temporary financial difficulties became mandatory.

The coming into force of Law no. 381 / December 10, 2009 on introducing the composition with creditors and the ad hoc mandate has filled the legislative void.

This law's purpose is to protect legal person companies facing difficulties, in order for them to continue their activity, to maintain the jobs and to cover the claims sent to the debtor by amicable renegotiation procedures concerning the claims or their conditions or by concluding a composition with creditors.

The ad hoc mandate is a confidential procedure initiated upon demand of the debtor by which an ad hoc proxy appointed by the court of law negotiates with the creditors in order to reach an understanding between one or several creditors and the debtor, with the purpose of surmounting the difficulties faced by the company of the latter.

In order to initiate the ad hoc mandate procedure, the debtor will lodge a petition to the president of the court of law under the jurisdiction of which its head office is located. After having received the petition, the president of the court of law will order, within 5 days, a meeting, in the council chamber, with the debtor and the ad hoc proxy

proposed by the latter. If the petition of the debtor has adequate grounds, having determined the difficulties that the company is facing, the president of the court of law will designate by an irrevocable resolution the proposed ad hoc proxy.

The object of the ad hoc mandate will be to conclude an agreement, in 90 days after the ad hoc proxy, insolvency practitioner was appointed, between the debtor and its creditors in order to surpass the difficulties faced by the debtor's company, to recover the company, to pay the claims to the creditors and to maintain the jobs.

The confidentiality of this procedure is mandatory for all persons and institutions involved.

The companies that face minor difficulties in developing their activity that may be solved in a short 90-day term must use the ad hoc mandate procedure.

This procedure ceases: by unilateral cancellation of the mandate by the debtor or by the ad hoc proxy or by fulfillment of the object of the mandate, if within the 90-day term the proxy did not manage to intermediate the conclusion of an agreement between the debtor and its creditors.

The composition with creditors is an understanding concluded between the debtor, on one hand, and the creditors that hold at least 2 / 3 of the value of claims accepted and unchallenged, on the other hand. By this understanding, the debtor proposes a plan for its company's recovery and for covering the claims these creditors have against it, and the creditors consent to support the debtor's efforts for surpassing the difficulties faced by the debtor's company.

This insolvency prevention procedure is accessible, mainly, to any legal person, except for the debtors that :

- have been convicted irrevocably for economic felonies;
- have initiated an insolvency procedure 5 years before the offer of composition with creditors;
- have benefited from a composition with creditors during the 3 years before the offer of composition with creditors;
- have been convicted finally during the last 5 years before the initiation of the procedure of composition with creditors for bankruptcy fraud, administration fraud, abuse of trust, deceit, embezzlement, false testimony, false-related felonies or felonies provisioned by the Law of competition. This requirement refers to the legal person and to the shareholders, partners, silent partners, and directors of the debtor;
- after initiating the insolvency procedure, the patrimony-related personal liability of the management and supervision bodies' members was invoked according to article 138 in Law no. 85 / 2006 modified and completed;
- have registered in their criminal record deeds provisioned in the Government Ordinance no. 75 / 2001 modified and completed;

In this procedure, the debtor will lodge a petition to the court of law for composition with creditors and will propose a conciliator among the insolvency practitioners.

The syndic judge will initiate the procedure of composition with creditors and will designate the temporary conciliator by an irrevocable resolution.

The debtor and the conciliator will draft, in 30 days since the appointment of the latter, the offer of composition with creditors that will be sent to the creditors. The offer of composition with creditors will comprise the composition with creditors draft and the debtor's statement as regards the financial difficulty state it faces. The composition with creditors draft will comprise:

- the situation of debtor's assets and liabilities certified by an accounting expert or audited by a certified auditor;

- causes of the financial difficulty state and measures taken by the debtor for surpassing it until the initiation of the composition with creditors procedure;
- projection of accounting and financial evolution for the next 6 months;
- recovery plan that will comprise the measures envisaged by the debtor for reorganizing the activity (restructuring the management, altering the functional structure, staff cutbacks, etc.), manners it takes into account for surpassing the financial difficulty state (increase of share capital, bank loan, assets sale, etc.), as well as the percentage of meeting the requirements that cannot be below 50% as consequence of implementing the recovery measures;
- proposal of confirming the temporary conciliator and his / her remuneration for the period post-composition with creditors.

As regards the receivables, the debtor may propose payment delays or re-echeloning, deleting all or part of the receivables or just the interests or just the delay penalties, compensations, and novations by changing the debtor. The tax receivables hold a special position; for them the postponements, deletions, echeloning, re-echeloning or partial discounts may be made only upon observing the legal provisions concerning the state aid issue for which the National Tax Administration Agency must supply its express consent.

The deadline for paying the claims set out in the composition with creditors is of maximum 18 months starting on the date of its conclusion, with the possibility to extend this term by 6 more months.

At the same time with the offer of composition with creditors, the debtor may request the syndic judge to suspend temporarily the enforcement of judgments. If the suspension of enforcement is granted, this measure will be in force until the publication of the composition with creditors approved or until the majority of creditors reject the debtor's offer.

In order to obtain the approval on the composition with creditors draft, the debtor may organize one or several joint or individual negotiation meetings with the creditors for a period that cannot surpass 30 calendar days.

In principle, the creditors vote on the offer by post mail within 30 days after having received the offer of composition with creditors with the contingent amendments acquired as a consequence of the negotiations.

For the approval of the composition with creditors, the acceptance vote for 2 / 3 of the value of claims accepted and unchallenged is necessary. If this majority is not obtained, the debtor may send a new offer after the passing of at least 30 days.

The composition with creditors approved by the creditors will be found by the decision of the syndic judge. After the date when the decision is notified, the individual prosecutions, the interest accrual and penalties of signatory creditors on the debtors are suspended.

In order for the composition with creditors to become mandatory also for the non-signatory creditors, the syndic judge may be requested to homologate it if certain conditions are met (the debtor is facing financial difficulties; the value of claims challenged and / or litigated does not surpass 20% of the statement of affairs; the composition with creditors was approved by at least 80% of the total value of claims;).

From the time when the syndic judge homologates the composition with creditors, all enforcement of a judgment procedures will be suspended. As well, the conciliator may ask the syndic judge to impose the creditors that did not sign the composition with creditors a maximum term of 18 months for receivables due date postponement, provided the debtor grants guarantees to the creditors. During this period no interests, penalties or other expenses corresponding to the receivables will accrue.

Once the composition with creditors is homologated, on its entire duration no insolvency procedure initiation petition may be lodged according to Law no. 85 / 2006.

The creditors that voted against the composition with creditors may request the cancellation of the contract in 15 days since its registration at the Trade Registry.

If it is found that the debtor violates severely the obligations assumed in the composition with creditors (supplies advantages to a creditor, hides or disposes of assets, performs payments without an equivalent service rendered), the creditors' assembly may decide to initiate the termination of contract. Beginning on that date, the composition with creditors is suspended by juror.

If the procedure of composition with creditors ends successfully, on the term set out or before it, the syndic judge will give a resolution to find the achievement of the composition with creditors' subject matter. In this case, modifications of receivables provisioned in the composition with creditors remain irrevocable.

Should the conciliator consider that the objective proposed in the composition with creditors cannot be achieved due to reasons non-imputable to the debtor, he may, at any time, request the syndic judge to ascertain the failure and to end the procedure.

If at the expiration of the term provisioned for paying the receivables the obligations set out in the composition with creditors are not met, the creditors may vote the extension of the term by maximum 6 months, following the conciliator's proposal.

In the legal regulation of ad hoc mandate may be seen that this procedure is accessible to any legal person debtor that faces a financial difficulty, without being in state of insolvency. Actually, the only condition the debtor must meet for opening the ad hoc procedure is that the "company's difficulties be serious". Law no. 381 / 2009 does not define the "serious difficulties" notion, but according to article 1 they must be "financial". As well, the law does not impose certain rules of evidence for proving the debtor's financial difficulties.

As regards the composition with creditors, it is complex procedure, a reorganization of the debtor under the strict control of the creditors, in which the court of law, by the syndic judge, has a limited position.

The ad hoc mandate and the composition with creditors are legal procedures meant to help the debtor surpass the financial difficulty state it faces and avoid the initiation of insolvency procedure provisioned by Law no. 85 / 2006. Law no. 381 / 2009 creates a legal mechanism meant to make an honest debtor that deserves protection, victim of some unfavorable circumstances, now facing a financial difficulty, able to avoid the insolvency¹. Naturally, not achieving the objective of this procedure should lead to initiating the insolvency procedure.

If for the composition with creditors, there is an express provision that the time since when the initiation of insolvency procedure cannot be lodged is the homologation of composition with creditors as regards the ad hoc mandate the law does not provision such a term. Considering this, I believe that initiating the ad hoc mandate procedure does not hinder the creditors from lodging the petition for initiating the insolvency procedure.

Nonetheless, taking into account that the debtor attempts, by his own will, to resolve the litigations with the creditors amicably, in the ad hoc mandate procedure as well as in the procedure of composition with creditors until its homologation, we believe that the possibility for the creditors to be allowed to lodge the initiation petition of the insolvency procedure denies the very purpose of Law no. 381 / 2009.

An objective to follow will be if the syndic judges will postpone the petition to initiate the insolvency procedure until the expiration of the 90-day term provisioned in the ad hoc mandate procedure, respectively until the homologation of the composition with creditors.

¹ Piperea, G.: *Insolvența: legea, regulile, realitatea* (Insolvency: law, rules, reality), Ed. Wolters Kluwer, București, 2008, p.220

Furthermore, we believe that the Legislator failed to regulate the situation of the creditor that, unsatisfied with the offer made by the debtor in the composition with creditors, lodges the petition to initiate the insolvency procedure. Even in the case when the remaining creditors approve the composition with creditors with the majority requested by law, the insolvency procedure will be initiated because the interdiction is enforced as soon as the homologation of the composition with creditors is done.

Taking these aspects into account, we consider that the interdiction concerning the initiation of the insolvency procedure should exist since the initiation of the ad hoc mandate procedure and until the expiration of the 90-day term, respectively since the initiation of the procedure of composition with creditors and until its approval.

Introducing this interdiction alongside with the easy way of accessing these procedures is favorable to the honest debtors and, at the same time, a legal instrument for postponing the initiation of the insolvency procedure for the dishonest debtors. This comment must be made because the initiation of the insolvency procedure following the request of a creditor, according to Law no. 85 / 2006 assumes the development of a contradiction process, upon observing certain procedure rules, much more time-consuming than the procedures to follow for initiating the insolvency prevention procedures according to Law no. 381 / 2009. As long as the syndic judge does not supply a resolution to begin the insolvency procedure according to Law no. 85 / 2006, the debtor cannot be deemed as being in a state of insolvency, as consequence this one being able to use the ad hoc mandate procedure, respectively that of the composition with creditors.

Nonetheless, we believe that it is only by introducing the interdiction to lodge the petition to initiate the insolvency procedure that the two procedures, i.e. the ad hoc mandate and the composition with creditors can reach the very purpose for which they have been set up, namely the safeguarding of companies facing difficulties.

From a practical point of view, the recent coming into force of these legal provisions, on January 13, 2010, renders me unable to quantify the real impact this law has on companies facing financial difficulties.

From a theoretical point of view, there must be noticed on one hand expanding the attributions range of the insolvency practitioner that acquires the “negotiator” position between the debtor’s interests and those of the creditor and, on the other hand, creating some negotiation procedures for helping the debtor facing difficulties that may take place in a relaxed environment lacking the rigors of the court of law. The success of these procedures depends greatly on the negotiator skills of the designated insolvency practitioner that will be able to propose deletions, re-echeloning or partial debt discounts, the continuation or cessation of some contracts in progress, staff cutbacks, as well as any other measures necessary for reaching the purpose of the procedure.

Finally, I believe that this law is part of the modernization process of the insolvency domain in Romania, the need for implementing some insolvency prevention measures being very acute on a market “demoralized” by the effects of the world economic crisis.

REFERENCES

1. Piperea, G.: *Insolvența: legea, regulile, realitatea* (Insolvency: law, rules, reality), Ed. Wolters Kluwer, București, 2008