MANAGERS LIABILITY IN INSOLVENCY PROCEEDINGS

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Abstract:
More and more enterprises face with insolvency. In Romania, the law stipulates the managers' liability in the case of insolvency, but most of managers are absolved about their responsibilities. It established the entitled and the term where the application can be forwarded and the conditions to be fulfilled for forwarding the patrimonial responsibility. Although the legislator in the succession of texts has first regulated closing the insolvency proceedings and forwarding the liability; such an application may only conducted during insolvency proceedings, and obviously, in legal deadline. The application is made in training patrimonial responsibility, following the closure of the procedure; it will be rejected as tardy. To be simulative, the responsibility of management members of the debtor, the legal person or any person that caused the insolvency state by committing one or more acts expressly provided and limited by law, it must fulfill cumulatively the conditions foreseen for civil liability

Key words: *liability, insolvency, patrimonial responsibility*

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Introduction

The insolvency procedure, regulated by Law 85/ 2006 regarding the insolvency and bankruptcy can be opened only through an official request, by the ones empowered by law to proceed accordingly (debtors, creditors and other persons or institutions stipulated by law) at the court house whose jurisdiction covers the debtor's position, according to the Commerce Registry, agricultural societies register or the register of associations and foundations.

The bodies that apply this law are judicial courts, the syndic judge, the judicial administrator or the judicial liquidator. The same as in other fields, in the procedure of insolvency, the legislator instituted the involvement of liability of the members of administration of the debtor, legal person, when they caused the insolvency statute of the debtor. The material competence in applying the liability stated in article 138 of the abovementioned law belongs to the syndic judge.

In our demarche, considering the non-unitary practice in applying the text of the article 138, it is considered as being opportune to proceed to the analysis of this text. In what concerns the titular holder of the request, what did the legislator meant and how the judicial instances understood the application of these provisions.

For a better understanding of the issue presented, we will partly present the context of article 138, according to which: "At the request of the judicial administrator or the liquidator, the syndic judge can dispose of a part of the assets of the legal person, that is in a state of insolvency, will be supported by the members of the supervision organs within the society, or the management, as well as any other person that caused the insolvency state of the debtor.

The creditor's committee can ask the syndic judge to authorize it to act according to paragraph 1, if the judicial administrator or the liquidator omitted to indicate in the

insolvency report the causes, the persons guilty of the state of insolvency of the legal person debtor's patrimony or if he omitted to formulate the action stipulated and the liability of the persons mentioned threatens to be prescribed".

Thus the syndic judge cannot auto invest himself in order to establish the liability in virtue of the abovementioned text and in the category of persons able to refer if the judicial administrator and the creditor's committee are comprised.

In what concerns the titular holders of this type of request, it is important to mention that the creditor's committee can proceed with such a request only if the following conditions are met:

- The judicial administrator or the liquidator omitted to indicate in the report in the causes of insolvency, the people guilty of the insolvency state of the legal person debtor's patrimony.
- A liability request by the judicial administrator or liquidator is not introduced, although the guilty persons have been indicated.
- The judicial administrator or the liquidator omitted to formulate responsible actions and this leads to prescription.
- Obtaining the authorization from the syndic judge by the creditor's committee in order to be able to proceed with this action.

The insolvency procedure offers the possibility for a creditor to recover its claim and, at the same time, the manner in which he will participate at the distribution of the sums resulted from the exploitation of the debtor's actives. This activity is directly connected to the spread of the claim rights of the other creditors and the guarantees they present, this is why the creditors are obliged to follow the sequence of the debtor's insolvency procedure.

In practice the result is the closure of the procedure, in which case the creditors solicit the liquidator to draft a detailed report regarding the causes and the circumstances that generated the insolvency of the debtor, also mentioning the persons that are responsible for this. This report has to be drafted within 60 days from the designation of the judicial administrator or the liquidator (article 59, paragraph 1) and not at the end of the procedure.

In this stage, the judicial liquidator draws up a final report that has to contain all financial statuses, according to Article 129 of the law, but there are some case in which creditors solicit the liquidator to draft a report with the content stipulated in Article 59, as opposed to the law.

In applying the text related to the judicial administrator's or the liquidator's omission to formulate the action stated by article 138, paragraph 1, the judicial control instance maintained the decision of the syndic judge that rejected the creditor's committee request through which the authorization was solicited, on the grounds that the judicial liquidator did not omit, but refused to formulate this request, based on the fact that there are no persons guilty of the insolvency, so the premises of engaging their liability are inexistent.

It has been stated that between omission and refusal there is an important difference and the recurrent affirmation that the "judicial liquidator is obliged to formulate an action" is groundless, because this is not an obligation but a right of the liquidator. In my opinion if a judicial liquidator mentioned that he did not understood that he has to formulate this kind of request, this statement should not be equivalent to an omission in the legislator's opinion. In analyzing the liquidator's position, based on the presented evidence, the instance has to ascertain if the liquidator's refusal to promote a request is abusive, meaning that it is not covered regarding the legal dispositions and the evidence in the file.

In fact, creditors want that an action against the debtor society's administrator to be exerted in order to involve its liability, with the direct consequence of recovering the claims, of course before the procedure's closure. It is true that the legislator grants active procedural legitimacy only for the creditor's committee, and not to any individual creditor in promoting the request to support the creditor's assets.

There are situations in which there are only two creditors or even one, case in which the creditor's committee cannot be constituted, consisting in only three members. This situation is not regulated by the Article 16 of the abovementioned law, but in practice[1] the instances have stated that this type of request can be made by one or two creditors. It has been argued that the main role of the creditors is to represent the interests of the creditor's assembly during the insolvency procedure and there are cases where an identity between the two participants in the procedure can be encountered (the creditor's assembly and the creditor's committee).

Consequently, Law no. 85/ 2006 has been modified through the Government's Emergency Ordinance no.173/2008 that states in Article 16, paragraph 1 thesis II that the legislator adopted this solution accordingly: "if due to a small number of creditors the syndic judge does not consider as being necessary to constitute a creditor's committee, the attributions of the committee stated in article 16, b) and f) will be exerted by the creditor's assembly".

Most of the times in the closure of an insolvency procedure, the creditor's formulate individual requests that solicit the implication of the liability of the debtor's administrators for the remaining uncovered assets, if the creditor's committee has not been constituted. The civil procedure code regulated the principle of the judge's active role in Article 129, but the parts of the litigation also have the duty to follow the civil trial and to exert their procedural rights in good faith.

The practice demonstrates that there is a real competition between the creditors that consider themselves as being prejudiced, following the unrecovered claims and they individually promote this kind of requests by invocating this reason. They refer to the instance without making any proof of the active procedural quality and when they have active procedural legitimacy, don't prove the existence of any of the facts stated in Article 138, paragraph 1, a-g.

In the matter of insolvency procedure, it is not sufficient to be part of trial before the first instance, but one has to prove that it is the titular of the request. Thus, the judicial control instance[2] retained that the action in patrimony liability was promoted by the judicial liquidator against the defendant, former administrator of the debtor, legal person. It has been retained also that, although the request has been rejected, the judicial liquidator accepted the decision of the syndic judge and did not proceed with the appeal. The appeal was rejected as being inadmissible since it was declared by an individual creditor that was not the titular of the request.

It had been held that the request based on article 138, paragraph 1 was formulated by the judicial liquidator and not by the creditor committee authorized by the syndic judge. So, the appears the question if the attributions of the creditor's committee have to be exerted by the creditor's assembly, in cases where the solution proposed by the instance for cases in which there is only two creditors and one of them does not agree with the other one.

[1] In this context, Appeals Court Galati, Com. Sec. Maritime and fluvial, decision no. 769/R/12.10.2007 (unpublished);
[2] In this context, Appeals Court Galati, Com. Sec. Maritime and fluvial, decisions no. 96/R/11.02.2008 and no.111/R/15.02.2008

In this case, only if a creditor formulates the request state din article 138 and the instance rejects it for lack of active procedural quality, the principle of free access to justice is violated and the direct consequence of it is non-coverage of the claims through the involvement of the former administrator's liability to cover the remaining of the asset.

Some courts[3] have stated that there are cases when the judicial liquidator did not understand to formulate the request in virtue of article 138, paragraph 1 and that one of the creditors empowered him to formulate a request to the syndic judge, in order to promote such a request. Other cases refer to the promotion of the request, according to article 138, paragraph 1 and paragraph 3 of the law, where the syndic judge wrongly admitted the exception for the representative of a certain creditor, referred by as creditor A, and canceled the request to authorize the request of involving the liability solicited by that creditor A. The court for judicial control conceded the appeal of creditor A and overturned the recurrent decision, hence the case was sent to retrial to the same instance. The court motivated that the debtor creditor's committee met the quality of representatives and the two creditors represent the majority of the creditors on the claim's table.

It important to mention that in the case mentioned above there are three creditors, one of which maintained a neutral attitude and did not approve on promoting the request by the creditor A. Therefore, the solution given by the Court of Appeal Constanta is consistent with the purpose of the law on insolvency proceedings.

It is considered of great importance the moment when the creditor's committee should formulate such a request during a procedure, since, in my opinion, in order to give efficiency to the principle in implementing a procedure, such a request has to be formulated after preparing the report stated in Article 59 of the law. If the participants to this procedure ignore this procedure arises the situation in which the effect pursued by the legislator in recovering the claims is significantly reduced.

Regarding the elements that should be contained in an authorizing request for the creditor's committee, obviously, there are the elements that any request of this kind should consist, together with the specific of the procedure and the indication of meeting the conditions stated in the text of Article 138, paragraph 3 mentioned above.

This is a fact that should be accepted, if not we could talk about arbitrary indicated by the syndic judge in solving these requests. When the syndic judge formulates the motivation of admitting the authorizing request, he doesn't have to motivate the solution based on the former administrator's guilt or the volume of assets that has to be covered. If he does motivate his solution based on these facts can be challenged as he prejudges on the solution that has to be given to solve this request. If the authorization request from the committee is rejected, we find the same situation, based on the fact that the conditions stipulated by the Article 138, paragraph 1, a-g, are not fulfilled.

Conclusions

In what concerns the formulation of the text of Article 138, paragraph 3 regarding the "liability of the persons referred to by the paragraph 1 threatens to be subscribed". Therefore, as stated by other authors[4] the conditions to prove that there is the possibility that this action to be subscribed should not be imposed to the creditor's committee, opinion also stated by.

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[3] In this context, Appeals Court Constanta, sec. Com., decision no. 579/COM/17.09.2008, published in the Appeals Courts Bulletin, no. 1/2009, Ed. C.H. Beck, Bucharest, p. 22 and following.

[4] Adam I., Savu C.N., Insolvency procedure law, Comments and explanations, Ch Beck Publishing House, Bucharest , 2006, p.766

If this article is taken into consideration, the creditor's committee would be detained to act immediately the report is being submitted (Article 59). Just as the authors quoted above stated, it is also my opinion, that the legislative intervention is imposed so that the creditor's committee would not be retained anymore by the formulation or the request of liability of the judicial administrator or the liquidator, given the fact that the purpose of this collective procedure is to constitute a collective procedure to cover the asset of debtors in insolvency.

This issue is imposed, especially due to the fact that the syndic judge is not allowed to authorize the creditor's committee in order to formulate such a request and self-refer to. Adam and Savu[5] argued in 2006 the hypothesis according to which, the court will solve the case on grounds and not due to the exception of the lack of authorization, if the prescription term is imminent and the syndic judge refuses to authorize the creditor's committee to promote the request for liability.

As far as the persons that have passive procedural statute in liability actions, the law mentioned above takes into consideration the members of the administration organs and the supervision organs of the commercial societies, corporate organizations and groups of economic interest. The liability mentioned in Article 138 can be exerted both on administrators of law as well as on administrators of fact, based on the evidence administrated in the case. The acts that can involve the liability of the management organs are the ones stated in Article 138, paragraph 1 (a-g) in the law. The legislator provided in paragraph 2 that the application of these dispositions does not eliminate the application of criminal lie for the actions that represent deeds.

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