PREVENTION OF INSOLVENCY THROUGH CONTRACTUAL AND JUDICIAL METHODS

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Abstract:

Alternative ways to solve disputes may be used with the purpose of preventing insolvency. All extrajudicial means to solve disputes, from simple and pure transaction to mediation, conciliation and arbitration, are based on the will of the parties, meaning the debtors and the creditors. Judicial reorganization could be replaced by equal measures , such as preventive concordat proceedings, which don't require a Court decision to declare insolvency , but a contract drawn up by the debtors and the majority of the creditors, signed and enforced under the mediation of an insolvency specialist, a contract whose failure should lead to bankruptcy.

Key words: *insolvency, debtor , creditors, concordat proceedings.*

JEL classification-*K-35*

Introduction

During the economic crisis the „weaknesses" of insolvency mechanisms in Romania have become more clear: non-functional pre-insolvency instruments, lack of equilibrium between the protection of interest in business failure – creditor versus debtor –, the existing possibility of manipulating the votes for the approval of reorganization plans (that are not viable) triggering the artificial prolongation of the procedure, the increase of procedure costs and of risk run by creditors of not recovering all debts, high duration of the insolvency processes associated with the low level of recovering liabilities within the procedure etc. Insolvency has the preventive role or, as the case may be, the extinctive role in respect to financial or economic crises, and this role is clearly shown through prevention of insolvency occurrence or deletion of insolvency elements, insolvency that breaches the credit-company-profit process.

The majority of the legal provisions in the field, at global level, are grouped in big law categories and include both procedure provisions as well as substantial law provision referring to the insolvency effects. These provisions are more or less similar from one system from another. They aim at the debtor recovery as well as the liquidation of its wealth, the possibility of civil/penal liability enforcement of the statute organs of the debtor for creating insolvency due to certain acts, effecting to their being responsible for a part of the debtor's liabilities.

Materials and methods

During this time of crisis, the word insolvency has received a greater visibility, an almost privileged status in the daily sphere. The Romanian Government, taking into account the current economic context requires some rapid measures for the increase of legal and administrative premises that lead to increase of business efficiency, increase of economic security increase and the investment activity of the Romanian market, issued the Emergency Ordinance No 91/2013 of October 2nd 2013 regarding the procedures for insolvency procedures and insolvency prevention. Later, the Act regarding the procedures for preventing insolvency and the insolvency procedures has been adopted (Acronym

LPPI_I) No 85/25.06.2014. LPPI_I has an integrating vision that includes in one legal corpus the general legislation, applicable to all economic operators, the special legislation relating to credit institutions and insurance and re-insurance companies, regulating insolvency of groups of companies, regulating the cross-border insolvency. The new Act also regulates the instruments for preventing insolvency/pre-insolvency. As author Nagy C. recall "Commercial insolvency involves the application of appropriate regulation, because the geographic area of those activities goes beyond national borders, involving the harmonisation of legislation in terms of insolvency, reglementation methods, harmonisation, approach or legislative coordination between states without requesting to the UE members to introduce a uniform law in the matter of companies, or just involving some sorts of commercial company. Although it is international regulated, the commercial insolvency involves mutual recognition of the proceedings brought by each country".

Professional problems that occurred in procedures for preventing insolvency and the insolvency procedures are generated by the:

1. Step from the antique procedure of bankruptcy to insolvency;
2. Economic and competitiveness increase;
3. Prevention, resolution or attenuation of financial and economic crises;
4. Debtors liability and ensuring creditors by extending crediting;
5. The activities of company that have cross-border effects, when these effects are regulated ever more by the community and/or international legislation.

Obviously, the Romanian law-maker has finally understood that, just like in medicine it is easier and less expensive to prevent a disease than to treat it, in market economic it is also better to prevent insolvency, than to try to treat it, because not seldom these treatments prove inefficient and the result is tragic both for the debtor as well as for the creditors. Under these circumstances, the law-maker has adopted Act no 85 of June 25, 2014. Although the official name of Act No 85 of June 25, 2014 is ***Act regarding the procedures for preventing insolvency and insolvency procedures,*** in practice it is called ***Insolvency Code;*** for this reason we will also use this phrase; however we must state that we are not speaking of a veritable Code due to at least 2 reasons: a) the new act does not regulate the insolvency of natural persons; b) there are still other acts that regulate the insolvency applicable to other legal entities.

Results and discussion

In the frame of preventing the opening of insolvency procedures we will enumerate some of the alternative means for extra-judicial solution of disputes arising from the pure and simple transaction to **mediation, conciliation and arbitrage;** all these being the basis of the parties will, i.e. the debtor and its creditors. The debtor undertakes it to restructure its company for recovery and the creditors agree to a series of facilities for the benefit of the debtor that favor its recovery. Although there is no specific regulation for this purpose, (unofficial) **agreements** concluded between the debtor and its creditors for restructuring the debt are acknowledged and even encouraged by the legal framework. Most of the times, in practice, they remain the most attractive modality for the creditors whose debtors, although having some cash flow problems, continue to enjoy economic and financial trust of business partners.

These agreements also have the incontestable advantage of flexibility and lead to the quick accomplishment of an agreement regarding restructuring. For encouraging the use of these instruments, the Insolvency Act No 85/2014 regulates that the documents concluded in good faith in executing an agreement with creditors, concluded as a result of extra-judicial negotiations for restructuring the debtor's debts are not considered fraudulent,

under the provision that the agreement has been destined to lead – reasonably – to the financial recovery of the debtor and did not aim at bringing prejudice and/or discriminating some creditors.

If the indications regarding a possible insolvency of the co-contractor occur after the legal contractual relation has already been established, the legal frame provides the parties with a series of mechanisms and procedures that can be used by companies that are under financial difficulties for preventing insolvency. We must recollect here the ***preventive deed of arrangement and ad-hoc mandate,*** procedures with a low rate in practice, but also the various extra-judicial agreements that can be concluded between the debtor and the creditors regarding restructuring debts. Whereas the ***ad-hoc*** mandate is an extra-judicial and confidential procedure, the **preventive deed of agreement** is a less judicial procedure and partially confidential. None of these prevention procedures requires the stigmata of insolvency.

The ad-hoc Mandate

According to the opinion of Mrs. Gheorghe Piperea, as a method of preventing insolvency, a debtor whose company is in difficulty, may ask the president of the court to appoint an ad-hoc procurator, with an application that contains the „detailed description of the reasons that require an ad-hoc procurator". According to the deed of agreement Act (Act no 381/2009), the appointment of the procurator is not public and it takes place in the council room, after calling the debtor and the proposed ad-hoc procurator. The application, as well as other attached documents, is registered in a special, non-public register. After appointing the procurator, the procedure is maintained confidential during its entire duration. If the president of the court establishes that the debtor's difficulties are „serious" and the ad-hoc procurator meets all the legal requirements for this quality, the president shall appoint the ad-hoc procurator proposed by the debtor by way of an irrevocable decree.

The ad-hoc procurator is a third party that is independent both in respect to the debtor as well as to the creditors. It is no proxy of the debtor and not proxy of the creditors, but a procurator of the court president. Herein lies the higher potential of negotiation and credibility of the ad-hoc procurator compared to those of the debtor.

The act of the deed of agreement stipulates a 5-day deadline during which the debtor and the proposed ad-hoc procurator are called in the council room for the solution of the application. The calling is performed by way of a procedure agent, but if the debtor submits the application in person, it may also take act of the deadline and it can inform the proposed ad-hoc procurator to make sure this comes to the meeting. After this appointment, the ad-hoc procurator shall have the task of analyzing, within 90 days, an agreement between the debtor and one or more creditors, to the purpose of overcoming the difficulty in the debtor's company, saving the company and preserving the workplaces and covering the debtor's debts.

The preventive deed of agreement with creditors

The preventive deed of agreement with creditors is a judicial contract, because the will of the debtor with the majority of creditors must be established and regulated by the syndic judge in order for it to have effects towards third parties and towards all creditors, including those that did not sign the contract. The deed of agreement is essentially the will of the parties and is, until its homologation is established, confidential. The beneficiaries of the deed of agreement can be debtors, legal persons that are not under insolvency. In order for the deed of agreement procedure to be opened one must check if: (i) the applicant is a legal person and (ii) the company is in financial difficulty.

Conclusions

Taking into account the fact that the law is first of all a creation of social conscience we observe that the law-maker in the Insolvency Code, tried to create an unitary construction of all existing institutions and concepts, following the way in which they must evaluate in accordance with the practical, social and human current framework, however preserving the functional logic of these institutions and concepts, trying to introduce a recommendable jurisprudence that may establish correct, just and reasonable solutions during the application of Act no 85/2006.

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