THEORY OF CURRENT LIABILITIES IN THE INSOLVENCY PROCEDURE

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Abstract:
The legal treatment of the current debt in the insolvency procedure was regulated by the old law of the insolvency Law no.85/2006 as well as by the current law of the insolvency Law no. 85 on 2014. The new insolvency law came with a series of changes that would strengthen the current creditors position in the proceedings but the exercise of this right raises a number of problems.

Keywords: *insolvency, creditors rights*

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Introduction

The insolvency procedure is governed even at present by two insolvency laws, Law No. 85/2006[1] and Law No. 85/2014[2]. This is possible because once with the entry into force of Law 85/2014, the insolvency procedures opened in accordance with the old law will carry on in observance of the provisions of Law No. 85/2006. Thus, even on the current date, on the dockets of the courts we will find both insolvency files where the provisions of Law No. 85/2006 are applied and files which are administered in accordance with Law No. 85/2014.

The law on the insolvency prevention procedures and insolvency No. 85/2014 published in the Official Journal 466/25.06.2014, entered into force on 28.06.2014, was for the Romanian legislation a first attempt at joining the various regulations which used to govern the insolvency prevention mechanisms and the insolvency of legal entities belonging to different categories. It contemplated autonomous state-owned public service companies, national enterprises, commercial companies, sole traders, family owned and operated associations
and self-employed persons.

In this paper we intend to analyze a distinct category of liabilities defined for the first time in Law No. 85/2015, namely the creditor with current liabilities. By art. 5 of Law 85/2015 titled "Defining certain terms and expressions used in the law", at point 21 there is the definition "of the creditor with current liabilities" or "current creditor" as being: "the creditor who has certain, liquid and exigible claims during the insolvency procedure and who is entitled to precedence in the payment of such claims, as per the documents they are based on."

An analysis of the definition of the notion of current liability is provided by the doctrine[3], being considered that the notion of current liability is not defined by the

[1] Law no.85/2006 on insolvency law, published in Official Monitor of Romania no.359 form 21 April 2006. Was in force from 20 July 2006 to 27 Juny 2014, being repealed by the entry into force of the Law no.85/2014

[2] Law no. 85/2014 on insolvency prevention and insolvency procedures, published in Official Monitor of Romania no. 466 form 25 June 2014

[3]Piperea, Gh. (2017). Creanţe şi creditori în procedura insolvenţei, https://www.juridice.ro/essentials/autorgheorghe-piperea, published on 08.02.2017(Gh. Piperea, Claims

Insolvency Law No. 85/2014, which, nevertheless, does provide two definitions for two neighboring and associated concepts: the creditor with current liabilities and the current activity. It should be noted that in his opinion the holders of current liabilities are current creditors "inasmuch as the current liabilities were born only after the procedure opening date while the creditors are entitled to precedence in the full and immediate payment of their claims, as per the documents they are based on. This rule results from art. 5 point 21 as well as from art. 102 comma (6) of Law 85/2014. As compared to the established principle of the immediate and full payment that art. 102 comma (6) enunciates as a literal reproduction of art. 64 comma 6 of the old Insolvency Law No. 85/2006, the definition of the current creditor provided by art. 5 point 21 of Law No. 85/2014 comes with an additional and apparently contradictory condition: "the current liability must be certain, liquid and exigible, arisen during the insolvency procedure."

Based on the opinion expressed above, i.e. that Law 85/2014 literally reproduced concepts enunciated in art. 64 comma 6 of the old Insolvency Law No. 85/2006, the regulations included in Law 85/2006 on the insolvency procedure and Law 85/2014 on the insolvency prevention procedures and insolvency, which refer to the "creditor with current liability-current creditor" expression seem to be susceptible of being comparatively analyzed in this material.

The accounting principle on accrual basis „cannot be applied in bankruptcy proceedings because collecting receivable payments and debt payments will be made in a period other than the reporting period in which they occurred, but the way they are registered and their reporting will be done at the time of production"[1].

THE COMPARATIVE ANALYSIS OF THE REGULATION OF CURRENT LIABILITIES BETWEEN THE TWO REGULATORY DOCUMENTS

1. Comparison between art. 3 point 7 and point 13 of Law 85/2006 and art. 5 point 21 of Law 85/2014

By analyzing the text of Law 85/2006 we may acknowledge that the "current liability" or the "creditor with current liabilities" concepts may be found in various articles of Law 85/2006. As already explained, a definition of the creditor with current liabilities was only introduced in art. 5 point 21 of Law 85/2014[2].

Art. 3 of Law 85/2006 mentions "the terms and expressions below have the following meanings" - there follows the general definition of the notion of creditor at point 7, while at point 13 within the definition of unsecured creditors the "new current liabilities pertaining to the current activities in the observation period" are also mentioned. By analyzing the quoted text it might be understood that only the unsecured liabilities arisen during the observation period might be acknowledged in the insolvency procedure as current liabilities, while the ones arisen during the reorganization period or during bankruptcy would be subsequently qualified as simple unsecured debts, yet the practice clarified the fact that all the liabilities arisen during the insolvency procedure bear the name of current liabilities.

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and creditors in insolvency proceedingshttps://www.juridice.ro/essentials/autorgheorghe-piperea, published on 08.02.2017)

[1] Nagy, Cristina Mihaela, Sabău, Crăciun (2015). Applying the principles of accounting in bankruptcy proceedings. Annals. Economic Science Series Vol XXI/2015, p. 291

[2] Art.5 point 21 Law 85/2014: current creditor or current creditor is that creditor who has certain, liquid and due claims, born during the insolvency proceedings and who has the right to receive his claim as a matter of priority according to the documents from which it result.

2. **Comparison between art. 64 (6) of Law 85/2006 and art. 102 (6) of Law No, 85/2014**

Comparing the provisions of art. 64 (6) of Law 85/2006[1] and art. 102 (6) of Law 85/2014[2] we may notice that in the text of Law 85/2014 the lawmaker failed to reformulate the expression "liabilities arisen after the procedure opening date" used in Law 85/2006 into the "current liabilities" expression introduced by art. 5 point 21 of Law 85/2014. Furthermore, the formulation "liabilities arisen within the bankruptcy procedure" of Law 85/2006 was merely nuanced into "liabilities arisen after the bankruptcy procedure opening date". We may find the text of art. 64 (6) of Law 85/2006 almost entirely reproduced in art. 102 comma 6 of Law No. 85/2014, while in the new regulation of art. 102 points (7), (8) and (9) have also been added.

Point (7) expressly mentions: "in case the bankruptcy procedure is opened after the observation or reorganization period, the creditors shall request the registration in the additional table for liabilities born after the insolvency procedure opening date that have not been paid". The same omission of using the expression "current liabilities" introduced by art. 5 point 21 of Law 85/2014, instead of "liabilities arisen after the insolvency procedure opening date that have not been paid..." should be noted.

As can be seen, the creditors holding current liabilities are not part of the liability holders who will be entered into the liability table within the procedure, since their liabilities are to be paid based on supporting documents. An exception from this rule is made by the provisions of art. 102 point 7 of Law 85/2014 where the lawmaker compels the creditors holding such liabilities to lodge a statement accompanied by supporting documents in order to be registered in the additional table of liabilities when the bankruptcy procedure is opened.

3. Comparison between art. 36 of Law 85/2006 and art. 75 comma (3) of Law 85/2014

The purpose of both regulations is to cover the debtor's liabilities by granting, when possible, the chance to redress the activity. An important role in the achievement of the goal of the insolvency procedure is the suspension of all the judicial, extrajudicial actions or forced execution measures.

Art. 36 of Law 85/2006[3] generically regulated the suspension of the judicial actions against an insolvent debtor. Once with the issuance of Law 85/2014, the generic regulation of the suspension of the judicial actions as it had been provided in Law 85/2006 was much explicated, establishing a series of exceptions. Amongst the exceptions from the suspension by right of such actions, art. 75 comma (3) of Law 852014[4] also introduced the judicial actions for the determination of the existence and/or the amount of certain liabilities upon the debtor, arisen after the procedure opening date.

The same omission of not using the expression "creditor with current liability" defined in art. 5 point 21 of Law 85/2014 should be noted. We are basically dealing with a lack of colligation among different articles of the same law; in the new insolvency law

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[1] Art.64 (6) Law 85/2006: The liabilities arisen after the procedure opening date, during the observation period or within the judicial reorganization procedure shall be paid according to the documents they are based on, without there being a need to register them as insolvency claims. The provision applies accordingly to the liabilities arisen in bankruptcy.

[2] Art. 102 (6) Law 85/2014: The liabilities arisen after the procedure opening date, during the observation period or within the judicial reorganization procedure shall be paid according to the documents they are based on, without there being a need to register them as insolvency claims. The provision applies accordingly to the liabilities arisen within the bankruptcy procedure.

[3] Art.36 Law 85/2006: From the date of the opening procedure, all judicial and extrajudicial actions or enforcements measures for the realisation of claims against the debtor or his assets are suspended by law.

[4] Art.75(3) Law 85/2014: The judicial action for determinig the existence and/or the amount of claims on the debtor, born after the date of the opening the procedure are not subject to suspension.

the lawmaker literally used the same expressions as in Law 85/2006, but without referring to the definition of the creditor with current liability introduced by art. 5 point 21 of Law No. 85/2014. The same article 75 comma (3) of Law3 85/2014 regulates the fashion in which a creditor with current liability may demand the payment thereof by formulating a "payment request" which may be lodged, both within the observation period and within the reorganization period.

With the introduction of the "payment request" as a manner provided for the creditor holding a current liability to ask the trustee/official receiver the payment thereof, we consider that it is necessary to lodge all the documents supporting the amounts requested in the payment request, which was omitted in the text of the law.

In our opinion the payment request lodged after the initiation of the bankruptcy procedure shall have to fulfill all the requirements analyzed above and will be subsequently settled following the same procedure provided by the lawmaker for the payment request lodged during the observation or the reorganization period.

We believe that it is an omission by the lawmaker when drawing up art. 75 comma (3), in the sense that the payment request may also be introduced after the bankruptcy procedure opening date. We support this assertion by the provisions of art. 102 comma (6) where the lawmaker expressly refers to the current liabilities arisen during the observation period and within the reorganization procedure mentioning that they shall be paid based on the supporting documents and shall not be registered in the list of creditors, complementing the omission in art. 75 comma (3) by the provision that "it is applied accordingly to the liabilities arisen after the bankruptcy procedure opening date"

We want to point out that the submission of the payment requests is subsumed within the observance of the provisions of art. 106 comma 1 of Law 85/2014.where the lawmaker provides the obligation of the trustee to check "every single request and the submitted documents", making a detailed request so as to establish the legitimacy, the exact value and the precedence of each liability. The expression "every single request" is left at the discretion of the interpreter. We consider that the lawmaker referred to the liability statements formulated by the creditors within the procedure and to the payment requests formulated by the creditors holding current liabilities in relation to the debtor.

Although art. 75 (3) of Law No. 85/2014 fails to mention that it is mandatory to lodge the supporting documents, art. 106 (1) of Law 85/2014 states the analysis of the submitted documents, while a more detailed verification of the legitimacy, the exact value and the precedence of every single liability is to be performed by the trustee, without defining the meaning of the detailed verification by the trustee when analyzing the requested lodged by the creditors.

Payment request procedure

For the settlement of the "payment request", the lawmaker provided in the same art. 75 of Law 85/2014 a very lacunary procedure which might have a single explanation in that the requested current liability must fulfill the requirement of being certain, liquid and exigible so as to be payable with precedence within the procedure.

At a first analysis the operation seems to be simple: once the payment request has been lodged it shall be analyzed by the trustee who is to make a decision on its payment. The creditor who holds a current liability will be able to formulate an appeal against the trustee's decision, which shall be lodged within the court having competence over the debtor's insolvency procedure. The syndic judge has competence over the settlement of such appeal and the sentence pronounced by him/her may be appealed against within the competent Court of Appeal whose sentence is final. The current liability requested by means of the payment request and granted is to be considered for payment by the trustee, but it will not be entered in the liabilities table based on art. 102 comma (6) of Law 85/2014.

At a more careful analysis things are not so simple. The current creditor who does not collect the claim by the due date shall have to formulate a payment request. It is not very clear whether the payment request must be lodged only with the court, only with the insolvency practitioner or communicated both to the court and the insolvency practitioner. In an ideal case, to relieve the court of useless communications and analyses, the entire procedure could have been realized between the insolvency practitioner and the current creditor, while the court would have intervened only in case of an appeal against the practitioner's decision. In other words, is the communication with the insolvency practitioner via the court of law necessary? We consider that in order to observe the expediency principle which governs the insolvency procedure this procedure might take place strictly between the practitioner and the creditor, by communicating the documents via fast electronic means such as e-mails or faxes, with the practitioner being able, under the same conditions, to ask for further details from the creditor, if applicable. In practice very many creditors keep away from the procedure which exceeds the lawfulness control exercised by the syndic judge for reasons that might depend on the lack of trust in the insolvency practitioner or the probatory force of certain e-mails.

Regardless of the payment request communication method, the insolvency practitioner is compelled to make a decision, to adopt a measure with respect to the formulated request. The manner in which a measure adopted by the creditor will be communicated is not regulated by the law. Is one e-mail, a formal letter attached to the e-mail, a notification with acknowledgment of receipt enough or will the measure have to be included within an activity report? If the liability is accepted by the insolvency practitioner, the topic does not raise any issues, instead, if the problem of appealing against the measure taken by the practitioner is raised, the creditor must act within the deadline. May an e-mail or a formal letter or a notification be appealed against? In our opinion, to be appealed against by the creditor, the measure must be mentioned in the activity report, which has a legal framework of appeal in the insolvency procedure. It must not be forgotten that, in principle, we may find the activity reports after a 3-month time interval, which term totally lacks expediency for a current creditor when it comes to waiting for the insolvency practitioner to make a decision.

When sending the request, the current creditor is compelled to check the Insolvency Procedure Bulletin daily while waiting for a decision made by the insolvency practitioner, which does not correspond to the very principles of the insolvency procedure: efficiency, suitable communication mechanisms, a high degree of transparency. It should not be forgotten that the Insolvency Procedure Bulletin is actually an online platform where all the publications by insolvency practitioners in Romania may be consulted, but please be aware, for a fee! If such subscription to access the Insolvency Procedure Bulletin does not constitute an impediment for the state-owned creditors, we must also consider the commercial partners, who besides not having received payment of the liability are also compelled to pay for a subscription in order to be able to see whether their claim will be accepted by the insolvency practitioner.

Art. 75 comma (4) of Law No. 85/2014[1] regulates a new possibility of action of the holder of the certain, liquid and exigible liability exceeding the threshold value of 40,000 RON. This particular case of exceeding the threshold value of 40,000 RON cumulated with the existence of the certain, liquid and exigible liability entitles the creditor holding a current liability to formulate a bankruptcy opening request in relation to the insolvent debtor during the observation period, if such liability was not paid within 60 days from the date on which the trustee took the measure or the court of law passed

[1] Art.75(4) Law 85/2014: the holder of a certain liquid and due current claim that has been recognised by the judicial administrator or by the syndic judge and whose amount exceeds the threshold value may request during the observation period the opening of the bankruptcy procedure of the debtor if this claims are not paid on time, 60 days from the date of the measure taken by the judicial administrator or the court decision

the irrevocable decision. To conclude, the creditor who holds a current liability may request the opening of the bankruptcy procedure during the observation period only if such current liability cumulatively fulfills all the aforementioned requirements.

The manner of action regulated by art. 143 comma (3) of Law 85/2014 by means of which the creditor who holds a current liability may be fully satisfied within the reorganization procedure, even if his liability is not entered in the liabilities table, but it rather represents a restraining tool for the creditor who may force payment of his liability under the threat of opening the debtor's bankruptcy. It should be mentioned that such right to action was not regulated by the old law.

Before analyzing the provisions of the aforementioned article we must point out that all the current liabilities must be mentioned in the reorganization plan, specifying the income source and the manners of payment thereof, although, as shown before, it is not registered in the only document highlighting the situation of the insolvent debtor's debts, i.e. the liabilities table, liabilities which must be taken into consideration when making payments within the reorganization plan.

Art. 105 of Law 85/2006 provided for the opening of the bankruptcy procedure only in case the debtor failed to observe the provisions of the restructuring plan approved by the creditors or if the debtor's activity produced losses as preliminary conditions for the formulation of the bankruptcy opening request. The lawmaker gave the trustee, the creditors committee, the special administrator and the creditors registered in the liabilities table the possibility to formulate such a request, if one of the two aforementioned conditions was fulfilled. The registration of such a request with the syndic judge did not suspend the activity of the debtor until the resolution pronounced by the syndic judge did not become irrevocable, inasmuch as it was appealable within a higher court.

The novelty brought by the provisions of Law 85/2014 by art. 143 (3) which we are analyzing consists in the fact that every creditor holding a current certain, liquid and exigible liability older than 60 days, amounting to more than 40,000 RON may request, both during the execution of the reorganization plan and after the completion thereof, the debtor's passage to bankruptcy.

The fundamental difference between the two law texts resides in one creditor who was not registered in the liabilities table being able, under certain cumulative conditions, expressly formulated by the law (certain, liquid and exigible liability, exceeding the threshold value, payment delayed by more than 60 days) throughout the reorganization procedure, to formulate a bankruptcy opening request for the debtor undergoing reorganization.

Based on the comparative analysis of art. 105 of Law 85/2006 and of art. 143 comma (3) of Law 85/2014 it must be noticed that the two criteria mentioned by the ;lawmaker in Law 85/2006 for the introduction by a creditor of a bankruptcy opening request for the debtor undergoing reorganization, namely: inobservance of the reorganization plan and the activity of the debtor undergoing reorganization producing losses, are no longer mentioned when the conditions under which the creditor holding current liabilities may formulate a bankruptcy opening request for a debtor undergoing reorganization are established. In other words, according to Law No. 85/2014, the mere existence of an unpaid current liability, amounting to a value larger than the threshold, may lead to the opening of the bankruptcy procedure, regardless of whether the payment schedule assumed by the reorganization plan was observed or not.

Even after the formulation of the bankruptcy by the creditor, the debtor may prevent bankruptcy opening by paying the current liability or by signing a commitment to pay with the current creditor. Although one of the natural manners to avoid the opening of the bankruptcy procedure is the payment of the current liability, the debtors speculated the condition of the 40,000 RON threshold value making payments so as to lower the amount of the current liability below such threshold, which prevents the current creditor

from formulating the bankruptcy request. In our opinion the lawmaker should consider the rejection of the bankruptcy opening request under condition of full payment of the current liability.

Also susceptible to discussions is the second option proposed by the lawmaker where the syndic judge may reject the bankruptcy request formulated by the creditor who holds a current liability if a payment convention is concluded between the creditor and the debtor. Thus, the lawmaker admits that in the reorganization procedure where all the creditors are compelled to wait for the payment of their liabilities within the deadlines mentioned in the payment schedule annexed to the reorganization plan - liabilities which are sometimes largely diminished - in the case of the current liability it is allowed to conclude a payment convention, which may lead us to think, if the law is quiet, to payment scheduling, without any limitation from a temporal perspective.

Such lacuna in drawing up the newly-introduced art. 143 (3), by failure to colligate it with the other deadlines provided in chapter: "Judicial reorganization" might lead to the distortion of the deadline imposed by the law for the completion of the reorganization period provided in the reorganization plan, to its unjustified extension by the deadline of the specific payment convention.

The only legal requirement provided by art. 143 (3) to be taken into consideration by the syndic judge on the date of rejection of the bankruptcy request formulated by the creditor who holds a current liability being the one provided for the debtor to prove the conclusion of a payment convention, we consider that it may lead to interference in the judicial reorganization administration procedure. In our opinion, to give efficiency to this new legal construction by means of which an attempt is made to achieve the goal contemplated by the new Insolvency Law No. 85/2014, namely to provide the insolvent debtor with the possibility to reorganize its activity in hopes of being able to continue it must be achieved by mandatorily introducing, in conjunction with the specification of the conclusion of a payment convention, the maximum deadline within which such payment must be made.

Conclusions

Reorganization is the chance of a debtor facing financial difficulties to rethink his activity so that by means of the reorganization plan he should be able to pay the debts he made before the opening of the insolvency procedure, but at the same time he is bound to also pay all the debts generated by the continuation of his activity during the insolvency procedure period.

Although the current liabilities do not seem to hold an important place in the lawmaker's conception about the insolvency procedure, it must not be forgotten that the holders of such liabilities are the ones who grant trust to the debtor by the continuation of their business operation as usual even if the company is in an insolvency state. Without minimizing the legislative amendments made in 2018, which grant an enhanced protection to the current creditor, we cannot fail to notice that the realization of the current liability in practice does raise a series of issues. The absence of a clear current liability recovery procedure within the insolvency procedure shall invariably lead to the situation where the business milieu will avoid collaborating with the companies in an insolvency state, which is not to be desired.

To convince the business milieu that continuing business operations with the insolvent companies will not cause financial difficulties to them, we believe that it is mandatory for the lawmaker to consider a future establishment of a clear current liability recovery procedure without costs for the creditor, inasmuch as otherwise all the debtor's efforts to reorganize his business shall be hindered by the business partners who will refuse to collaborate with the insolvent debtors.

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