

Procedural issues on patrimony liability in matters of insolvency

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Abstract: The Law of insolvency procedure expressly provided the acts for which it can be engaged the members' management responsibility of the debtor's liabilities, legal person, reached in insolvency state. However, 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. In case when the procedure ended, but not have passed such an application, the interested litigant parties have the way the appeal against the sentence which insolvency proceedings closed. If, however, 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 fulfil cumulatively the conditions foreseen for civil liability. During the course of the proceedings the creditors are obliged to pursue compliance with the laws relating to the designation of the creditor and the performance of the incumbent so as to make application to the training period in property liability laws. Regarding the onslaught state, this law pronounced by the court decisions can be challenged by appeal. As the law on insolvency procedure is completed by the Code of Civil Procedure, to the extent of compatibility, the motives for appeal are those set out in art. 304 Code of Civil Procedure. Judicial control is done both on the grounds of appeal raised by the recurrent and ex officio in all aspects, because the pronounced decisions in first instance on this subject, according to the law, can not be challenged by appeal.

Keywords: insolvency proceedings, property liability, judicial administrator, judicial liquidator, debtor's liabilities

The insolvency procedure, regulated by Law no. 85/2006 on the insolvency and bankruptcy procedure can be opened only through an addressed request, by the ones who the law recognizes the active procedural quality (debtors, creditors as well as any other person or institutions stipulated by law), the tribunal whose jurisdiction covers the debtor's seat, according to the commerce register, agricultural societies register or the register of associations and foundations. The organs that apply this law are the judicial instances, the judge-syndic, the judicial administrator and the judicial liquidator. Like in any 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 judge-syndic. In our demarche, considering the non unitary practice in applying the text of the article 138, I considered as being opportune to proceed to the analysis of this text, in what concerns the titular holders 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 issues presented, we will partly present the context on the article 138, according to which: (1) "At the request of the judicial administrator or the liquidator, the judge-syndic can dispose that a part of the asset 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, by one of the following acts: (a-f)

(1) The creditor's committee can ask the judge-syndic to authorize it to act according to al.1, if the judicial administrator or the liquidator omitted to indicate, in the report on the insolvency 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 in al.1 and the liability of the persons mentioned in the al.1 threatens to be prescribed.(2), (3)".

Thus the judge-syndic 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 it the judicial administrator and the creditor's committee are comprised. If, in what concerns the titular holders of this type of request, namely the judicial administrator and the liquidator do not impose certain conditions, we have to mention that the creditor's committee can promote such a request only in 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.
- Not introducing a liability request by the judicial administrator or the liquidator, although the guilty persons have been indicated
- The judicial administrator or the liquidator omitted to formulate responsible actions and this is going to be prescribed
- Obtaining, by the creditor's committee of the authorization from the judge-syndic, in order to be able to proceed with the action.

The insolvency procedure has a collective and the possibility for a creditor to recover its claim and the way in which he will participate at the distribution of the sums resulted from the exploitation of the debtor's actives is tightly connected to the spread of the claim rights of the other creditors and the guarantees they present, this is why the creditors have the obligation to follow the sequence of the debtor's insolvency procedure. In practice it is usually observed the fact that it results in the closure of the procedure and the creditors solicit the liquidator to draft a detailed report on the causes and the circumstances that generated the insolvency of the debtor, mentioning the persons who might be guilty. This report has to be drafted within 60 days from the designation of the judicial administrator or the liquidator (article 59, al.1) and not at the end of the procedure. In this stage, the judicial liquidator makes a final report, accompanied by all the final financial statuses, according to the article 129 of the law, but some creditors ask the liquidator, as opposed to the law, to put in for a report with the content stipulated in article 59.

In applying the text related to the judicial administrator's or the liquidator's omission to formulate the action stated by article 138, al.1, the judicial control instance maintained the judge- syndic's decision that rejected the creditor's committee request, that solicited the authorization, on the grounds that "the judicial liquidator did not omit to formulate this request but refused to do so, 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 and the appeal will be rejected".¹ We think that in the case in which the judicial liquidator mentioned that it doesn't understand to formulate this kind of request, this statement is not equivalent to an omission in the legislator's opinion. In analyzing the liquidator's position, the instance has to ascertain, establish on the grounds of the evidence presented, that the liquidator will not introduce himself this kind of request and if his refusal to promote a request is abusive, meaning that it is not covered regarding the evidence in the file and the legal dispositions. Actually what do the creditors want? That an action against the debtor society's administrator is 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 granted 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. But in certain cases there are only two creditors or even one, situation 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 practice² 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, in the insolvency procedure and in this case there is an identity between the two participants in the procedure (the creditor's assembly and the creditor's committee). Consequently, the Law no.85/2006 has been modified through the

¹ In this context, Appeals Court Galati, Com. Sec. Maritime and fluvial, decision no. 568/R/2.08.2007 (unpublished);

² In this context, Appeals Court Galati, Com. Sec. Maritime and fluvial, decision no. 769/R/12.10.2007 (unpublished);

Government's Emergency Ordinance no.173/2008 that states in article 16, al.1 thesis II that the legislator adopted this solution accordingly: "if due to a small number of creditors the judge-syndic 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".

Usually, in the closure of the insolvency procedure, the creditor's see that the creditor's committee has not been constituted and formulate individual requests that solicit the implication of the liability of the debtor's administrators for the remaining uncovered assets. 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 it is a real "contest" between the creditors that consider themselves as being prejudiced, following the un recovery of claims and by invoking this reason, they individually promote this kind of requests. 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, al.1, a-g.

The common law rule is that the litigants, unsatisfied with the decision of the first instance, can appeal or choose one of the ways to contest a decision that the legislator established as being fair, in each situation. But in the matter of insolvency procedure, it is not sufficient to be part of trial before the first instance, but you have to prove that you have been the titular of the request. Thus, the judicial control instance³ 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 judgment of the judge-syndic and did not proceed with the appeal. The appeal was declared by an individual creditor that was not the titular of the request and was rejected as being inadmissible. The instance of appeal where the recurrent creditor exerted the appeal although he wasn't the titular of the request rejected the appeal for lacking active procedural quality.⁴ It had been held that the request based on article 138, al.1 was formulated by the judicial liquidator and not by the creditor committee authorized by the judge-syndic. What is 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, that the attributions of the creditor's committee have to be exerted by the creditor's assembly? 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 instances⁵ have stated that the judicial liquidator did not understand to formulate the request in virtue of article 138, al.1 and that one of the creditors empowered him to formulate a request to the judge-syndic, in order to promote such a request, as well as for the promotion of the request, according to article 138, al.1 and al.3 of the law and that the judge-syndic wrongly admitted the exception for the representative of creditor X and canceled the request to authorize the request of involving the liability solicited by the creditor X. The instance for judicial control admitted the appeal of this creditor, annulled the recurrent decision and sent the case to retrial to the same instance, so that it can decide on the request of creditor X, with the purpose on authorizing the formulation of the request to engage the administrator's liability. The court motivated that the two creditors represent the majority of the creditors on the claim's table and that the quality of representative of the debtor creditor's committee is fulfilled, committee that is mixed with the total amount of creditors. We have to mention that in the abovementioned case there are three creditors, one of which maintained a neutral attitude and did not approve on promoting the request by the creditor X. We argue that the solution pronounced by the Appeal Court in Constanta as being according with the purpose of the law regarding the insolvency procedure.

³ 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

⁴ In this context, Appeals Court Galati, Com. Sec. Maritime and fluvial, decision no. 337/R/09.05.2008 (unpublished);

⁵ 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.

Going back to the conditions stated above, in the case in which the judicial administrator or the liquidator does not indicate in the report the persons guilty of the general state of insolvency, in virtue of article 138, al.3, the creditor's committee has the possibility to ask the judge-syndic to authorize the action for liability stated by article 138, al.1. In which moment of the procedure the creditor's committee must formulate such a request? We think that in order to give efficiency to the principle or celebrity in deploying a procedure, such a request has to be formulated after drafting the report stated in article 59 of the law. Ignoring this principle by the participants in this procedure (especially by creditors) leads to the diminution of the effect pursued by the legislator in recovering the claims.

What are the elements that an authorizing request for the creditor's committee must contain? Obviously, that they are the elements that any request of this kind has to consist, together with the specific of the procedure and the indication of meeting the conditions stated in the text of article 138, al.3 mentioned above. Even if the text doesn't stipulate it, in the practice of the instance it has been observed that the judge-syndic is "touching the bottom". If we don't accept this reality, we could talk about arbitrary indicated by the judge-syndic in solving these requests. In the motivation of the admission of the authorizing request, he doesn't have to motivate the solution on the grounds of the guilt of the former administrator and the volume of the asset that has to be covered. If so the judge-syndic can be challenged as he pre judges on the solution that has to be given to the fund of this request. The situation is the same in case the authorization request from the committee is rejected, on the grounds that the conditions stipulated by the article 138, al.1, a-g, are not met.

In what concerns the formulation of the text of article 138, al.3 on the "liability of the persons referred to by the al.1 threatens to be subscribed", we argue together with the other authors⁶ that the condition to prove the fact that the action threatens to be subscribed doesn't have to be imposed to the creditor's committee. Maintaining this phrase would detain the creditor's committee to act immediately the report is being submitted (article 59). As the purpose of this collective procedure is to constitute a collective procedure to cover the asset of the debtor in insolvency, we argue, as well as the author quoted above, that the legislative intervention is imposed so that the creditor's committee is no longer retained by the formulation or not of the request of liability of the judicial administrator or the liquidator. This issue is imposed, especially because the judge-syndic cannot self refer to and authorize the creditor's committee in order to formulate such a request. The doctrine⁷ stated the hypothesis according to which, in case the judge-syndic refuses to authorize the creditor's committee to promote the request for liability, and the prescription term is imminent, the instance will solve the case on grounds and not due to the exception of the lack of authorization. Regarding such a proposition, the judges would appreciate that it doesn't respects the stages imposed by law, concerning the authorization and then the formulation of the request by the creditor's committee. We state that the judge of the cause has to pursue the recovery of assets and consequently pronounce a solution as such.

In what concerns the persons that have passive procedural statute in liability actions, the law abovementioned takes into consideration the members of the administration organs and the supervision organs of the commercial societies, corporate organizations, agricultural enterprises and groups of economic interest. The liability instituted by article 138 can be exerted both on de jure administrators as well as on de facto administrators, on the basis of the evidence administrated in the case. The acts that can involve the liability of the management organs are the ones stated in article 138, al.1 (a-g) in the law. The legislator provisioned in al.2 that the application of these dispositions does not eliminate the application of criminal law for the actions that represent deeds.

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⁶ For details, see I. Adam, C.N. Savu, *Insolvency procedure law, Comments and explanations*, Ed. Ch Beck, Bucharest , 2006, p.766

⁷ I. Adam, C.N. Savu, *op.cit.*, p. 768.