

BANKRUPTCY. STAGE OF INSOLVENCY PROCEDURE

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Abstract: *This paper looks at the bankruptcy stage, which is a collective and egalitarian insolvency procedure that applies to the debtor in order to liquidate his property for covering the liability, followed by the debtor's deletion from the register in which he is enrolled. We presented the special procedure, regulated distinctly by the Romanian legislator, which gives creditors the chance to recover their debts from the debtor company, a procedure that takes place with the direct assistance of the judicial liquidator and the syndic judge.*

Keywords: *bankruptcy, liquidation, debtor, creditor, judicial liquidator, syndic judge.*

JEL Classification: *K350*

1. Introduction

Law no. 85/2014 on the insolvency procedure also regulates the bankruptcy procedure in its legislative content, in addition to the judicial reorganization process, which can be carried out under both simplified or general procedures.

Bankruptcy is the last and one of the procedural steps provided by the legislator under the legislation regarding the insolvency procedures or the prevention of this state. The bankruptcy phase may also be seen as a forced execution procedure involving all the assets of the debtor who is unable to pay the debts owed with the available amounts of money at that time.

The legal framework is represented by Law no. 85/2014 on the insolvency procedure and the insolvency prevention procedures.

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The stage of bankruptcy has as its objectives actions such as the liquidation of the debtor's property for covering the liability, followed by the deletion of the debtor from the trade register in which he is registered and the verification of the issues regarding the admissibility of an action for a patrimonial liability as defined in Art. 169 of Law no. 85/2014.

2. Cases in which the debtor's bankruptcy commencement is ordered

If the legal conditions are found to be fulfilled, the insolvent debtor will go bankrupt as a result of a judgment given by the syndic judge in the competent court. In this respect, the provisions of art. 120 Civil Procedure Code are enforced; it provides that *claims in insolvency are the exclusive jurisdiction of the court in whose circumscription the debtor has its domicile*. The judgment is admissible and the syndic judge will order as follows if:

- the debtor has expressed its intention to undergo the simplified procedure;
- the debtor has not expressed its intention to reorganize its activity;
- none of the other entitled subjects/persons have proposed a plan of reorganization, according to the provisions of art. 132, or none of the proposed plans has been approved and confirmed;
- the debtor has expressed its intention of reorganization, but has no plans of reorganization or the proposed plan has not been accepted and confirmed;
- the payment obligations and the other incumbent obligations are not accomplished according to the conditions stipulated in the confirmed plan or the debtor's activity carried out during the reorganization process triggers losses to its patrimony;
- the judicial administrator's report proposing, as the case may be, the commencement of the bankruptcy proceeding was approved, according to art. 92 para. (5) or art. 97 paragraph (5) of the Law.
- in the cases provided by art. 75 par. (4) and Art. 143 par. (3) of the Law.

3. Effects of the debtor's bankruptcy commencement

It is very important to point out that, according to the legal provisions regulating this procedure, regardless of the form of the procedure, whether general or simplified, the dissolution of the debtor entity occurs lawfully.

The debtor's bankruptcy commencement, as it is normal, produces consequences and legal effects, provided in the content of art. 145. These are:

a) with drawing the debtor's right to administer its business. The purpose of this measure is to prevent the loss of the insolvent debtor's assets through illegal or defective activities of the persons who administered the debtor prior to bankruptcy. It is important to note that according to art. 85 par. (4) of the Law no. 85/2014, the debtor's administration right ceases lawfully at the date when the bankruptcy is commenced; the right to administer is to be exercised by the judicial liquidator;

b) appointing a temporary judicial liquidator within the general proceeding as well as stating their duties and fee according to the criteria approved by the law on the organization of profession. Moreover, the appointment of the temporary judicial liquidator shall be done in accordance with the provisions of art. 98 paragraph (2) of the Law, by the syndical judge, who will also establish the remuneration of the provisional liquidator. The measure is of a short duration since its term of office is valid until the date of the appointment of the definitively appointed judicial liquidator chosen by the creditors' assembly;

c) confirming, as liquidator, the judicial administrator within the simplified proceeding appointed according to the provisions of art. 57 par. (2) or art. 73 of the Law, as the case may be. These provisions refer to the situation of confirmation as a liquidator of the judicial administrator only if the general procedure goes into the simplified procedure in which the debtor goes directly into bankruptcy and this situation occurs only under the hypothesis provided by art. 92 of the Law (Adam, I., Adam, R., 2016, p.727).

d) within the general procedure, the maximum term from the bankruptcy commencement of passing the management of the entity from the debtor / judicial administrator to the judicial liquidator, together with the list of acts and operations performed after the opening of the procedure provided by art. 84 par. (2) of the Law;

e) drawing up by the judicial administrator and the delivery to the judicial liquidator within a maximum of 5 days from the bankruptcy commencement within the general procedure of a list containing the names and addresses of the creditors and all their claims at the date of bankruptcy, indicating those made after the opening of the proceeding, the final claim

table and any other tables drawn up during the proceedings, any distribution reports, the list of acts and transactions made after the opening date of the proceeding. This obligation rests with the special administrator, with the opinion of the judicial administrator, if the right of administration has not been withdrawn up to the date of opening the bankruptcy procedure. This legal provision essentially seeks to distinguish between the claims arising before the opening of the procedure and those born in the observation period, that is to say after the opening of procedure;

f) notification of bankruptcy commencement. It is a natural effect of bankruptcy, followed by the obligation of the liquidator who will have to notify the bankruptcy commencement regardless of the form of the procedure in which bankruptcy would go, whether we refer to the general procedure or to the simplified one.

4. Inventory, evaluation and procedure of the liquidation of assets

The immediate purpose of the bankruptcy procedure is to transform the debtor's assets into cash and to cover the existing claims on the debtor under the conditions provided by the law (St.D. Cărpenaru, 2014), while the mediated purpose is to pay the insolvent debtor's liabilities. It can be said that the purpose of bankruptcy is subsumed to the purpose of the law, because it aims to regulate a procedure for the payment of the insolvent debtor's liabilities. The bankruptcy procedure consists of a set of operations and legal acts concerning: the decision to go bankrupt, the establishment of the active mass, the liquidation of the debtor's assets, the distribution of the liquidity, the closure of the procedure (St.D. Cărpenaru, 2014, p.687).

The bankruptcy procedure is not closed even if the claimant's request for the opening of the proceeding has been satisfied if other creditors have filed legal actions, since the purpose of the proceeding is to liquidate the assets and pay all the debts of the insolvent debtor.

As a result of the bankruptcy procedure, the receivables are due, so the restriction to participate in distributions ceases, except for the qualified financial contracts and the bilateral clearing operations based on a qualified financial contract or a bilateral clearing agreement which, by the will of the legislator, will not be able to participate in distributions because they are not considered mature during the bankruptcy procedure (Adam, I., Adam, R., 2016, p.749).

The sealing of the goods constituting the debtor's assets follows, being a conservative measure, which is one of the liquidator's duties according to art. 64 para. d of the Law, stipulating that the liquidator *has the obligation to apply the seals, to inventory the assets, and to take the appropriate measures for their preservation*. The sealing operation of the debtor's assets is accomplished after the debtor's assets have been fulfilled, but it is also possible for these operations to take place at the same time. If the debtor's assets can be fully inventoried in one day, the judicial liquidator will be able to immediately proceed with the inventory without applying the seals. The inventory procedure is a fast-track procedure and will be conducted in the presence of the special administrator only if the syndic judge says so. The legislator provides a sanction applicable to the special administrator, stating that *if this does not appear for the inventory procedure, he will not be able to subsequently challenge the inventory data*.

In order to satisfy the creditors who have certain liquid and due claims to be recovered from contractual, commercial, etc. agreements with the debtor, following the moment of inventory of the assets of the latter, is the procedure for the actual liquidation of the assets from the debtor's assets.

The liquidation of the goods from the debtor's assets is performed by the judicial liquidator under the control of the syndic judge. In order to satisfy the interests of all directly interested creditors, as stated above, the judicial liquidator, within the scope of his duties, must carry out his duties in compliance with the principle of maximizing the debtor's assets. The principle of maximizing the debtor's assets, although not expressly regulated by Law no. 85/2014, can be inferred from several texts of the law, being consistent with its primary purpose. Thus, it is the responsibility of the judicial liquidator to make every effort to capitalize the debtors' assets at a price as high as possible, preferably above the evaluated value of these assets and to effectively recover the debts from the debtor's assets or the amounts of money transferred by this before the opening of the procedure.

The assets existing in the debtor's property can and will be valued, their sale being made in block or individual, depending on their nature and the possibility of capitalizing on them. The assets will have to have a valuation report made by an expert accepted in the field, specifying their market value, the expert using methods to identify the optimal value of each asset in order to satisfy the creditors enrolled in the creditor table. Thus, the judicial liquidator will be able to conclude a sales contract, the proceeds of

the sales being deposited with the bank in the debtor's account where they will be kept until the date of distribution.

The order in which the amounts of money made after the liquidation will be distributed is regulated by the content of art. 161 of the Law, which states that, in the event of bankruptcy, the receivables are paid in the following order:

1. taxes, stamps and any other expenses related to the sale of the respective assets, including the expenses necessary for the preservation and management of these goods, as well as the payment of the remuneration of the persons employed under the conditions of art. 57 para. (2), art. 61, 63 and 73, subject to the provisions of art. 140 para. (6);

2. claims arising from financing granted according to art. 87 para. (4);

3. claims arising from the employment relationship;

4. the debts resulting from the continuation of the debtor's activity after the opening of the procedure, those due to the co-contractors according to the provisions of art. 123 par. (4) and those due to third-party acquirers in good faith or to sub-lenders who return the assets to the debtor's assets or their value according to the provisions of art. 120 par. (2) and art. 121 par. (1);

5. budget receivables;

6. debts representing the amounts owed by the debtor to third parties, on the basis of maintenance obligations, allowances for minors or payment of periodic amounts intended to provide means of subsistence;

7. claims representing the amounts established by the syndic judge for the maintenance of the debtor and his family if he is a natural person;

8. receivables representing bank loans, related expenses and interests, those resulting from the deliveries of goods, services or other works, as well as from rents according to art. 123 para. (11) lit. b), including the obligations;

9. other chirographic claims;

10. subordinated claims, in the following order of preference:
a) claims arising in the patrimony of third-party acquirers of bad faith of the debtor's assets under art. 120 par. (2), those due to the bad faith sub-creditors under art. 121 par. (1) as well as the credits granted to the juridical debtor by an associate or shareholder holding at least 10% of the share capital, respectively of the voting rights in the general meeting of the associates or, as the case may be, by a member of the economic interest group; b) debts arising from documents free of charge.

The amounts to be distributed among creditors in the same priority rank will be awarded in proportion to the amount allocated to each claim through the consolidated final table.

For the creditors holding receivables entered in the final consolidated debt table, which have been only partially allocated sums or debts under suspensive condition and have taken part in the distribution, the due amounts will be held at the bank, in a special deposit account, until their situation is clarified.

The legislator states that after the assets of the debtor's assets have been liquidated, the judicial liquidator will submit to the syndic judge a final report accompanied by the final financial statements. In this regard, copies of these will be communicated to all creditors and the debtor by their publication in the Insolvency Proceedings Bulletin. The syndic judge will convene the convocation of the creditors' assembly within a maximum of 30 days from the publication of the final report and the creditors may object to the final report at least 5 days before the convocation date. The syndic judge shall, by concluding, pronounce on all the objections formulated in the final report and accordingly, as appropriate, approve or amend it. After approving the final report drafted by the judicial liquidator, this will have to make the final distribution of all the funds from the debtor's assets.

The legislator also states a special situation if it is found that there are no assets in the debtor's assets or that they are insufficient to cover the administrative expenses and no creditor offers to advance the corresponding amounts, the syndic judge will urgently hear the creditors, and in the case of their refusal to advance the necessary sums or in case of failure to submit them, the judge will issue a closing sentence for the procedure, which also orders the debtor to be removed from the register in which he is enrolled.

Conclusions

If the claims of the creditors are fully covered by the distributions made during the bankruptcy phase, the syndic judge will issue a sentence closing the bankruptcy procedure and removing the debtor from the trade register in which he is enrolled. The closing sentence of the procedure will be notified by the syndic judge to the Regional General Public Finance Directorate or, as the case may be, the County Public Finance Administration and the Trade Registry Office or, as the case may be, the

Agricultural Companies Register or other registers where the debtor is registered for making all the necessary entries. By publishing it in the Insolvency Proceedings Bulletin, all creditors will be notified of the closure of the procedure. Thus, the syndic judge, the liquidator and all the persons who assisted them are discharged of any duties or responsibilities regarding the procedure, the debtor and his property, creditors, holders of preference rights, shareholders or associates.

By closing the bankruptcy procedure, the individual debtor will be discharged from his obligations prior to bankruptcy, but obviously, unless he is found guilty of fraudulent bankruptcy or fraudulent payments or transfers. The legislator also provides that in such situations the individual debtor may and will be discharged from obligations only to the extent that they have been paid during the insolvency procedure.

References

1. Adam, I., Adam, R., -*Codul Insolventei. Comentarii si explicatii Titlul II. Procedura insolventei (art. 1-5, 38-196, 197-203) / The Insolvency Code. Comments and explanations* Ed. C.H. Beck, București, 2016
2. Turcu, I., *Codul insolvenței. Comentarii pe articole – Ediția 5 / The Insolvency Code. Comments on articles – fifth edition*, Ed. C.H. Beck, București, 2015
3. Cărpenaru, S.D., Hotca, M.A., Nemes, V., *Codul insolvenței comentat. / The Insolvency Code*. Ed. Universul Juridic, București, 2014
4. Adam, I., Savu, C.N., *Legea procedurii insolvenței – comentarii și explicații / The Insolvency Code. Comments and explanations*, Ed. C.H. Beck, București, 2006