

THE TEMPORAL METAMORPHOSES OF THE NATIONAL REGULATIONS ON INSOLVENCY OF PROFESSIONALS

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ABSTRACT: *One of the concepts we constantly stumble upon in the business environment is "insolvency." From historical perspective, this concept has seen different approaches, according to the business environment on which it was transplanted. The paper proposes an analysis of the historical aspects of the concept of "bankruptcy" from the moment of its first regulation at national level, in 1887, until this date. Following the proposed analysis, it is observed that, over time, the philosophical approach of the concept of "bankruptcy" has undergone a change of paradigm. The concept of insolvency comes to light and its content transcends from its punitive character for the small trader to its restructuring and redressing character for the business itself.*

KEYWORDS: *bankruptcy; bankrupt; insolvency; restructuring; liquidation*
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1. INTRODUCTION

The precursor of the concept of insolvency, the concept of "bankruptcy" is explained in the doctrine (Costin & Miff, 2000, p.7-9) from the etymological point of view: the Latin, "fallo-fallere" is translated as "missing, escaping", "deceiving expectations"; in Italian "fallire" means "wrong, stop paying, deceiving, not responding to expectations" and "fallimento" means "bankruptcy, error, mistake".

2. THE ORIGIN OF THE CONCEPT OF "BANKRUPTCY"

Analyzing the origin of the legal institution of bankruptcy, the previously cited doctrine reveals the importance of enforcement procedures under Roman law, namely the "manus iniectio" and "venditio bonorum" procedures, which essentially consisted in the forced execution of the debtor for failing to fulfill his obligations. With regard to the 'manus iniectio' procedure, it is emphasized that it is based on the material relation between the creditor and the debtor, which gives the former the right to dispose of the latter, just as an owner disposes of his/her property based on the right to property, materializing in the following manifestation of the creditor indicated by Hanga (1977,

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p.124) "*Manus iniectio* is therefore the creditor taking possession of the debtor and disposing of it." In case the amount due was not paid, the creditor was taken to the creditor's private prison for 60 days. The debtor was taken out in the town square for three times, the creditor announcing the amount due in hope another person would pay it. At the 60-day maturity, the debtor could be sold by the creditor in order to recover the debt, and beyond the Tiber the debtor would be even killed, and "if there were more than one creditor, they could cut his body into pieces." Even though this measure has been abrogated over time, forced execution over the person has remained in force in the old Roman law.

The "*venditio bonorum*" procedure had two phases: "*missio in bona*" and "*venditio in bonorum*". Within the first phase, the debtor owner was supervised by the creditor in order to avoid increasing his inability to pay. If the debt was not paid within 30 days and if the debtor was alive and respectively within 15 days if the debtor was dead, "*venditio bonorum*" would step in, that is the sale of the debtor's assets. The praetor would assign a magister bonorum that went on to sell the goods in bulk. The buyer of the goods acquired the debtor's patrimony and exerted all the actions for the collection of any claims, acknowledged or challenged the receivables, verified them and the magister would assess how much to pay the creditors. The debtor executed through *venditio bonorum* became infamous. The forced execution was also known through the retail sale *distractio bonorum* of goods; the goods were no longer sold in block but successively until the claims of all creditors were met, and the procedure did not attract the infamy of the debtor, as shown in the doctrine (Firoiu & Marcu, 1987, p.173-174 și Sâmbrian).

Essentially, in terms of the legislation on the cessation of payment of the trader-debtor, the Middle Ages feature the repressive nature of the punishments applicable to persons in such situations, which were particularly cruel punishments in both Italy and France. In Italy, the concept of "*bankrupt*" came from the concept of „*banca rotta*”, meaning the crushing of the counter on which laid the goods of the merchant that did not honor its debts. The concept of „bankruptcy fraud” is maintained up to this date in the national legislation.

The French Commercial Code of 1807 included this regulation in the matter that covers bankruptcy and bankruptcy fraud, and traders who did not fulfill their obligations to their creditors were judged "extremely and conclusively " (Ripert & Roblot, 1990, p.747), bankruptcy lawsuits were settled in commercial county courts and the punishment applicable for bankruptcy, was imprisonment, the so-called „debtors prison”, which we encounter in Cesare Birotteau, in Balzac (1990), as well as in the story of the life and works of Charles Dickens, as a reflection of the similar regulations in England during the same period

By locating our analysis at the temporary benchmarks indicated *ut supra*, we find that bankruptcy regulation was applicable to traders operating as natural persons in primary types of economic organization. Furthermore, bankruptcy regulations were based on ignominious sanctions applicable to the trader who did not meet his payment obligations to creditors. Through these sanctions, the trader was subjected to public disgrace, and the creditors' actions, such as grabbing and owning the debtor, or breaking the trader's counter, as well as "debtors' imprisonment," meant ways in which the situation of the trader who did not fulfill its obligations became "*opposable*" to other traders, who were thus made aware of its situation.

We also note that already since this period, for traders have been enacted not only particular rules such as those on obligations, bankruptcy, competition, but also have a specific jurisdiction, commercial jurisdiction, adopted for the legal relations of this area.

3. THE CONCEPT OF "BANKRUPTCY" IN THE REGULATIONS COMPRISED BY THE ROMANIAN COMMERCIAL CODE OF 1887

Inspired by the Italian Commercial Code of 1882, the Romanian Commercial Code entered into force on September 1, 1887¹, and it included the bankruptcy regulation. Since 1945, the Commercial Code, although not repealed, has not been applied, not being in accordance with the established economic and social realities, but has become applicable again after 1990. This paradoxical legal situation was generated by the fact that, after 1990, in the absence of specific regulations on commercial obligations and bankruptcy, the application of the provisions of the Commercial Code was resumed in both matters. These provisions instituted in a commerce and economy development period, were in line with the constitutional principles on the exercise of freedom of trade, established by the 1991 Constitution, developed in the doctrine (Ionescu & Dumitrescu, 2017, p.555), which essentially meant "The exercise of economic freedom under the law, without prejudice to any person, to any entity legal, public or private."

The provisions of the Commercial Code on bankruptcy were repealed with the entry into force of Law no.64 of June 22, 1995, on the procedure of reorganization and judicial liquidation,² mentioning that the bankruptcy provisions contained in the Commercial Code were applicable to the procedures opened up to the date of entry into force of this law, a principle that we will find in each of the new bankruptcy regulations, for the reason of the continuity of the procedure under the authority of the law under which it was triggered, and in contradiction with the principle according to which procedural rules are immediately applicable. It is worth mentioning also that the regulation of commercial obligations in the code, art.35-59, remained in force until 2011, being repealed only with the entry into force of the Law no.287/2009 on the Civil Code,³ which substantiates the thesis of the unity of private law, namely the monist conception on it, opposed to the dualistic concept of private-civil and commercial law applicable until that date (Marian, 2015, p.203-266). The provisions of the Commercial Code, namely art.43 regarding interest rate applied after the maturity date; art.44 regarding the prohibition to grant of the grace period (Turcu, 2003, p.21-26) by the judge, are found in similar versions in the provisions of the Civil Code, maintaining the essence, which is that the professional debtor is lawfully behind payment when he fails to fulfill the obligation to pay an amount of money, and the interest flows in the hypothesis of not paying a sum of money at the due date (Apan, 2017, p. 106-120).

¹ Published in the Off. Gazette no.31 of 10 May 1887, hereinafter called *Commercial Code*, otherwise the only Romanian Commercial Code adopted up to this date.

² Published in the Off. Gazette no.130 of 29 June 1995, amended and supplemented, updated on 17 November 2004, hereinafter called Law no.64/1995; repealed with the entry into force of Law no.85 of 5 April 2006 on insolvency.

³ Published in the Off. Gazette no.511 of 24.07.2009, consolidated version of 27.03.2017, hereinafter called *Civil Code*.

We also notice at the national level a focus exclusively on the trader of the applicability of bankruptcy regulation, as the doctrine reads (Firoiu & Marcu, 1987, p.173-174). "In the capitalist economy, *bankruptcy* was a measure to defend the commercial credit; in accordance with the Romanian Commercial Code - as in the case of French or Italian codes, only traders could be declared bankrupt, with all the consequences of such a declaration, while non-traders in a similar situation, that is to say, in collapse, were not subject to any legal change, this state not being legally regulated."

The bankruptcy procedure regulated in the Commercial Code had the following characteristics according to Turcu (2006, p.3-20): the bankruptcy was instituted only for the trader who had ceased payments of his commercial debts according to art.695 of the Commercial Code, and these payments aimed at its commercial debt. We note the duality of the requirement of trade, both as the status of that who ceased payments and as the nature of the debt, with the indication that non-commercial claims were requested after the opening of the procedure. The opening of the procedure can be done by court order at the request of the debtor or any creditor or by the court of its own motion; the consequences on property of a sentence consisted of waiving the right of the bankrupt person to manage his property, cancellation of documents made at the expense of creditors, stay of interest accrual for receivables unescorted by guarantees or privileges; the patrimonial effects of the sentence consist of imprisonment, restrictions on freedom of movement of the bankrupt individual, displaying the sentence at the court entrance hall and at the trade exchanges and also in the media; the establishment of a syndic judge's institution in charge of bankruptcy management in each county court, so the syndic judge had both judicial and administrative powers; the tribunal is competent to hear all bankruptcy procedure brought before it and the actions resulting from that procedure. The doctrine (Firoiu; Marcu, 1987, p.173-174) explains in extenso the non-property effects of the bankruptcy ruling.

It also regulates situations in which trade may be continued, as well as moratorium meaning the suspension of the execution of the bankruptcy decision in expressly determined cases and the agreement between the debtor and the creditors for the cessation or suspension of the bankruptcy procedure; the simple bankruptcy provided for in art.876-879, if the debtor's personal or family expenses were too high in relation to his economic status or condition, or if he has lost a large part of his patrimony or in gambling or inconsiderate operations, or if after the cessation of payments, he paid a creditor to the detriment of the creditors listed in the statement of claims.

In the bankruptcy fraud, provided in art.880 et seq. the bankrupt trader has stolen or forged its registers, destroyed, concealed or dissimulated a part of his assets, the trader who has incurred non-existent debts or has fraudulently established amounts in books or in authentic or private documents or on the balance sheet which he did not owe; traders who, prior to bankruptcy, have alienated a significant portion of the commodities or assets at reduced prices, lower than their cost, for fraudulent purposes to fraud the creditors.

The bankruptcy fraud is punished with correctional imprisonment and with the ban on exercising the trader profession and the ban on the right to enter the premises of the exchange market, as shown in the doctrine (Hacman, 1930, p. 4-5) "What from the very beginning imprints to this *bankruptcy* a very characteristic feature by which it differs more from the forced execution of the civil procedure was that the trader, in that situation, was stuck in his professional honesty, being considered as a debtor, who in bad faith

caused damage to his creditors. It is only in recent times that this rigid conception was edulcorated, making in this case of bankruptcy a distinction between simple bankruptcy and bankruptcy fraud. Still, this fatal bias still follows the bankrupt trader even these days ...”

The major inconvenience of the procedure governed by the Commercial Code is revealed by the doctrine (Turcu, 2000, pp. 43-45). "The bankruptcy procedure governed by the Commercial Code, as subsequently amended (the most recent major inter-war amendment being that of May 5, 1938), is mainly expressed in measures of deprivation of liberty, bankruptcy advertising, limitation of subsistence means, application of seals and in the inexorable course of the procedure until the liquidation of the trader's property. This hypertrophy of the punitive function is explicable if we take into account the subject to whom the procedure applies: the small merchant."

From a terminological, conceptual point of view, we note a constant use of the term "*bankrupt*" in the content of the code, used to designate the debtor against whom the bankruptcy procedure was opened, the connotation of this term preserving its pejorative character. The regulation on bankruptcy explicitly refers to the two terms, to designate the debtor and the procedure, namely, bankrupt and bankruptcy. Exempli gratia art.724 states that "All acts and operations of the bankrupt and all payments made by him following the bankruptcy decision are null and void". What we also note to be mentioned by Turcu (2002, pp.16-17) is the distinction made in the case-law of those times between the concepts of "*insolvency*", as a termination of payments and "*balance sheet insolvency*", as a financial imbalance of the debtor's patrimony, a distinction that we find in current regulations.

We also find a correlation between the level of economic development of the period in which the Commercial Code was adopted, characterized by the small merchant's emblematic figure and the nature of the sanctions imposed in case of bankruptcy. As the doctrine reads (Turcu, 2002, p.28) "The 253 articles governing bankruptcy (685-888 and 936-994) and which make up about 60% of the text remaining in force of the 1886 Commercial Code preceding Law no.64/1995 are devoted to the trader natural person, except for Articles 866-874 which apply to commercial companies." Because the trader the natural person represents *totum factum* for his activity, the determination of the infamous measures for him, has as a result the stigmatization as well as his removal from the honest traders, the dissemination of information regarding the status and / or the regulation of the possibility for the creditors to dispose, through the trade union and the court, of the person and his possessions. In addition, it is the doctrine cited above, which also notes the lack of preventive measures in the bankruptcy regulation of the Commercial Code.

Applicable until 1994, the insolvency regulation comprised in the Commercial Code was the tributary of the era in which it was adopted and enforced, although for that time it represented a breakthrough in regulating the relations between traders, as stated in the doctrine (Zlătescu, 1997, pp.176-177). It is obvious that the transition to a new regulation, based on principles adapted to the economic realities in the settlement after 1990, was necessary.

4. THE CONCEPT OF "REORGANIZATION" AND THAT OF "JUDICIAL LIQUIDATION" INSTITUTED THROUGH THE REGULATION COMPRISED IN LAW NO.64/1995

Law No.64/1995 focuses on the concepts of "reorganization" and "liquidation", so it gives prevalence to the debtor's ability to reorganize his activity, and if he is incapable of reorganization, he proceeds to the liquidation of the assets in his patrimony to cover the liabilities of bankruptcy, as it results from art.2 of the law. Both assumptions are analyzed for traders who can no longer meet their trade debts. Thus, the requirement of the duality of the trade, both of the debtor-trader's status and of the receivables, as commercial obligations stemming from objective trade acts, is maintained.

The concept of "*reorganization*" is defined by Costin & Miff (2000, p.34) as "*the action to reorganize and its outcome, a new organization*" or "*to organize again on new bases.*"

As a matter of fact, the doctrine (Maurie et al, 2010, p.648) also states that "traditionally, French law repudiated collective proceedings, except for those in commercial matters where the system of the debtor's "bankruptcy" existed for a long time. Applied to businesses, today these procedures have as their primary objective to allow their safeguarding, even to the detriment of the creditors' rights."

From a conceptual point of view, the text of the law mentions other two concepts besides the concept of "reorganization": the "debtor" designating the categories of persons undergoing insolvency, namely traders, trading companies, consumer cooperatives and craft cooperatives; that of "insolvency", consisting of the condition of the debtor's patrimony, characterized by the obvious inability to pay the due debts with the amounts of money available, meaning in essence, the cessation of payments - art.1. We notice that the term "bankrupt" is no longer used in the new regulation, but "bankruptcy" is maintained. Moreover, also the name of the law has been changed since 2004 in the "Law on the Procedure of Judicial Reorganization and Bankruptcy", thus giving up the concept of "judicial liquidation". These new regulations have as source of inspiration, as the doctrine (Bufan, 2014, pp.52-53) criticizes the law-making process based on abandoning the neo-latin path, and turning on the Anglo-Saxon path (developed in Tabb, 1997, pp.2-4). The text analyzed is the one contained in the republished version of the 2004 law, which up to that moment had undergone countless changes. An analysis of successive changes to the law was carried out in Turcu (2006, pp.197-243).

A feature remains constant in this matter, which is the jurisdiction of the tribunal in solving the reorganization or bankruptcy procedure, that is, the tribunal in whose territory the debtor's office is located, as it appears in the trade register.

The procedure is applied by more bodies, compared with those established in the previous regulation, namely the administrator, the liquidator, the creditors' committee (Turcu, 2002, p.233). The tasks of the syndic judge are "control and general coordination of the procedure in accordance with his statute as magistrate" (Bufan, 2014, p.52) excluding the managerial duties provided by the Commercial Code. The administrator is appointed for the possibility of reorganization, and if bankruptcy is ordered, a liquidator will be appointed, in which together will take over the managerial duties in the procedure. The creditors' committee is established, which will have the right to analyze the debtor's situation, the measures taken by the administrator or the liquidator, their effects and to

propose also other measures, based on reasoned grounds. The Committee consists of 3-7 creditors of those with the highest guaranteed or unsecured claims. In the course of its work, the syndic judge may request the assistance of the creditors' committee or a delegate thereof.

The procedure may be opened following an application filed by the debtor or creditors to the court – art.31. With certain exceptions, the receivables for which the claim is made must be higher than 3000 EUR calculated at the date of the claim. Together with the decision to open the proceedings, the syndic judge will order the notification of the decision to all the creditors included in the list submitted by the creditor, to the debtor and to the trade registry office. The notification will be published in a widely circulated newspaper, the status of the debtor being thus enforceable, but by the use of newer means of advertising than those provided in the Commercial Code.

The law regulates a new way of performing the communication of procedural documents, namely the Bulletin of Insolvency Proceedings published by the National Trade Register Office, such as publishing the summonses, convocations, notifications and communications of procedural documents carried out by the courts, the judicial administrator / liquidator following the opening of insolvency proceedings.

Against the decision to initiate the procedure, if the claim was submitted by the creditor, the debtor may appeal it and, if it was submitted by the debtor, the creditors may oppose, so any of the two main "actors" have the possibility to challenge it. The opening of the procedure waives the debtor's right of administration, that allowed him to manage his activity, to administer his assets and to dispose of them - if he has not declared his intention to reorganize. The debtor's right of administration ceases to be lawful on the date when the bankruptcy is commenced.

As effects of the opening of the proceedings, it is suspended the trial of cases and enforcement proceedings against the debtor or his assets and the expiration of the prescription periods for certain actions, it is suspended the accumulation the interest rate for unsecured claims or the unsecured part of the guaranteed claims.

In applying the principle of creditor protection, it is established a mechanism to ensure the declaration and verification of claims for creditors whose claims precede the opening of the proceedings, applicable both to the reorganization and to the bankruptcy. They shall submit their *application for admission of claims* within the time limit set in the opening decision and the claims will be subject to verification by the administrator, art. 78-80, except for receivables determined by enforceable titles and for tax receivables resulting from an enforceable title uncontested within the time limits prescribed by special laws.

As a result of the verifications, the administrator will prepare and register with the tribunal a *preliminary statement of claims* against the debtor's property and preference rights, specifying that they are: unsecured, guaranteed, prioritized, conditional or unpaid, and indicating for each one the creditor's name, the amount for which verification was requested and the amount which was listed on the table, while the debtor, creditors and any other interested party will be able to submit objections about them. After all objections and appeals against the list of claims have been settled, the administrator will immediately register with the court and display at his headquarters the final table of all claims against the debtor's assets - art. 86, 87, 88, showing the amount, priority and the situation - guaranteed or not guaranteed - of each claim

The reorganization plan is an element of novelty compared to the previous regulation and has been enacted to support the recovery of those who are unable to pay their debts, and may have in view either the reorganization and continuation of the debtor's activity, or the liquidation of some part of the debtor's assets. The plan may be proposed by the debtor, the administrator or the creditors' committee and will indicate the recovery prospects in relation to the possibilities and specificities of the debtor's activity, based on the available financial means and the market demand for the debtor's offer, - art.90-92. The plan will include measures consistent with the interests of creditors and members or associates / shareholders, as well as with public order, including the manner of selection, appointment and replacement of administrators and directors. The plan will be subject to the vote of the creditors and if voted it will be subject to confirmation by the syndic judge.

Following the confirmation of the plan and as its consequence, the debtor's activity is properly reorganized, it will operate under the supervision of the administrator and the claims and rights of creditors and other stakeholders are modified as provided in the plan.

If the debtor fails to comply with the plan or the activity leads to loss of his / her assets, the administrator, the creditors' committee or any of the creditors, as well as the representative of the members or, as the case may be, of the associates / shareholders may at any time request the syndic judge to approve the bankruptcy - 104. Under this hypothesis, the liquidation of assets from the debtor's patrimony will be performed by the liquidator under the control of the syndic judge, and the proceeds will be distributed among the creditors.

We find regulated also by this law, the annulment of the fraudulent acts concluded by the debtor to the detriment of the creditors' rights, and his administrator, or as the case may be, the liquidator can bring these actions to the syndic judge in the 3 years preceding the opening of the proceedings. The action may also be initiated for the annulment of the set-up or transfer of patrimonial rights to third parties and for the restitution by third parties of the goods delivered and the value of other services carried out by the debtor through certain categories of acts.

We find that the infamous sanctions and the measures of deprivation of liberty applicable to the natural person - the small trader, from the regulation contained in the Commercial Code, are no longer found in the text of the law, but patrimonial responsibility may be attached to the members of the management bodies, respectively they may be forced by the syndic judge to bear a part of the debtor's liabilities - a legal person undergoing insolvency, if they contributed to the debtor's reaching this situation, by certain acts determined expressly - art.137-140. The facts are the following: they have used the goods or credits of the legal person for their own benefit or for that of another person; they have done business for personal benefit under the cover of the legal person; they have, for personal benefit, ordered the continuation of an activity that would obviously lead the legal person to cease payments, they kept a fictitious accounting, made some accounting documents disappear, or did not keep accounting in accordance with the law; they embezzled or concealed part of the assets or they artificially increased the debtors liabilities; they have used ruinous means to obtain funds for the legal person with the purpose of delaying payment cessation; in the month preceding the cessation of payments they paid or ordered payment to a preferred creditor to the detriment of the other creditors. So the regulation is based on pecuniary sanctions for those who have committed fraudulent acts, which resulted in the bankruptcy of the debtor and launches

the attachment of liability to these natural persons, with their own patrimony, to cover the liability, which was not covered following the sale of the debtor's assets.

The simple bankruptcy offense is regulated, and it consists in the failure to submit or late submission by the debtor natural person or the legal representative of the debtor legal entity, of the application to open the proceedings within 30 days of occurrence of insolvency and it is punished with imprisonment from 3 months to one year or fine, and the fraudulent bankruptcy consists of the following facts: falsification, theft or destruction of the debtors' records or concealing some of the assets; featuring debts that do not exist, or displaying in the registers, in another act or in the financial situation, undue amounts, each of these acts being made in order to apparently diminish the value of assets, alienates, in default of creditors in the event of insolvency, a significant part of the assets. The insolvency prevention procedures applicable during this period were regulated separately by Law no.381/2009 on the introduction of the preventive agreement and the ad-hoc mandate,⁴ developed in the doctrine (Piperea, 2010).

The regulation under Law no.65/1994, analyzed *ut supra*, is essentially the skeleton of the judicial reorganization and bankruptcy procedure applicable to this date, but with numerous modifications, supplements and nuances brought by the new regulations. It can be easily noticed that within the proceedings, the judicial reorganization procedure prevailed over the bankruptcy procedure. This change implied the establishment of a reorganization procedure aimed especially at the legal persons, thus, the transition from the small trader to entities having typologies of complex organization and activity. There was also the prevalence of creditors' position in the proceedings, displayed both in the creditors' meeting and in their committee. They have the main position both in voting on the reorganization plan and in making the most judicious use of the debtor's wealth and in distributing the resulting proceeds.

Besides the beneficial aspects, the shortcomings of the law resulting from its application have been synthesized in the doctrine (Bufan, 2014, p.57) as follows: "Even though during the 11 years of its existence Law on judicial reorganization and bankruptcy has undergone several changes (seven in number), being republished twice (in 1999 and 2004), it has not yet become a normative act without gaps, the procedure remaining complex, lengthy, cumbersome and therefore unjustifiably expensive ...".

5. THE CONCEPTS OF "INSOLVENCY PREVENTION" AND "INSOLVENCY" UNDER LAW NO. 85 OF 5 APRIL 2006 ON INSOLVENCY PROCEEDINGS AND LAW NO. 85 OF 25 JUNE 2014 ON INSOLVENCY AND INSOLVENCY PREVENTION PROCEDURES

The starting point in the analysis of the Law no.85/2006 on insolvency proceedings is the one retained in the following assertion of the doctrine (Bufan, 2014, p.58). "It is noteworthy that although Law no.85/2006 does not contain an essentially different regulation compared to Law no.64/1995, republished in 2004 and amended by Law no.249 / 2005, the legislator preferred not to amend the old law, which in the future could be republished for the third time, but adopted the pragmatic solution of making

⁴ Published in the Off. Gazette no.870 of 14 December 2009, repealed by Emergency Ordinance no. 91 of 25 October 2013 on Insolvency Prevention and Insolvency Proceedings, the latter being in force until January 2015.

amendments and supplements in a new regulation, with the consequence of the adoption of another normative act, which abrogated *in integrum* the law on judicial reorganization and bankruptcy.”

As stated in the previously indicated doctrine, Law no.85/2006 regarding the insolvency proceedings⁵ "brought some novelties without, however, providing a radically different concept than that of the previous law". As a consequence, the concepts of "reorganization plan" and "insolvency", together with the related regulatory framework, with modifications, additions and nuances compared to the regulation under Law no.65/1995, were in force during the 8 years and made the transition to the regulation of Law no.85/2014 on insolvency and insolvency prevention procedures⁶, which is currently in force. It is worth mentioning that during the applicability of Law no.85/2006, as indicated in section 1, came into force the Civil Code, which marked the transition from the concept of "trader" to those of "professional" and "enterprise".

It can be easily ascertained even from the title that it primarily pursues the establishment of insolvency prevention procedures and, in the event that the debtor fails to consider them, it regulates the insolvency proceedings. Insolvency prevention procedures established by code are ad hoc mandate and preventive agreement, but in a wider and more rigorous regulation.

The constant features resulting from the analysis of each regulation so far are also found in the Insolvency Code, namely, the procedure is placed in the jurisdiction of the tribunal at the debtor's headquarters that is registered in the trade register. The syndic judge, the judicial administrator, the liquidator, the creditors assembly and the creditors' committee are still the pillars of the insolvency proceedings, having the more precisely defined and delimited powers and duties, while the summoning procedure and the communication of acts within the procedure is fulfilled by publishing them in the Bulletin of Insolvency proceedings (Bufan, 2014, p.58). Also, the concept of "insolvency" is defined in the same manner as in Law no.65/1995 stating the obvious inability to pay the debts due with the amounts of money available for the payment of certain, liquid and enforceable debts. The insolvency of the debtor is presumed when he / she does not pay his / her debt to the creditor within 60 days after the maturity, the presumption being relative. Insolvency is imminent when it is proven that the debtor will not be able to pay the due debts incurred, with the money available on maturity date. The threshold value represents the minimum amount of the claim necessary in order to be able to submit the application for opening the insolvency proceedings and is of 40.000 lei for the creditors as well as for the debtor.

Except for those who practice liberal professions, schools and educational units and institutions of pre-university and university level and the entities stipulated in art.7 of Government Ordinance no.57/2002 on scientific research and technological development, professionals are included in the scope of the Insolvency Code. Persons who are subject to special provisions regarding their insolvency regime are excluded from the scope, such as

⁵ Published in the Off. Gazette no.359 of 21 April 2006, amended and supplemented, hereinafter called *Law no.85/2006*.

⁶ Published in the Off. Gazette no.128 of 27 June 1995, amended and supplemented through Ordinance no.88/2018, this being a true Insolvency Code, combining both insolvency and insolvency prevention procedures, including those applicable to credit institutions, insurance companies and groups of companies, for which reason we will call it *the Insolvency Code*.

natural persons to whom is applicable Law no.151/2015 on Insolvency Procedure for Individuals,⁷ developed in the doctrine (Apan, 2017 (2) and doctrine therein).

Simple bankruptcy and bankruptcy fraud offenses are incriminated, but are no longer part of the body of regulations underlying the insolvency procedure, following the entry into force of the New Criminal Code but are contained in the provisions of art.240 and art.241 of the code, and are analyzed by the doctrine (Dobrinou et al, 2012, pp.289-300). Attaching the patrimonial liability of those who caused the state of insolvency is extended from individuals and determined acts to "any person" and "any act".

Essentially, the basis of the current insolvency proceedings, through the Insolvency Code, is given by the legal mechanisms created for creditors, whereby they decide on the debtor's fate in order to obtain a quick recovery of their claims. It is the creditors who can apply for the opening of the proceedings, can appoint a liquidator, decide on the granting the debtor a chance to recovery, to reorganization by voting the plan, the creditors are the ones who can request the opening of the bankruptcy proceedings if the reorganization plan is not respected, deciding on the manner in which the debtor's assets are sold so as to maximize the capital of the debtor, they have an active procedural capacity in attaching the patrimonial liability of the natural person who caused the insolvency of the debtor and in the court action for canceling fraudulent transfers if the liquidator does not submit such a request.

6. ELEMENTS OF NOVELTY REGARDING THE STATUS OF THE TAX RECEIVABLES WITHIN THE INSOLVENCY PROCEEDINGS, INTRODUCED FOLLOWING THE AMENDMENT OF LAW NO.85 OF 2014 THROUGH GEO NO.88 OF 2018

As also indicated in the Emergency Ordinance no.88/2018 for the amendment and completion of regulations in the field of insolvency and other legislation⁸, it was enacted in view of streamlining insolvency procedures and improve the protection of creditors' rights. The explanatory memorandum sets out that this creates the premises for the recovery of viable business and faster recovery of receivables, including of the tax ones, being consistent with both the budgetary interest and the general economic and social interest of Romania. Thus, the changes will be centered on the conversion, reduction and transfer of tax receivables within the insolvency procedure. In correlation to these amendments to Law 84 of 2014, the same ordinance modified Law no.207/2015 on the Fiscal Procedure Code,⁹ namely the conditions for the debtors under insolvency in which the conversion the tax receivables in shares, as well as those of the assignment, by the tax creditor of the tax receivables due by the insolvent debtor.

The amendments to the Law no.85 of 2014 from the perspective mentioned above are as follows:

- in art.5, point 72, the amendment regarding the definition of the threshold value. Starting from the definition of the threshold value, one can see a restriction of the right of

⁷ published in the Off. Gazette no.464 of 26 June 2015, but whose application was extended until 01.01.2018.

⁸ Published in the Official Gazette of Romania, no.840 of 2 October 2018

⁹ Published in the Official Gazette of Romania, Part I, no. 547 of 23 July 2015, as subsequently amended and supplemented.

a professional to formulate the request to initiate insolvency proceedings, in case the professional would have debts to the consolidated budget of the state which exceed 50% of the total amount of the certain, liquid and enforceable debts. The amendment seeks to establish the protection of the tax receivable in the sense that it is in the hands of the professionals to be extremely cautious in the conduct of business so that the total amount of the payment obligations to the consolidated budget of the statute does not exceed 50% of their debts.

- in art.102 para.1, unlike the previous regulation, which required the tax inspection bodies to carry out a tax inspection report in accordance with the provisions of the Fiscal Procedure Code, the current regulation provides for an inspection to be carried out on the basis of a risk analysis. The risk grid according to which taxpayers are selected (even ones not undergoing insolvency proceedings) is not transparent and cannot be challenged, as opposed to a tax inspection report that can be challenged by the insolvent debtor or the administrator / the liquidator under Law no.544/2004 on administrative contentious. In the absence of the possibility of challenging the conclusions of an inspection carried out by the tax authorities on the basis of a risk analysis, claims can no longer be entered in the table of claims under a suspensive condition. In this context, the tax creditor participates in the voting at creditors' meetings even if the claim is not certain, liquid and perhaps not enforceable.

- art. 102 para.8 ind.1. As a consequence of this amendment, by including the claim in the table of claims, under resolutive condition, in the context imposed by the provisions of art.102 par.8 ind.1, the creditor of such a claim shall be entitled to vote. Therefore, the holder of a challenged tax claim and whose forced execution has not been suspended, is affected by the resolutive condition and holds more than 30% of the amount of claims, can make decisions regarding the debtor in insolvency. This is possible even when, subsequently it is determined that the respective creditor does not actually hold any claims, so a vote from a creditor whose claim can be found as nonexistent is decisive for the fate of a professional.

- at art.133 letters K and L, concerning the content of the reorganization plan. It can be easily observed that the conditions for the content of the reorganization plan are drastically tightened, and with regard to the category of tax receivables a special framework is created for: full conversion and conversion to the value of the nominal claim. This does not allow the debtor to apply the provisions of art. 133 para.4 on the reduction of the amount of the claim, i.e. it does not allow the tax claim to be converted into a disadvantaged claim; the institutions and bodies of the state can become associates / shareholders of the company. The obligations of state bodies in the recovery of debts, until the date of modification of Law no.85/ 2014 we find in Apan (2017 (2)).

- art.135 ind.1. By reference to the content of paragraph 1, namely that the date of discharge of the convertible debt is the date of the conversion, if we place ourselves in the hypothesis of a 3-year reorganization plan, it results that it would be necessary to modify the reorganization plan during its implementation, if we take into account that the tax claim in the debt settlement program disappears through conversion. There is no reference to the effects of the cessation of the state of insolvency and the debtor's reintegration in activity after successfully carrying out a plan, respectively, if the state remains a shareholder / associate, although the professional would no longer be undergoing insolvency proceedings.

7. CONCLUSIONS

Following this cross-examination, we find that in the regulations analyzed, within the collective forced execution procedure, the obligation to pay a sum of money owed by the debtor to the creditor maintains its ethical content, as stated in the doctrine (Craiovan, 1999, p.415), "the obligation is not explained solely by the constraint with which it is sometimes invested in positive law. It has, as a subjective law, an ethical content, without which its true meaning disappears." Or the constraint with which this obligation has been invested is specific in the regulation of the insolvency proceedings, since it is assured the protection of the participating creditors, namely the equality of creditors of the same rank, this time, under the jurisdiction of the tribunal, the syndic judge supported by the administrator / liquidator.

In the landscape carrying out economic activity, starting from 1990 the business environment has had to do with a great deal of conditions: the payment obligations were not fulfilled at the due date by professionals, but increasingly late, and the coercive measures were insufficient and ineffective; the state was late in fulfilling its payment obligations to professionals and did not stimulate a competitive environment in awarding its contracts; the procedural means created for the prosecution of professional debtors were ineffective and took a lot of time; in the private sector, the economic activity was "haunted" by the spectrum of the confusion of patrimonies, that is between the patrimony of the professional and that of the associate natural person, by fraud and tax evasion, and the reduced liquidity was deepened by the economic crisis. On this background, the reflection in the business environment of the obligation to pay a sum of money owed by the debtor to the creditor became pathological and famous bankruptcies caused by the discontent of the creditors would soon be set off.

Although initially regulated as a source of infamous measures and public disapproval for debtors, the *illo tempore* regulation of the insolvency proceedings transgressed the barriers created by the infamous character of its application and generated a new perspective. From an insolvency proceedings hanging like Damocles' Sword above the head of the debtor that ceased payments, the debtor developed to requesting "the protection of the tribunal" by formulating its own request for the opening of proceedings. Thus, it is highlighted the journey from the moment of the infamous measures applied to the trader natural person in the state of cessation of payments until now, in order to objectively regulate the concept of "insolvency" and the procedure *per se*. However, the basis for this change of paradigm is the institutionalized framework of the proceedings, which tends to give participants the tools to protect their rights.

Following our analysis we find that the insolvency procedure played *ab initio* the role of constraining the debtors but the way it is regulated and enforced at this date, it attempts to meet the desideratum of the prevalence of rescuing the business and maximizing valorisation the debtor's capital, in order to satisfy as many creditors as possible. The challenge launched by the very recent amendments made in order to protect the tax claim within the insolvency proceedings is to be confirmed or invalidated in time.

The analysis of insolvency regulations reveals that their specificity qualifies them as "the rebel daughter of private law" (Turcu, 2015, p.1).

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