

ABOUT THE IMPOSSIBLE SIMULTANEOUS RUNNING OF INSOLVENCY AND ARBITRATION PROCEDURES

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ABSTRACT: *The insolvency procedure is a special procedure aiming to treat all the claims against the insolvent debtor's estate in a unitary and unique manner. By that, the opening of the insolvency procedure is fundamentally prohibiting any attempt of the creditors to simultaneously recover their claim through alternate procedures, like arbitration. This paper examines, from various perspectives, the incompatibility of these procedures running simultaneously.*

KEYWORDS: *Insolvency Procedure; Arbitration; Recovery of Claims; Syndic Judge*

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1. INTRODUCTION

The arbitration procedure is more and more appealing to creditors attempting to recover their claim against their debtor, based upon the agreed arbitral clauses inserted in their contract. Sometimes, such arbitration procedure is facing the unexpected insolvency of the debtor, declared prior to the opening of the arbitration procedure or during the arbitration proceedings. Moreover, now and then, the arbitral tribunal has to decide upon debtor's arguments that the claim of the creditors has been decided upon in a prior or contemporaneous insolvency procedure.

All these situations make worth the examination of various legal texts and principles in order to establish an order of priority between these two procedures and to confirm the supremacy of the insolvency procedure that is incompatible with any other procedure, general or special, aiming to recover claims/receivables against the estate of the insolvent debtor.

2. THE RELEVANT PRINCIPLES GOVERNING THE INSOLVENCY PROCEEDINGS THAT ARE OPPOSING SIMULTANEOUS ARBITRATION

As characterized by most of the scholars, the insolvency procedure is a judiciary, collective and concursual procedure, promoting and ensuring the equally treatment of the creditors, with a unitary and general character, constituting a special framework on the

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management of the estate of the insolvent debtor (Bufan, 2014). The insolvency procedure is governed by several general principles, out of which two are relevant for the relation existing between arbitration procedure and the insolvency procedure.

Principle of Equality of Creditors. The insolvency procedure is, first of all, a unique and concursual procedure, which means, from a double perspective, (a) that all patrimonial claims of creditors cease to be treated individually, in separate proceedings, being reunited in a sole proceeding and (b) that all the creditors are called upon to declare their claims within the frame of the insolvency procedure and will be paid on an equal basis, proportionally, in accordance with the order established by the law.

The filed claims are subject to a complex procedure aiming to assess the total receivables against the debtor's estate, involving their verification by the judicial administrator, challenges made by any interested person and decisions of the syndic judge. Further, the insolvency procedure provides for the creditors the recovery of their receivables on a pro rata basis, with their percentage calculated to the amount of all receivables against the insolvent debtor, by that ensuring a just and equitable treatment of all receivables.

The requirement of determining precisely the full level of the receivables against the debtor is outlined by the various provisions of the law, encompassing:

(a) The obligation of the creditors to file all their claims, including the not yet due and conditional claims.

(b) The sanction of forfeiture if the claim is not filed within the timeframe established by the syndic judge, and

(c) The legal impossibility to add any ancillary receivables against debtor, namely interest, increase or damage of any kind or expense after the opening of the insolvency procedure.¹

All these features of the insolvency procedure prove that such procedure is the only procedure that establishes the legal frame for recovery of the creditors' claims against the debtor's estate. As such, the insolvency procedure is incompatible with a simultaneously running arbitration procedure that aims to decide upon creditors' claims within a separate jurisdictional frame. That's because, by allowing individual actions of the creditors against the estate of the debtor, outside the insolvency procedure carried on in front of the syndic judge, the rights of other creditors would be negatively affected and there will be a very high risk that some creditors would satisfy their claim entirely while others would be prevented to do so. Moreover, the amount of the total receivables against the debtor will be uncertain, diminishing of the chances for debtor's re organization.

Principle of Equality of Arms. The principle of Equality of Arms is based upon the procedural principle of equal treatment and on the right to a fair process, expressing the belief that the parties to a trial should have equal chances to defend their case and that no party should enjoy a substantial advantage towards the other party.

When an insolvency procedure is opened against the debtor, its creditors are bared to file their claims in front of arbitration or ordinary courts and outside the timeframe established by the syndic judge. Consequently, allowing a creditor to avoid such procedure and simultaneously to follow an alternate dispute resolution procedure represents a violation of the principle of equality of arms.

¹Article 102, Article 114 and Article 80 of the Insolvency Law no. 85/2014.

In a nutshell, both these principles are opposed to a simultaneous and concurrent arbitration procedure being used for satisfaction of the creditors of an insolvent debtor.

3. VARIOUS EFFECTS OF THE OPENING OF THE INSOLVENCY PROCEDURE IN RELATION WITH ONE OF THE PARTIES TO AN ARBITRATION PROCEDURE

The insolvency procedure is a judicial one, falling in the exclusive jurisdiction of the state courts of justice.

According to Article 75 of the Insolvency Law no. 85/2014, on the opening day of the insolvency procedure, all judicial or extrajudicial actions as well as the enforcement procedures aiming to recover the claims against the estate of the insolvent debtor are automatically suspended².

Therefore, the arbitration being an extrajudicial procedure, all arbitral claims filed against the insolvent debtor will be suspended and, thereafter, as the case may be, closed. However, this suspension and/or termination will not affect the actions filed by the insolvent debtor, including those entrusted to the domestic or international arbitration, aiming to recover, from its own debtors, damages or owed money.

The claims of any creditor arisen prior to the opening of the insolvency procedure will be recovered only within the insolvency procedure, by filing claims' admission requests, in the time and conditions provided by the law. Such claims may be recovered during the reorganization of the debtor or through the bankruptcy proceedings.

If the debtor is successfully reorganized under the insolvency procedure, then the claims and the rights of the creditor and other stakeholders are amended in accordance with the mentions of the reorganisation plan, which has been voted and approved by the creditors' meeting and confirmed by the bankruptcy judge, through a judgment that, as from the moment of entering into force, is enjoying, as any definitive judgment, *res judicata* authority; indeed, even if the reorganization fails and the assets of the debtor are liquidated under the bankruptcy procedure, this judgment will preserve a definitive character, constituting an enforceable legal title. Likewise, the judgments solving various objections or contestations raised by the insolvent debtor or the creditors, if definitive, have *res judicata* authority.

During the bankruptcy procedure, which is an assets and receivables' liquidation procedure, the creditors' claims will be recovered in the limits of the distributions made by the receiver from the collected receivables of the debtor's estate.

During the insolvency procedure, the certain, liquid and exigible claims will be registered in the claims' table and will be recovered through the distributions made by the receiver; the conditional claims (*pendente conditionae* claims, whose valid birth is depending of the fulfilment of a certain condition) will be registered in the claims' table but will be recovered only if and after the fulfilment of the suspensive condition that affect their validity.

² The Article 75 of the Insolvency Law reads like this:

"All judicial, extrajudicial or enforcement measures for recovery of the receivables from the debtor or its assets are *de jure* suspended as of the date of opening the procedure [...]. When the opening judgment becomes final, the judicial or extrajudicial request as well as the enforcement measures cease."

After the closing of the insolvency procedure, only the claims that have been registered in the claims' table, that have not been amended through the reorganization plan, may be recovered from the remaining estate and future receivables of the debtor; likewise, the conditional claims will be recoverable only after the fulfilment of the suspensive condition, since they do not validly exist before that event.

The creditor of the insolvent debtor that has not submitted, in due time, its statement of claim, will not be admitted to the insolvency proceedings and will not have the right to recover its claims, after the closing of the insolvency procedure, against the estate of the debtor, unless the debtor was convicted for fraudulent bankruptcy or for fraudulent payments or transfers.

4. THE TRIBUNAL AND THE SYNDIC JUDGE

IN THE INSOLVENCY, THE TRIBUNAL WITHIN WHOSE CIRCUMSCRIPTION RESIDES THE DEBTOR HAS EXCLUSIVE JURISDICTION OVER ALL MATTERS RELATED TO THE INSOLVENCY PROCEDURE. THE LEGAL NORMS ATTRIBUTING EXCLUSIVE JURISDICTION TO THE TRIBUNAL ARE REGARDED AS BEING MANDATORY NORMS OF PUBLIC POLICY.

The syndic judge is a judge specialized in insolvency, designated by the president of the tribunal to administrate an insolvency procedure. Thus, all provisions in the Insolvency Law referring to the jurisdiction of the tribunal actually covers the jurisdiction of the syndic judge.

On the other hand, in line with the collective character of the insolvency proceedings, the Insolvency Law provides a restriction of the creditors to take individual actions against the estate of the debtor outside the insolvency procedure (see the above mentioned Article 75). The restriction concerns all the judiciary or extra judiciary procedures with no distinction as of the date of the submission of the action, respectively, if the actions were registered prior or after the opening of the insolvency procedure.

ACCORDINGLY, ONCE THE INSOLVENCY PROCEDURE IS OPENED AGAINST THE DEBTOR, ALL INDIVIDUAL ACTIONS THAT ARE PENDING ARE SUSPENDED BY LAW AND NO OTHER INDIVIDUAL ACTIONS MAY BE COMMENCED, REGARDLESS IF IT IS BEFORE NATIONAL COURTS, ARBITRATION TRIBUNALS OR ENFORCEMENT BODIES.

Therefore, a simultaneous attempt to recover a claim against the insolvent debtor through arbitration will infringe the exclusive jurisdiction of the syndic judge, the only person entitled to decide upon the fate of such claims, within the frame of the insolvency procedure.

5. THE ARBITRABILITY OF A CONDITIONAL CLAIM THAT, WITHIN THE PROCEDURE OF THE REORGANIZATION OF THE INSOLVENT DEBTOR, HAS BEEN ADMITTED TO THE LIST OF RECEIVABLES OF THE CREDITORS

In other words, the issue that has to be determined at this point is whether a creditor whose claim has been admitted to the claims' list may, during the reorganization procedure, bring the same claim to an arbitration procedure.

The insolvency proceeding is a collective and concursual procedure that meaning that all the creditors are together participating to the procedure and all claims against the debtor's assets or estate may be realised only through the confines of this procedure. For these reasons, upon the opening of the insolvency procedure, the creditors have the legal obligation to declare their claims against the debtor, in the term affixed by the law and provided for in the opening judgment [Article 102(1) of the Insolvency Law].

Consequently, according to Article 112 (1) of the Insolvency Law, the insolvency administrator or, as the case may be, the liquidator has the obligation to register at the tribunal and to publish a final list of the duly declared claims (receivables) of the creditors, as soon as any dispute regarding these claims has been finally decided upon by the syndic-judge. The said list of receivables will show the amount of each claim, their priority and the situation of each claim, i.e. unsecured or secured receivables, privileged claims, *pendente conditione* claims or claims that have not matured yet.

According to Article 102 (4) of the Insolvency Law, the claims that have not yet reached maturity and the conditional claims will be admitted to the statement of the liabilities of the debtor (actually, in the receivables' list) and will participate to the distribution of the liquidation results as provided by the Law. In accordance with the provisions of Article 129 para (3) Insolvency Law, the receivables that, at the date of the final report drawn by the liquidator, will still be *pendente conditione*, will not participate to the final distribution of the amounts recovered during the insolvency procedure.

The Insolvency law, in order to protect the concursual character of the procedure, establishes that the creditor holding a claim born before the opening of the insolvency procedure that failed to declare its claim in the legal term, is precluded from the right to participate to the distribution of the recovered amounts within the procedure and, also, from the right to recover its claims against the debtor, after the closure of the procedure.

One of the most relevant provisions, regarding the topic of recovery of creditors' claims, is that of Article 75 of the Insolvency Law that establishes that as of the date of the opening of the insolvency procedure, all judicial, extrajudicial or forced enforcement measures aiming to recover claims against the debtor's estate or assets are suspended. In other words, the only way that may be used by a creditor to recover a claim from the debtor is to use the insolvency proceedings, by declaring the claims and having them registered in the receivables' list.

More, Article 120 of the Civil Procedure Code establish that all claims regarding the insolvency procedure or the preventive concordat are attributed to the exclusive jurisdiction of the court in whose circumscription resides the debtor. That means that all claims against the debtor's estate or assets, born after the opening of the insolvency procedure, will be recovered exclusively within the insolvency procedure.

Consequently, any creditor of the insolvent debtor, holding a claim born before the opening of the insolvency procedure, that has not declared its claim in due time will not participate to distribution of sums during the procedure and will be precluded to recover its debt against the debtor after the closure of the proceedings.

Any claim, born before or after the opening of the insolvency procedure, even being conditional, that has been admitted to the procedure and registered in the claim's list, falls in the exclusive jurisdiction of the insolvency court and any secondary judicial or arbitration procedure aiming to recover that debt will be automatically suspended, as long as the insolvency procedure was not closed.

Any conditional receivable, not recovered within the insolvency procedure due to the fact that the suspensive condition did not occur, may be claimed, after the closure of the procedure, as soon as the condition retained in the reorganization plan has been fulfilled.

Consequently, due to the *res judicata* plan of the judgments conforming the reorganization plan and of the reorganization plan itself, it is not possible for any arbitral tribunal or state court to deliberate upon the said conditional claim in other terms than those provided for in the reorganization plan.

REFERENCES

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