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THE TREATMENT OF CREDITORS AND THE LEGAL REGIME OF CLAIMS IN INSOLVENCY PROCEEDINGS

- SUMMARY -

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The treatment of creditors and the legal regime of claims in insolvency proceedings

The research thesis **"The treatment of creditors and the legal regime of claims in insolvency proceedings"** is of particular importance as far as insolvency is concerned, since the achievement of the purpose of Law no. 85/2014, establishing the procedure "to cover the debtor's liabilities", requires the knowledge and deepening of the legal status of creditors' claims in the proceedings, ensuring that such claims are covered to the fullest, timely and reasonable extent and, at the same time, the procedure in an efficient, transparent, predictable manner, in compliance with established rules on the treatment of creditors in an objective and impartial manner.

Better knowledge of the specific mechanisms, rules, the notions defined by the general and special law i.e. the Insolvency Code can contribute to the immediate purpose of the procedure, namely to better satisfy creditors' claims against the debtor who has become insolvent, or bankrupt, as well as the achievement of the mediated goal of the rehabilitation of the economic environment by leaving out debtors who can no longer deal with the debts and are unable to recover economically and financially.

The idea for this research thesis "The treatment of creditors and the legal regime of claims in insolvency proceedings" arose from the need to clarify certain aspects of case-law regarding claims arising from European funds financing contracts, budgetary debts challenged under the terms of the Fiscal Procedure Code and suspended by the administrative courts, the debts established by titles representing non-final judgments, the current debts that raise issues even in terms of their qualification as such.

Unlike most of the literature approaches, which are made as comments on the law provisions, this thesis aims at making a complete set of comments, explanations and practical applications regarding the treatment of creditors and the legal regime of their claims.

The introductory chapter deals briefly with the evolution of bankruptcy in general from the Roman law to the first coding in France and bankruptcy in Romanian law from Condica Caragea, the Calimach Code and the Organic Regulations until the current Insolvency Code amended by O.U.G. no. 88/2018, as well as the principles governing insolvency in the light of the treatment of creditors and the legal status of claims, translated by ensuring an efficient procedure with a high degree of transparency and predictability, ensuring equal treatment of creditors of the same rank and recognition of existing rights of the creditors and respecting the order of priority of claims on the basis of a set of clearly defined and uniformly applicable rules.

Chapter II, "Creditors", addresses, on one hand, aspects regarding the way in which the creditor acquires the status of a participant in the insolvency procedure, formal aspects regarding the declaration and

registration of the claim, as well as the substantive and procedural law on verifying and enrolling in the creditors' table, and, on the other hand, matters relating to one of the most important rights accompanying the status of a creditor participating in the procedure, i.e. the right to decide in the creditors' meeting and the creditors' committee.

As the *creditor is entitled to participate in the proceedings*, as a rule, the filing of the claim and the enrolling of the claim in the claim tables against the debtor also revealed the exceptions to the rule, such as employees who acquire the status of creditor who are entitled ex-officio to be enrolled in the claim tables on the basis of the debtor's accounting documents, without their having to make an official claim, or creditors with current claims who, although not enrolled in the table, participate in the procedure and are paid on the basis of the documents from which the claim arises or even the creditors whose claims were dismissed by the court administrator and file appeals.

The section on the *registration of the claim statement* develops the rules on the notification of creditors, which takes place immediately after the opening of the procedure and it is the duty of the insolvency practitioner who performs it to take into account the list of creditors filed by the debtor subject to the insolvency procedure, and to carry out the individual notification at the same time in accordance with the provisions of the Civil Procedure Code, as well as a collective notification written in a wide circulation newspaper and in the Insolvency Proceedings Bulletin.

The section covers the obligation of the regularly notified creditor to go through the formal stages of filing the claim in due time, the effects of the non-observance of the term, but also the possibility for the creditors who have not been notified under the legal provisions to continue as parties in the proceedings from the state at which it is at the time of their enrollment on the claim table, with all the resulting effects. We also elaborated on procedural aspects regarding the content of the claim statement, the filing of the supporting documents of the claim, the deadlines for filing these documents and the applicable sanctions for failure to meet the deadline.

The section on the *verification and the recording of claims* treats differently, in relation to the different types of procedure, the debts which started before the opening of the procedure in the case of the debtor's entry into the general insolvency procedure, the verification of the debts which started after the opening of the general procedure in the case the debtor became bankrupt after the opening of the general procedure and the verification of debts which started prior to the opening of proceedings and of those born in the observation period in the case the debtor went bankrupt by use of the simplified procedure.

In this section, we elaborated on the claims that were subject to verification, claims relating to debts from leasing contracts, and debts that are exempt from verification, such as those arising from enforceable titles

resulting from court rulings and those resulting from enforceable arbitration awards.

The budgetary claims resulting from an enforceable title which has not been challenged within the time limits provided by the special laws, we analyzed the limits of the verification in the sense that the insolvency practitioner can only verify the formal aspects and cannot make substantive verifications of the budgetary claim, or on the legality and the validity of the enforceable titles from which the budgetary claims derive, this power belonging exclusively to the specialized court for administrative and fiscal control. The insolvency practitioner reviews the claims in question in order to determine whether they are prior to or following the opening of the proceedings.

We dealt with the actual activity of checking the claims, as well as the possibility of the practitioner to invoke and observe the statute of limitation, to assess the validity of the document establishing the debt, and the activities of drawing up the claim tables corresponding to the procedure stage, challenging the tables and finalizing them, highlighting procedural issues and solutions to these issues.

In separate sections, we elaborated on the *updating of the claim tables* in the case of the total or partial repayment of the debts and *the special appeal provided by art. 113* against the filing of a claim or a right of preference in the final claim table or in the updated tables, in the event of the discovery of the existence of a forgery, intentional fault or essential error determining the admission of the claim or of the right of preference, and in case of the discovery of some decisive and hitherto unknown titles.

Since the most important rights of the creditor who is a party to the insolvency proceedings are the right to participate and vote in the creditors' meeting and the right to participate in the distribution of money, this latter right is treated within each category of claims in the chapter on the legal status of claims, the last two sections of Chapter II, "The Creditors", are dedicated to the "Creditors Assembly" and the "Creditors Committee".

The *"Creditors Assembly"* section deals with the definition, the powers of the assembly, the convocation, the publicity of the convocation, the agenda, the vote and the holding of the meeting, the types of decisions taken by the creditors' assembly and the cancellation of the decisions.

In the section dedicated to the *"Creditors Committee"*, we enlarge upon the notion, the designation of the members of this executive body of the creditors' assembly, the trustee of the meeting, the tasks of the committee, the rules of operation and the conflict of interests.

Chapter III "Debt categories and their legal regime" deals with the most important categories of claims analysed by section, claims arising from European funds financing contracts, claims arising during the procedure, budgetary claims, salary claims, preference claims, unsecured debts.

Although it does not treat as distinct section the category of disputed and uncontested claims, that of debts in dispute or that of claims affected by modalities, terms and conditions, the study deals with these issues in the existing sections.

In the first section, we enlarged upon *general considerations* stating that, in principle, in relation to the general law, the meaning of the notion of claim in the insolvency proceedings is a limited one, the right of the creditor to receive money and the corresponding obligation of the debtor, but there is no fundamental difference from the legal point of view, but rather a narrowing of the meaning given by the specific of the insolvency procedure, as a collective and concurrent enforcement that seeks to cover the insolvent debtor's liabilities (repayment of the debts).

In the analysis of each category of claim, we have departed from the similarities and differences with and against the meaning of the notion in the general law.

The section dealing with *the legal regime of claims arising from European funds financing contracts* discusses the issue of the moment when these claims arise and, by reference to the grant agreement as the source of the claim, the applicable laws and the obligation of the management authority with competence in the management of European funds to initiate the activity of finding the irregularities and to determine the budgetary debts within 15 days from the moment when the decision to open the procedure has been notified. and we concluded that the claim started before the opening of the insolvency proceedings.

In the section we debate on the issue of including these debts in the category of budgetary debts, the legal regime of the debts determined by the act of control of the management authority, with details on the solution for the enrolling of the claim in the case when the administrative court decides to suspend the operation of the control act which established the debt. The solution considered to be optimal in this situation of challenging the claim and suspending the enforcement of the act is to enroll the claim mentioning that it is a disputed claim under a suspensive condition.

Recent amendments to Law no. 85/2014 on insolvency and insolvency prevention procedures through O.U.G. no. 88/2018 published in the Official Gazette of Romania no. 840 / 02.10.2018 according to which in article 102 shall be inserted paragraph 8^1 which establishes the registration of fiscal slaims established by a fiscal administrative act, and whose enforcement has not been suspended by a final court decision under resolutive condition does not solve the controversial issue of the registration of disputed and suspended fiscal debts.

Although correct, the clarification was not necessary in the context in which the case-law had considered the disputed but unsuspended claims as regular claims, the legal regime being that of a pure and simple claim, conditional to the outcome of the litigation in the administrative court whose

final decision changes the claim is the same, so there is same regime as that of the claim under resolutive condition, which is a pure and simple claim until the condition is fulfilled.

The third section of Chapter III, *"The legal status of claims arising during the procedure"*, deals with the notion of current claims and the classification of claims arising during the proceedings as current debts, utility debts and indispensable creditors' claims.

This section also deals with issues of priority for payment of current debts, emphasizing differences in terms and regimes between the expenses for the continued activity of the debtor and claims arising from the continuation of the activity.

Changes brought by O.U.G. no. 88/2018 on current claims seeks to secure the creditors who are beneficiaries of these claims, which despite the payment priority do not enjoy the rights of the other creditors participating in the procedure, such as being included in the debt tables or the vote in the creditors' assembly.

Although it provides that they are paid with priority on the basis of the documents, Law no. 85/2014, in its initial form, established a payment procedure that made it difficult to recognize and recover current claims.

The introduction of a time limit within which the court administrator must consider the claim for payment of the current claim, the possibility of the creditor of the current debt to request the starting of bankruptcy proceedings if the court administrator has failed to adjudicate within the time limit, the possibility to request setting of deadlines and solutions for the starting of proceedings by the insolvency judge, together with the possibility of starting the enforcement proceedings for the debts accumulated during the insolvency procedure, which are older than 60 days, bring additional security for the creditors of the current claims, leading to the quick settlement of the existence of the claim and to the creation of the premises for the payment of the debt if the debtor has financial resources.

As regards the services providers' claims, we discussed the conditions under which the supplier is not entitled to change, refuse or temporarily discontinue a service provided to the debtor or his property the provider being obliged to continue providing the service, the assumptions of the application of the text, the notion of captive consumer and the penalties applicable in the event of non-compliance by the service provider with the obligation laid down by law.

As regards the indispensable creditors' claims, we pointed out the issues regarding the submission of the list of indispensable creditors, the constitution of the category of these creditors and the holder of the right to set up the category .

The fourth section of Chapter III, starting from the notion of budgetary claim, in relation to the meaning in the general civil law, a similar notion, as defined in the Insolvency Code, deals with *the legal regime of budgetary*

claims, both in the light of the request for the opening of proceedings formulated by the budgetary creditor as well as the treatment of the creditor holding a budgetary claim in the insolvency proceedings.

In the section dealing with *the legal regime of salary claims* there were included considerations regarding the regulation over time of salary claims, the scope of the salary claims, which includes the rights stipulated in the individual labour contract, the collective agreement, but also the rights deriving from the assimilated relations, as well the rights of the employee in the event of the employer's insolvency, issues concerning the maintenance or termination of the employment contract in case of insolvency, as well as matters concerning their legal regime and the Guarantee Fund for the Salary Claims.

Chapter III continues with the section on *preferential claims* and the ana*lysis* starts from similarities and differences with the notions of preferential claims under the general civil law.

The Section examines the holders of preferential claims, the goods subject to the preferential cause, the advantages granted to the creditor beneficiary of the preferential cause i.e. being a member of the creditors' committee, the distribution of the money existing on the debtor's account at the date of the opening of the procedure by the simple request of the secured creditor, the lifting of the suspension provided by art. 75 par. 1 and the capitalization of the asset on which the guarantee was lodged in the insolvency proceedings, the privilege of the promising buyer of a bilateral sale promise to acquire the good by performing the promised obligation by the insolvency practitioner, adding the accessories after the opening of the procedure for claims incurred prior to the opening of the procedure, the priority for distribution according to art. 159.

The last section of Chapter III deals with *the legal regime of unsecured debts* starting with the general creditors' guarantee in general civil law, continuing with the effects of the opening of proceedings on the debtor and its wealth and considerations regarding the general guarantee of creditors in insolvency, the notion of an unsecured creditor in the procedure; ending with the legal status of these creditors' claims.

As a result of the research, which seeks to perform a unitary and complete analysis of the treatment of creditors in insolvency proceedings, both in terms of acquiring the status of creditor participating in the procedure and of effective participation, as well as under the legal regime of the claims of these creditors, we identified and exposed, on one hand, the legal inconsistencies and uncertainties and, on the other hand, a number of gaps, in which the Insolvency Code is silent, although the regulation would be necessary.

Without claiming to identify any gaps, inconsistencies and inaccuracies in the law, or that the opinions we expressed could not be subject to criticism, it is necessary to point out some so-called "imperfections" of the law.

A first so-called "imperfection" refers to the solution to summonsing and notifying the ordinary single creditors who were not notified through the Insolvency Proceedings Bulletin with acts subsequent to the opening of proceedings. Even if the provisions of art. 42 were drafted so as to remedy the previously established problems related to the unconstitutionality of art. 7 of the Law no. 85/2006 and have been aligned with Community law, it does not seem that full consistency has been achieved in terms of the conventionality of the text in relation to the ECHR practice.

The solution provided by the law on the notification of the ordinary creditors through I.P.B. of acts subsequent to the opening of the proceedings is not sheltered from criticism in the light of ECHR judgments delivered in the cases of Zavodnik v. Slovenia and Farcas against Romania.

The same questions also arises when it comes to the publication of the summons as it is regulated by the Civil Procedure Code in order to summons private individuals in cases where, during the procedure, the summonsing of the parties is carried out in accordance with the provisions of the Code of Civil Procedure.

Although the rationale for establishing the rules on summonsing and communicating through IPB has been to ensure the speed of insolvency proceedings and the purpose of the regulation is legitimate and proportionate to the underlying reason for the introduction of this special regulation, especially as a large number of creditors and parties may be involved in the procedure and the individual notification could lead to an expensive procedure, hindering its course, it has been revealed that the legislator can find a way of regulating in order to meet the requirements of the ECHR.

An effective remedy to ensure that the right to a fair trial is respected in the context in which actual notification of single creditors would create, in addition to delaying the procedure and a difference in treatment that can not be justified solely by quality (simple or professional) , could be the one in which the first notification of the individual creditor (also carried out under the Code of Civil Procedure) would include indications that all subsequent summons / notices throughout the procedure will only be published in IPB and that the receiver of the notification will have the obligation to follow the procedure in any way (electronic file, court archive, IPB consultation, etc.).

A clarifying legislative intervention would also be necessary with respect to art. 48 par. 1 on the convocation of the creditors 'meeting and on the nature of the terms foreseen for the summonsing of the creditors' meeting.

Besides the general rule of summonsing the creditors' meeting through the Insolvency Proceedings Bulletin, it appeared that legislative clarifications on the possibility or impossibility of convening by other means, such as fax, e-mail, etc., would be required.

As the current text shows, without denying the usefulness and effectiveness of such means in proceedings with a small number of creditors, it was considered that such a summonsing is not legal because it is an

exception from the general rule on insolvency publication, which must be expressly provided. On the other hand, as with the convening of the general shareholders meeting, such a provision designed to remove the difficulties of consulting IPB may become a ground for the annulment of the judgment case one single creditor was not properly summonsed.

It has been appreciated that the advertising rule in IPB ensures in the most efficient and safe way to a speedy procedure and the reduction of procedural expenses.

Unlike the provisions on convocation and voting in the creditors 'meeting, the provisions on communication and voting in the creditors' committee make it possible to use any means of transmitting the text and acknowledgement of receipt (Article 51, paragraph 2, last part). The possibility of using the means of communication and voting, such as telefax, e-mail or any other means of transmitting the text and confirming receipt, is explained precisely by the small number of members of Committee (3 or 5), so that the likelihood of violating decision-making making is significantly less compared to the situation of the creditors' meeting.

Regarding the nature of the deadlines set for the publication and call, we considered that the 5-day deadline for publication in the BPI of the convocation is imperative, under the sanction of nullity, and the 3-day deadline for filing with IPB the call for publication is one of recommendation, designed to simplify B.P.I activity.

Only the 5 days term is meant to ensure that creditors have a real opportunity to know the agenda and to be properly informed, within a reasonable time up to the date of holding the meeting, of the issues on which they will vote in the creditors' meeting.

It has been revealed that express provisions on means of convening the general meeting and deadlines would simplify the judgment of appeals at the creditors' meeting and would eliminate non-uniform practice.

Also in art. 48 par. 6 it would be necessary to clarify the text introducing the phrase "the chairman of the hearing" when it regulates the recording of the deliberations and decisions of the creditors 'meeting in a minutes, specifying that it is signed by the chairperson of the meeting, the members of the creditors' committee and the administrator or the liquidator.

As in the case of the old regulations, the question is "who can be this president" in the context in which the creditors' assembly is usually chaired by the judicial administrator or, as the case may be, by the liquidator.

The Insolvency Code took over, in this respect, the wording of Law no. 85/2006, although the chairman of the creditors' meeting is usually the insolvency practitioner, listed separately, or by the chairperson of the creditors' committee, also listed separately, as a member of the creditors' committee. An explanation of the wording of the text would be that the enumeration was intended to cover also the situations in which the presiding

is done by the creditor / creditors who have convened the convocation or the person designated for that purpose by the insolvency judge.

It has been shown, however, that an expression in general terms, such as "the person who chaired the meeting with members of the creditors' committee", would be more appropriate.

The same art. 48, but par. 7, should include the creditors who voted against the decision by correspondence in the list of persons who have legal standing to bring proceedings against the illegality of the creditors' meeting. In this case, the mentioning of the negative vote in the minutes of the meeting is implicit.

The legal provision in art. 47 par. 3 on the obligation of the chairperson of the committee of creditors and of the creditor who requested the convocation should be drafted in an enacting manner.

We stated that the opinion in the doctrine that the provision should be read in the light of the mandatory provisions of the Constitutional Court Decision no. 462/2014, which declared unconstitutional the provisions of art. 13 par. 2 a-II-a, art. 83 par. 3 and art. 486 par. 3 of the Code of Civil Procedure, establishing the obligation to file the appeal by a lawyer.

Even if the issue of access to justice is not questioned, there remains still the question of the exercise of rights in a collective enforcement procedure, we considered that the legislator's reasons for the drafting of art. 47 par. 3 of the Law no. 85/2014 on the assistance or representation by a legal professional are similar to those envisaged in the drafting of the Code of Civil Procedure, so that if the assistance of a lawyer is not mandatory in the case of the appeal on points of law, the Constitutional Court ruled that the support of a lawyer is not mandatory, the more it cannot be imposed in the case of the presiding of the creditors' assembly.

De lege ferenda the mandatory provision should be modified in order to give the possibility of representation or assistance by a lawyer or a legal adviser, the representation of a qualified person being preferable for a speedy procedure and avoiding unlawful decisions which will not stand to the censorship of to the insolvency judge, but leaving also the possibility of exercising the rights in the procedure without this support, which would involve additional costs for the creditor who presides over the assembly and who participates in the procedure precisely for the recovery of a claim.

Regulatory coherence issues also arise in the hypothesis regulated by art. 75 par. 9 where the creditor of the guarantee on the amounts of money existing in the debtor account, who can get the respective amounts pursuant to art. 75 par. 7 the first by a simple request addressed filed to the court administrator, does not agree with the debtor s intention to use the money for his/her current activity to provide the necessary resources for the continuation of the activity during the observation period and the insolvency judge is to decide on a request for authorization to use the respective amounts.

Contrary to the provisions of art. 45 par. 2 of the Law no. 85/2014, which establish the limitation of the judicial control to aspects of legality, the provisions of art. 75 par. 9 give the insolvency judge the power to appreciate on the opportunity that goes beyond this control.

Being a matter of opportunity that exceeds the scope of the powers of the insolvency judge, it should be regulated either expressly as an exception or as a power of the committee of creditors or of the judicial administrator, who has managerial duties.

Or it has been pointed out that it would be necessary to detail the provision regarding the powers of the insolvency judge in the sense that, in exceptional circumstances, such as the necessity to unblock the procedure that stays behind due to the lack of interest shown by the creditors, the insolvency judge should have the possibility to decide on grounds of opportunity. Such decisions are allowed to the insolvency judge in a number of cases: the convocation of the meeting of creditors with a certain agenda (Article 45 letter p), the analysis of the viability of the reorganization plan (Article 139), the approval of the sale of the goods by public auction (Article 156 paragraph 2).

It has been appreciated that some of the provisions governing the procedure for declaring and enrolling creditors in the table of claims against the debtor's assets also suffer as far as the wording is concerned either because of the mistakes in expression or ambiguity or the lack of correlation in some cases or even the lack of regulation itself.

An example of error in drafting, which needs to be corrected, is art. 106 par. 3 which stipulates that in order to fulfill the duty to verify the receivables, the administrator can request explanations from the debtor, may discuss with "each debtor", requesting, if necessary, additional information and documents.

The simple reading of the provision leads to the conclusion that, obviously, the legislator refers to each creditor, the pronoun "each" (indicating beings or things taken in part from a group or a category) cannot be associated with the debtor who is one person. In addition, as the debt verification activity is under discussion, it is natural to request information and additional documents from each creditor who has filed a claim.

The text can only be read in this logic key, which leads to the conclusion that the review made by the legal administrator requires that both sides of the legal relationship should be able to express their point of view - both the creditor requesting the recognition and the enrolling of the claim in the table and the debtor against whom it has been opened procedure, hence a correction of this mistake appears to be necessary.

As to the poor drafting, an example is the text of art. 104 par. 2 which provides the obligation of attachment of the supporting documents of the claim or of the documents proving preferential claims, specifying that those are documents to be submitted at the latest within the deadline set for the filing of the claim for admission of the claim and this, literally, would lead to

the conclusion that should this time limit be exceeded the right to prove the claim should be denied .

In the paper we argued that it is clear from the systematic interpretation of the texts on the content of the statement (Article 104), the verification of debts (Article 106) and the appeals against the claim table (Article 111) that evidence can also be filed together with information and additional documents required from the creditor by the insolvent practitioner at the time of the verification, as well as any other documents filed with the challenging of the preliminary table.

It has been shown that the reason for introducing the phrase *"at the latest within the deadline set for the filing of the application for admission of the claim"*, i.e. a maximum of 45 days from the opening of the procedure, is related to the speed of the proceedings but the submission of the supporting documents in the manner shown by the legislator when defining the corresponding procedural steps, although it is made after the deadline for filing the claim, do not lead to the delay in proceedings.

In a future change to the text, it would be preferable for it to provide that the supporting documents for the claim and of the preferential claims will preferably be filed with the statement of claim by the deadline set for the submission of the application and completed at the latest at the moment when the appeal against the preliminary claim table is filed.

And the wording of art. 102 par. 3 *"the claim for admission of claims must be made even if they are not established by a title"* is deficient, because the interpretation may lead to the conclusion that it may be required to enter the claim table by a creditor who does not have the title to his claim.

The enrolling in the preliminary table of creditor's claim which does not derive from a legal title in the sense of a probative instrument is excluded, the legislator's intention being to allow the creditor to enter in the preliminary table a claim deriving from a title in the sense of means of proof, even if it is not in possession of the documents proving the certainty or liquidity of the claim.

A better wording may be: the request for admission of claims must be filed even if the debts do not result from enforceable titles such as court judgments, arbitration awards, provided that the creditor can prove his claim by a title, meaning evidence, including the beginning of written proof, supplemented by other documents and even if he is not in possession of the documents proving the certainty or liquidity of the claim.

As for creditors who bring securities or investments, the law states that they must be presented as support for the claim form, this conclusion resulting from the reading of art. 104 par. 3, since the legislator provided for the possibility for holders of order or bearer commercial papers to request the return of the original titles and the keeping of certified copies in the court file.

In practice, the presentation of the original titles is done by the creditor for the purpose of verifying the claim by the insolvent practitioner, since these

documents incorporate the claim and after the verification, upon the creditor's request, the original documents returned, with the keeping of a certified copy, and the court administrator will write on the original document that it has been presented to the court.

Even if Law no. 85/2014 no longer provides, like the old Insolvency Law no. 85/2006, the new submission of the original again at the moment of any distribution of money among the creditors, as well as at the moment of the vote in the general meeting of the creditors, it was pointed out that a provision in this respect is required, the creditor's presentation of the original, at least on the occasion of the distribution of amounts resulting from the capitalization of the debtor's property, being necessary to make the appropriate notes.

It has been pointed out that the text of art. 105 lacks the clarification regarding the European Enforcement Orders for uncontested claims under Regulation (EC) No. 805/2004 and that a legislative clarification would be required by listing them among the exempted claims which are not subject to verification.

Art. 105 on the recording of claims resulting from leasing contracts generated different interpretations and some clarifications would lead to the elimination of differences of opinion and to a unitary jurisprudence.

It was stated in the doctrine that par. 3 of art. 105 regulates the way in which the lessor's claim is recorded in operating leases, but it was pointed out in the paper that the legislator did not distinguish between operating leasing and financial leasing, as it was done in the following paragraph where the status of the ongoing financial leasing contract at the date of the opening of the procedure is explicitly provided.

Another argument is also that the problem of ownership transfer occurs more in the case of financial leasing that closely resembles the sale of goods on installment, the difference lies in the moment of the transfer of the property (at the moment of the purchase of the goods in case of sale and at the termination of the contractual relations, only if the user chooses to do so in the case of leasing).

The doctrine expressed a strong criticism on the issue of how property is transferred in the case of a leasing contract because the law does not provide the moment and the way in which the transfer becomes effective.

As the starting hypothesis is that the lease was terminated prior to the opening of the procedure and the financier has to sell, the transfer of the property right takes place through a distinct transfer act, but the legislator did not specify anything in the text about the moment when the transfer of property is concluded, whether it is before or after the date of the opening of the proceedings.

It was revealed that if the moment of the transfer of the property of the good which was subject of the terminated leasing agreement is prior to the opening, then most likely all conditions and guarantees regarding the recovery

of the debt will be provided in the document, so that the text of art. 105 para. 3 letter a should be read in the sense of being applicable to the situation in which the trasnfer is concluded after the opening of the procedure because, although the termination of the lease contract occurred before the opening, the situation of the claim and the asset was not yet clarified.

As a result, clarifications on the timing and the actual way of transmitting the property would be welcome.

Analyzing the text of art. 105 para. 3 (a) in terms of coherence and clarity of the wording, the doctrine expressed opinions that it did not exclude the interpretation according to which, by reference to the provisions of art. 2386 of The Civil Code it refers exclusively to leasing transactions involving immovable property, being inapplicable to the case of movable assets.

Although the provision does not appear to make such a distinction, the clarifications appear to be necessary in the event of a change to the Insolvency Code, especially since the vast majority of the leasing contracts concluded by the debtors entering the procedure refer to movable goods. In addition, the legal regime of a debt secured by legal mortgage is the same as that provided by art. 105 para. 4, is given by the provisions of art. 159 para. 1 pt. 3. whereas in the case of the legal mortgage established by art. 105 para. 4 it is provided that the claim should be registered in the "relevant publicity registers", meaning that the legislator has considered both the land registers and the Electronic Archives of Real Movable Guarantees, so that the legal mortgage refers to both real estate, as well as to mobile goods.

In the case of preferential claims, we appreciated that it would be necessary for the legislator to expressly provide the right of retention of title.

Article 5 (15) enumerates among the preferential claims, the privileges and / or the mortgage and / or rights assimilated to the mortgage, and / or the pledge on the assets of the debtor's assets, being thus irrelevant if the debtor in insolvency proceedings is the principal debtor or third party guarantor of the beneficiaries of the preference causes.

The legislator explicitly stated in the definition that these preference causes have the meaning provided by the Civil Code, unless otherwise provided by a special law.

In other words, in the context of insolvency, receivables from a preferential claim that may appear in the claim table are the same as those provided by the Civil Code, namely: mortgage (movable or immovable), pledge, privilege and right of retention.

The right of retention is not mentioned in the legal definition, but this omission is casual, it is not due to the legislator's intention to exclude this right from the preference causes but it is a simple omission. Although this form of imperfect guarantee gives the creditor the right to withhold the asset and is prima facie incompatible with the insolvency procedure, which involves putting the debtor's assets at the disposal of all creditors, prohibiting the retention of any good by a creditor, in fact the creditor who is owner of

the right cannot be against the enforcement, according to art. 2498 par. 2 Civil Code, so that the collective enforcement in the procedure and the participation of this creditor in the distribution of money together with the other creditors under the conditions of the Insolvency Code are possible. As a result, it is possible to enroll the claim with this form of security in the creditors' table, the mention giving priority to payment under the condition provided by the law if the asset affected by the right of retention is capitalized in the proceedings.

The indication of this preference cause is desirable, since the legislator of the Insolvency Code considered the right of retention, as a preferential cause, with the same meaning as in is provided in the Civil Code, which is clear from the provisions of the Insolvency Code, art. 91 and art. 342.

we noticed that there are some inconsistencies in the Insolvency Code regarding the verification, registration and contestation of claims.

It is worth mentioning the issue of drawing up the preliminary table on the recording of salary claims when the debtor did not keep the accounting documents in accordance with the legal provisions or did not hand over the accounting documents to the insolvency practitioner due to the lack of legal correlation of the provisions regarding the drawing up of the table established by the insolvency judge with the text of art. 50 and 61.

In the above mentioned situation, it is necessary to appoint a specialized person, an expert accountant, according to art. 61, who will determine salary claims against the debtor's assets before the date set by the insolvency judge in the decision to open the procedure for drawing up and publishing in the Insolvency Proceedings Bulletin the preliminary claim table.

The actual drawing up of the expert's report by the specified deadline is an impossible task, since the appointment of the specialists and the establishment of their remuneration are subject to the approval of the Committee of Creditors, appointed at the first meeting of the Creditors' Assembly, which is set after the publication of the preliminary table.

The provisional appointment of the Committee of Creditors by the insolvency judge at the insolvency practitioner's request is not an effective solution, because the provisional designation is made by the judge after the drawing up of the preliminary table, according to art. 50 par. 2 of the law. However, it is clear that in the discussed situation, the creditors' committee must exist prior to the drawing up of the table, the approval of this collective body being necessary for the appointment of the accounting expert for the purpose of drawing up the preliminary table.

The correlation of the provisions involves the addition of this particular situation in which the debtor did not keep the accounting documents in accordance with the legal provisions or did not hand over the accounting documents to the insolvency practitioner, in which case the approval of the creditors' committee could be supplemented by the decision of the insolvency judge at the request of the insolvency practitioner.

Neither the text of art. 102 par. 9, which refers to the challenging of claims by the debtor, the administrator or any other creditor has not been correlated with the provisions of art. 111 par. 1, which makes it possible for the debtors, the creditors and any other interested person to challenge the claim table. The provision maintains the existing confusion from the old regulation provisions, art. 66 par. 3 and art. 73 par. 1 of the Law no. 85/2006.

This inaccuracy has been emphasized in the doctrine on insolvency law regarding Law no. 85/2006, being underlined that the judicial administrator cannot challenge his own verification to which he is bound by the law, being obvious that no one can invoke his own fault, so that the judicial administrator is not to be included among the persons entitled to file an appeal to the preliminary table.

Practically art. 102 par. 9 should be written again and the judicial administrator should be left out of this procedural step.

A non-correlation is also identified in the text of art. 147 par. 3, which establishes an unjustified difference of regime regarding the verification of the budgetary debts incurred during the procedure against the budgetary debts which occurred before the opening of the procedure,and are not verified according to art. 105 par. 2. The text of art. 147 par. 3 also reproduces a legally inaccurate statement in the context that the liquidator cannot make any substantive verification of the budgetary debts, the limits of the audit carried out by the liquidator being reduced to formal aspects: if the debt is paid in part or entirely, if the statute of limitation applies etc., the jurisdiction on the merits is the exclusive responsibility of the specialized court for administrative and fiscal control.

The issue was explained in Decision no. 11/2016 issued by the High Court of Cassation and Justice, published in the Official Gazette of Romania no. 434 of June 10, 2016.

Last but not least, we will give some examples of "silence" of the law, although regulation would be necessary to clarify doctrinal debates, but also to remove non-unitary practice at the level of the courts.

Art. 106 par. 2, which gives the insolvency practitioner the opportunity to observe the statute of limitation, when checking the claims, but the law does not provide a regulation on the statute of limitation regarding the enforcement of the claims arising from enforcement orders.

The text refers to the statute of limitation in relation to the material right to sue, and it would be logical that the insolvency practitioner can also rely on the statute of limitation of the right to demand enforcement for claims arising from enforcement orders.

The law is also silent when, referring to the inclusion of the budgetary claims challenged under the Code of Fiscal Procedure, it does not indicate how these receivables should be recorded in the case of the suspension of the title by the administrative court.

In the absence of provisions regarding these claims, various opinions were expressed: either the writing of this claim under a suspensive condition (the condition being that the creditor would win in court), or the writing of the claim as being under litigation or the provisional entry of the claim.

Starting from the definition of the preliminary claim table, given by the legislator in art. 5 par. 1 pt. 69, according to which the preliminary table includes all maturing or non-maturing debts, conditional or disputable, born before the date of the opening of the procedure and accepted by the judicial administrator the idea that follows is that the legislator distinguishes between the debts under condition and the debts in dispute as distinct categories of receivables that are included in the preliminary table.

Also, Article 67 1 (c) of Law no.85 / 2014, when referring to the list of creditors which must accompany the debtor's request to open insolvency proceedings, regarding the creditors' claims distinguishes between certain or conditional claims, liquid or illiquid, maturing or non-maturing, uncontested or contested, so that it can be concluded that the legislator regards both categories of claims, on the one hand, the uncontested claims, and, on the other, the disputed claims.

By interpreting the two provisions together, it is obvious that there is no equivalence between the disputed claims and claims under litigation and also between conditional claims and claims under litigation .

When referring to uncontested or contested claims, the legislator considered as a classification criterion the challenge of claims in the insolvency proceedings, so that the inclusion of the claim in the category of disputed or uncontested claims is made in relation to this aspect and in the case of the contested debts in the procedure provided for in the Fiscal Procedure Code, the intention of the legislator was that of categorizing the debts .

We emphasized that the mere appeal to the administrative court implies the existence of a litigation, but by challenging a claim it does not become a provisional or a claim under a suspensive condition, the categorization of one or another being very important in view of the legal effects that the enrollment in the table as pertaining to one category or another.

The filing of the appeal in tax administrative litigation therefore has no effect on the entry of the tax claim in the claim table against the debtor's assets, which is entered in the table as a pure and simple claim. The insolvency practitioner will make the mention “in dispute” and after the final judgment of the administrative court, the insolvency practitioner will amend the table in relation to the solution given by the judgment.

This is different from the claim that was provisionally registered in the table, which involves challenging the claim before the insolvency judge and at the same time his appreciation that evidence is required.

There is a difference between these type of claims and the claim provisionally registered in the table, which means that the latter was

challenged before the insolvency judge and this challenge requires that the judge decided tat certain evidence is needed.

Inclusion of the claim as a provisional claim is the exclusive power of the insolvency judge, who may decide provisional enrollment until the submission of evidence, when settling complaints on the preliminary table regarding past claims and rights, or, as the case may be, claim which were not registered by the judicial administrator in this table.

The difference is important, on one hand, regarding the person who makes the registration in the claim table, in principle this person should be the court administrator and only the insolvency judge in the case of the provisional claims, and, on the other hand, regarding the way of challenging the debtsin the administrative court , or in front of the insolvency judge during the insolvency proceedings for provisional claims.

At the same time, the issue is whether the aspects concerning the appeal against the taxation decision, the control act, to the fiscal body and the suspension of the enforcement of the debt, which is also enforceable, by a judgment handed down by administrative court, the litigation in administrative courts, represents a future and uncertain event depending on the birth of the creditor's claim.

It has been argued that if a claim has been appealed and suspended by the administrative litigation court, we are not in classical situation of a conditional debt whose birth depends on a future and uncertain event, a condition resulting from the legal agreement.

Suspension of the enforcement order until the final settlement by the court of appeals of the appeal against the debt claim, although extrinsic to the debt instrument, affects the claim in a similar way as the suspensive condition, in the sense that the legality of the debt act and of the amount of the claim in the administrative litigation is a suspensive condition.

The condition implies that the birth of the claim will occur at the time of fulfilling the condition as a future and uncertain event.

The budgetary claim in question, although born prior to the opening of the proceedings according to the title establishing the debt, which is the control act, the tax decision, which is also an enforceable order. The budgetary debt becomes ineffective until the end of the administrative litigation although it was born before the opening of the proceedings according to the taxation decision, which is also an enforceable order.

The effects of the suspension besides bringing into discussion the enforceability of the act, question its very existence, so that there is no certain, liquid and matured claim that can be enforced in the collective insolvency proceedings.

The claim is not affected by a classical suspensive condition because, even though the validity of the title is questionable while the suspensive condition affects the claim, the act was effective before the suspension,

meaning that the debt startedd as being valid and its existence cannot be denied unless the administrative court decides that the act is void.

It follows clearly from the definitions of the suspension of the enforcement of the administrative act given in the specialized doctrine that the effects of the act itself are suspended, as if the act has disappeared from the civil circuit and, until a final, formal and legal solution is reached, the act of the suspended debt is non-existent, although it had certain effects before the suspension, the claim being based on an act that benefited from the presumption of legality.

Law no. 85/2014 provides a case of claim under litigation assimilated to a conditional claim, under art. 102 par. 8 according to which the claim of an injured party in a criminal trial is registered under a suspensive condition, until the final settlement of the civil action in the criminal proceedings in favor of the injured party, by filing an application for admission of the claim.

The above-mentioned situation, although similar to the one in question, is expressly provided by the legislator, so that until a possible further legislative intervention in the sense of assimilation of the claim of the budgetary creditor whose claim was challenged and suspended by the administrative court with a claim under suspensive condition, such an interpretation is the exclusive result of jurisprudence.

In conclusion, there would be necessary to introduce a legal provision on the solution of enrolling the budgetary creditor in the claim table, with a claim under a suspensive condition when the title of the budgetary claim was suspended by the administrative court.

It would also be necessary to introduce a legal provision on the enrollment of the claim if the enforceable order issued by the budgetary creditor was not notified to the debtor or this notification was not valid, because this issue was also subject of controversy .

It has been shown that verification of the debt can only be made by the administrative court.

From the moment when the debt declaration is accompanied by the title of the debt, which becomes an enforceable order from the moment of maturity of the obligation and, debtor will know the existence of the act and will be able to challenge it in the administrative court, the communication being relevant to the challenging of the document (the debtor who was not notified or properly notified is still able to challenge the act).

The disclosure of the debt title, which is an enforceable order, is not relevant in terms of the effects of the act, communication is not a condition of validity of the fiscal administrative act, and that is why the claim is considered as pure and simple until the challenging of the title and its suspension by the administrative court.

As a result, we appreciated that after the submission of the claim statement, the debtor through the special administrator and the insolvency practitioner will have to challenge the title which was not properly notified

and to request the suspension under the conditions of art. 14 or 15 of the Administrative Law no. 554/2004, as the case may be (in case of lack of notification, the debtor will request the suspension under article 14, submitting the appeal to the issuing body, and in the case of the improper communication it is possible to request the suspension under art. 15 if he also files a complaint before the administrative court).

The claim will only be registered if the administrative court has ordered the suspension of the enforceable order, since the matters relating to the improper communication can be analyzed only within the framework established by law by the competent administrative court, not by the insolvency judge or the insolvency practitioner.

A provision regulating the manner in which the claim is registered into the table would also be necessary in view of the claims arising from the decisions of the non-final enforceable orders.

The provisional enrollment is not applicable in this situation. The provisional registration, expressly regulated in art. 111 par. 6, refers to the situation in which, in the context of appeals against the preliminary claim table, the judge, who has to settle all appeals at once, considers that evidence is needed with respect to one or more claims and allows their provisional enrollment until hearing the evidence and the judge is able to determine, on the basis of evidence, the extent of the claims.

As the provisional registration is the exclusive attribute of the insolvency judge, this enrollment cannot be extended for the situation of an ordinary civil case, on the one hand because the situation expressly regulated by art. 111 par. 6, which involves a trial before the insolvency judge is not similar to the one in question, which implies an ordinary civil trial, and on the other hand, because, from the point of view of provisional registrations, the situation may turn into a non-provisional one, if the ordinary civil trial ends in the appeal by remitting the case back to the first instance court, a solution equivalent to the lack of a decision on the claim in the context of the legal stay in proceedings under srt. 75 of the Law no. 85/2014.

It has been shown that there would be more appropriate to enroll the claim as being under litigation or under resolutive condition, the condition being the unfavorable solution to the creditor in the superior court. In the case of a favorable decision, the claim table will remain unchanged or will be reconsidered according to the decision, regardless of whether the claim will be the same, less or higher. In the case of an unfavorable decision, there are two possible hypothesis: the first is the one in which the appeal will change the decision on the merits by dismissing the complaint, in which case the table will be restored by deleting the claim, the creditor losing the standing as the creditor entitled to participate in the proceedings with all the rights resulting from this quality and the second is the one in which the superior court will not rule on the merits of the law, and the insolvency practitioner will then verify the claim.

It was taken into account that at the time the preliminary table was drawn up, the claim was established by a court order and the effects of the provisional registration giving the creditor all the rights except that for the distribution of the sums is compared to the registering of the claim as being "in litigation" or under resolutive condition whose effects are the same as those of a pure and simple claim until the dispute is final.

The solution we proposed is not perfect, given the unlikely but possible hypothesis that the claim would be erased, so that the best solution to the problem is the intervention of the legislator through an express provision.

Although the examples of imperfections could continue, and other such situations of lack of correlation, bad drafting or lack of regulation were debated in this research paper, we concluded that revealing the so-called imperfections was more meant to be an emphasis on the results of the research and less a critique of the current regulation, superior from all points of view to those who preceded it.

The paper aims to be a complete set of comments, explanations and practical applications regarding the treatment of creditors and the legal regime of claims, useful as a working tool for all categories of specialists in the field of insolvency law and not only this field.

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