PREVENTIVE AGREEMENT – THE VIABLE ALTERNATIVE TO LAW NO. 85/2006 ON INSOLVENCY PROCEDURE?

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Abstract
Given the economic crisis that Romania is going through and which influenced in a negative manner the activity of economic agents throughout the country, Law no. 381/2009 has been adopted for the implementation of the preventive agreement and ad-hoc mandate, in order to support companies facing economic difficulties in their activity. Law no. 381/2009 became applicable on January 13, 2010 and it implements, as an alternative to the difficult and time-consuming procedure of insolvency, a contractual mechanism for companies facing difficulties in organizing their activities, outside the insolvency procedure, with limited involvement from the court. This regulation is seen as a solution against the opening of the insolvency procedure. The solution applies especially to small and middle sized companies. The preventive agreement implies a longer deadline for payment liabilities based on a friendly agreement with the creditors. It is a mechanism for avoiding insolvency and it consists of an agreement made between the debtor and the creditors regarding the way in which the debtor, which is in a difficult financial position, will pay all its outstanding debts. The law applies to all legal entities which reorganize a company going through a difficult financial period, without being in insolvency and which are called debtors. Nevertheless, the preventive agreement law still forces us to relate to the notion of insolvency.

Key words: *preventive agreement, ad-hoc mandate, insolvency procedure, judicial moratorium*

Introduction

1.1. General aspects regarding the purpose and effects of the application of Law no. 381/2009 provisions

In order to approach the proposed topic it is crucial to emphasize the importance of the Judicial Moratorium Law and of the ad-hoc mandate to avoid the bankruptcy of companies. The judicial moratorium procedure must not be mistaken for the insolvency procedure (reorganization/bankruptcy), regulated by Law no. 85/2006 regarding the insolvency procedure, with all ammendments.

The judicial moratorium Law has been built starting from the idea that, in order to find financial balance, indebted companies could close a deal with the creditors for the payment of all debts.

The term 'judicial moratorium' is regulated for the first time in our country. The former Commercial Code regulated two measures to prevent bankruptcy, that is: *pre-bankruptcy moratorium*, which represented a means of delay from the debtor and the *post-bankruptcy moratorium*, both leading to unsatisfactory results in practice.

Thus, the judicial moratorium Law appeared in 1929, which eliminated the moratorium and shich, in 1938 has been recalled due to poor results in practice. It seems that the poor results of these measures meant to avoid the effects of bankruptcy are explained by the excessive involvement of the syndic judge and the court, through complicated procedures and by the fact that these institutions would intervene too late, the debtor being already bankrupt (cessation of payments).

The judicial moratorium concept is also implemented and applied in European Union countries, such as Belgium, which adopted it since 1997.

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The purpose of the application of Law no. 381/2009 regarding the implementation of the judicial moratorium is to protect societies in financial distress in order to reorganize their activities without going into the insolvency procedure. Thus, the aim is to avoid bankruptcy, by closing a deal with the creditors regarding the way in which debts will be paid. They will be able to cover the owed amounts, by means of amicable proceedings of negotiation of debts or debt-related conditions by concluding a judicial moratorium.

In order to better understand this regulation, a few succinct comments are necessary concerning the provisions of Law no. 85/2006 regarding the insolvency procedure (modified and amended by Law no. 169/2010, inclusive). The insolvency procedure is a unitary, collective and leveling enforcement procedure. It represents "that part of the debtor's patrimony that is characterized by insufficiency of funds available for the payment of exigible debts" (art. 3, item 1). This insolvency procedure can be performed in several ways, such as: the general procedure, the simplified bankruptcy procedure, the judicial reorganisation procedure and the bankruptcy procedure, which applies to the debtor in order to liquidate its fortune to cover the liabilities, being followed by the deletion of the debtor from the Registry of Commerce where he was registered. The judicial moratorium and the ad-hoc law whishes to be a new and radical solution for the treatment of enterprises in distress that go through a solvable crisis, by convincing the creditors that there are chances to regain balance, by means of an operative mechanism and procedure, other than bankruptcy, which reduce the involvement of judicial bodies to a minimum, based on a convention between the involved parties.

In other words, by means of a contractual proceeding, concluded between the creditors and an honest debtor, in financial distress, one aims at avoiding insolvency and creating a procedure of contractual reorganization between debtor and creditors.

The mentioned law itself states that its purpose is to safeguard enterprises in distress, in order to continue their activity, maintain workplaces and cover all debts of the debtor, by means of amicable procedures for the renegotiation of debts or related conditions, or by means of a judicial moratorium. The judicial moratorium implies a contract concluded between the debtor, on the one hand, and the creditors that own at least two thirds of the value of accepted and unchallenged debts, on the other hand, through which the debtor proposes a plan to reestablish the balance of its enterprise and to cover all debts to creditors, while creditors accept to support the efforts of the debtor to get over the distress that the debtor's company is in.

A new element brought by the judicial moratorium is that during its application, secondary debts – penalties and interest are stopped. Also the interdiction to start the insolvency procedure for the same period is another new element.

This procedure can be used by any debtor that meets a number of conditions: hasn't been convicted for fiscal offences, no insolvency procedure has been started against that debtor in the last five years etc. In other words, has „a good conduct in business".

The judicial moratorium Law no. 381/2009 offers companies in financial distress the possibility to avoid bankruptcy by means of an authorized person that can hire people or make them redundant, conclude or terminate contracts, everything on the purpose to avoid bankruptcy. The purpose of the law is to save a company in distress by means of one of the following procedures: the ad-hoc mandate or the judicial moratorium.

1.2. Considerations regarding the way in which Law no. 381/2009 regulates the "Ad-hoc mandate"

The ad-hoc mandate is a confidential procedure, triggered upon the request of the debtor, through which an ad-hoc representative proposed by the debtor and appointed by the court negotiates with the creditors in order to reach an agreement between one or more creditors and the debtor, in

order to get over the distress that the debtor's company is in[1]. In such cases, only the court has the authority to decide. Actually, a debtor can address the nearest court to request the appointment of an ad-hoc representative from among the authorized insolvency practitioners. The request must comprise a detailed description of the reasons for which he or she requires the appointment of an ad-hoc representative. After receiving the request, the president of the court has five days to decide the invitation of the debtor and of the proposed ad-hoc representative. After listening to the debtor, if one finds that the company is indeed in serious distress, the court authorizes the appointment of the proposed ad-hoc representative. The ad-hoc representative has the obligation to reach, within 90 days after the appointment, an agreement between the debtor and its creditors, so that financial problems are solved, debts are paid, the company is saved from bankruptcy and workplaces maintained. The ad-hoc representative has the right to propose deletions, reschedulings or partial reductions of the debt, continuation or termination of ongoing contracts, personnel reductions, as well as any other measures necessary to save the company from bankruptcy and bring it back on the floating line.[2]

Regarding the ad-hoc mandate procedure, the law does not stipulate sanctions, but only the acknowledgement of its cessation by the president of the court, if no agreement has been mediated between the debtor and its creditors.

The purpose of the implementation of the ad-hoc mandate procedure is unclear, since it cannot offer a better position of the debtor in relation with its creditors – an agreement with the creditors being possible without the involvement of the court.

1.3. Considerations regarding the way in which Law no. 381/2009 regulates the "judicial moratorium"

The judicial moratorium is a contract that has been concluded between the debtor, on the one hand, and the creditors that own at least two thirds of the value of accepted and unchallenged debts, on the other hand, through which the debtor proposes a plan to reestablish the balance of its enterprise and to cover all debts to creditors, while creditors accept to support the efforts of the debtor to get over the distress that the debtor's company is in[3]. Thus, one can notice that in both cases, the intervention of the court is limited and under no circumstances does it involve a decision to enter insolvency. It only implies the conclusion and performance of new agreements between the debtor and most of its creditors, which are concluded through mediation by insolvency specialists. But the failure of these agreements leads, inevitably, to bankruptcy. It's also necessary to emphasize that during the ad-hoc mandate or the judicial moratorium period, the debtor maintains its right to manage its own business for all current inventory documents.

1.3.1. Entering the procedure and the offer for judicial moratorium

This procedure is similar to the ad-hoc mandate procedure, because debtors can file the competent court, a request to enter the judicial moratorium procedure. By means of this request, the debtor proposes a temporary conciliator (a negotiator that can be replaced by decision of the creditors' assembly, with the consent of the debtor), from among the authorized insolvency practitioners, as per the legislation. The syndic judge appoints the temporary conciliator through irrevocable decision. 30 days after being appointed, the conciliator drafts, together with the debtor, the list of creditors as well as the offer for judicial moratory. The judicial moratory offer will be added to the open file and, for enforceability against third parties, it will be sent to the court clerk where it will be filed and recorded in a special registry. Its submission and notification will be mentioned in the Trading companies registry where the debtor is registered.

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[1] Law no.381/2009 regarding the implementation of judicial moratorium and ad-hoc mandate, art.3, item c

[2] Legea nr.381/2009 privind introducerea concordatului preventive si a mandatului ad-hoc, art.10 items 2,3

[3] Law no.381/2009 regarding the implementation of judicial moratorium and ad-hoc mandate, art.3 item d

The offer for judicial moratorium will also include the judicial moratorium project, that will have attached the debtor's statement regarding the distress it faces, as well as the list of known debtors, including those whose debts are fully or partially challenged, stating the amount and pledges accepted by the debtor.

The judicial moratorium project must also include a recovery plan that has to include the following minimum measures:

a) reorganization of the debtor's activity through outplacement, modification of the functional structure, personnel reduction or any other measures seen as necessary;

b) the ways in which the debtor understands to get over the financial distress, as well as: the increase of share capital, bank loan - obligational or other, set up or abolishment of branches or lucrative facilities, selling of assets, establishing of securities etc;

c) the estimated percentage for the payment of debts, which cannot be lower than 50%, after the implementation of proposed measures.

The judicial moratorium project is considered to be approved by the creditors when all the required votes from the creditors representing the majority of two thirds of the value of the accepted and unchallenged debts are met, except those that might not be independent, as per the exceptions stipulated by law.

Through the judicial moratorium project, subject to the creditors' approval, the debtor also proposes the confirmation of the temporary conciliator, as well as the conciliator's remuneration for the period subsequent to the date the moratorium has bwwn concluded.

Nevertheless, the debtor can also ask the syndic judge, based on the judicial moratorium offer, to temporarily suspend legal seizure.[4]

The request is judged by the council, in and urgent and special manner, without summoning the parties. Temporary suspension of individual legal seizure is maintained until the approved or rejected judicial moratorium is published, or until the debtor's offer to most of the creditors is rejected. This procedure does not apply to people who were convicted for economic felonies or who entered the insolvency procedure in the last five years. Also, the provisions of the law that regulates judicial moratorium do not apply to those companies whose shareholders, associates or administrators have been convicted in the last five years for fraudulent bankruptcy, fraudulent administration, cruel intentions, deception, peculation, false testimony, forgery and use of forgery.

The debtor will develop its business activities in a normal manner, in compliance with the signed judicial moratorium and under the supervision of the negotiator. The suspension of the application of procedures against the debtor's assets is triggered in a different manner, depending on the relevant stage of the procedure. Thus:

- on the date the judicial moratorium offer is made – the debtor can solicit the court to decide to decide with respect to the temporary suspension of the application of the foreclosure proceedings;
- on the date the court confirms the judicial moratorium – the application of the foreclosure proceedings initiated by the creditors which signed the moratorium are suspended on legal grounds;
- on the date the judicial moratorium is is homologated by the court – all the proceedings for foreclosure are suspended by the court.

Only the application procedures are suspended. Any creditor that obtains a foreclosure mandate during the procedure can solicit to adhere to the moratorium or can recover the amounts owed by the debtor via any other means stipulated by law. It is not clear what are the other means stipulated by the law. The increase of interest and penalties is suspended in relation with the creditors executing the agreement of the moratorium, when the moratorium is confirmed by the court. Regarding the creditors that do not accept the moratorium, the increase of interest and penalties is only suspended under limited circumstances stipulated by law. During the homologated judicial moratorium, no insolvency procedure can be opened against the debtor.

[4] Law no.381/2009 regarding the implementation of judicial moratorium and ad-hoc mandate, art. 22, item 1

1.3.2. Conclusion, finding and homologation of the judicial moratorium

In order to exercise the vote of the creditors over the judicial moratorium project, the debtor can organize one or several collective or individual meetings for negotiation with the creditors, in the presence of the conciliator proposed by the debtor. The initiative of negotiation can belong to one or more creditors, as well as to significant shareholders or the debtor's associates. The period for negotiations regarding the judicial moratorium cannot exceed 30 calendar days.

Creditors can also vote the judicial moratorium offer, with its potential amendments as a result of negotiations, via correspondence. The judicial moratorium project is considered to be approved by the creditors when all the required votes from the creditors representing the majority of two thirds of the value of the accepted and unchallenged debts are met. If the stipulated majority is not met, after at least 30 days, the debtor has the right to make another judicial moratorium offer. After the moratorium has been approved by the creditors, the conciliator asks the syndic judge to acknowledge the judicial moratorium.

Non-signatory creditors – those who voted against the judicial moratorium proposed by the debtor – have the possibility to introduce an action for annulment within 15 days since the judicial moratorium has been mentioned in the trade register.

The individual legal seizure of all signatory creditors over the debtor are suspended starting with the date the judicial moratorium finding decision has been communicated, and on the same date the flow on interest, penalties as well as any other debt-related expenses towards the signatory creditors will be suspended.

In order to make the judicial moratorium opposable to non-signatory creditors, including unknown or challenged creditors, the conciliator can ask the syndic judge to homologate the moratorium. By deciding the homologation, the syndic judge suspends all foreclosure proceedings. Also, upon the request of the conciliator, the syndic judge can enforce the non-signatory creditors of the judicial moratorium a period of maximum 18 months to postpone the due date of their debt, a period during which the flow on interest, penalties as well as any other debt-related expenses will cease. During the homologated judicial moratorium the insolvency procedure cannot be opened against the debtor.

Any creditor that obtains an enforceable title over the debtor during the procedure can draft a request to adhere the moratorium or can recover its debt by other means stipulated by law. The deadline to pay the debts established via moratorium cannot exceed 18 months after the judicial moratorium has been concluded.

1.3.3. The causes that generate the conclusion of the judicial moratorium procedure

The creditors that voted against the judicial moratorium can ask for the cancellation of the agreement, within 15 days since the moratorium has been mentioned in the trade register.

In case of a serious breach by the debtor of obligations undertaken through the judicial moratorium (such as to favor one or several creditors to the detriment of the others, the hiding or outsourcing of assets during the period of the judicial moratorium, performance of payments without counterperformance or under ruinous conditions), the assembly of the moratorium creditors can decide the entering of the action into the resolution of the judicial moratorium, in which case the judicial moratorium procedure is suspended automatically.

If the judicial moratorium procedure ends successfully, the syndic judge will rule a conclusion that will establish the achievement of the object of the judicial moratorium.

If during the process, the conciliator appreciates that it is impossible to reach the objectives of the moratorium for reasons that cannot be imputed to the debtor, it can request the syndic judge to establish the failure of the judicial moratorium and conclusion of the procedure.

If, on the expiry date of the deadline set by law[5] the obligations provided by the moratorium are not met, the creditors will be able to vote, upon the conciliator's request, the extension of the judicial moratorium duration with a maximum of 6 months as compared to its initial duration.

As for the judicial moratorium, the law stipulates the following sanctions:

- the creditors that voted against the judicial moratorium can ask for the cancellation of the moratorium within 15 days since the moratorium has been mentioned in the trade register;
- when absolute nullity is invoked, the right to establish nullity belongs to any stakeholder and is imprescriptible;
- the court can decide the suspension of the judicial moratorium by judge's order;
- if the debtor seriously breaches the obligations undertaken via the judicial moratorium, the assembly of the moratorium creditors can decide the entering of the action in for resolution of the judicial moratorium;
- when the conciliator appreciates that it is impossible to achieve the objectives of the judicial moratorium for reasons that cannot be imputed to the debtor, during the procedure and no later than 18 months, it can solicit the syndic judge to establish the failure of the judicial moratorium and conclusion of the procedure.

1.3.4. The advantages of the judicial moratorium procedure compared to the insolvency procedure

For the debtor, the procedure regulated by Law no. 381/2009 representes a series of advantages, such as:

- the debtor can propose measures to postpone or reschedule the payment of its debts;
- the debtor can propose the complete or partial deletion of some of the debts or only of the interest or delay penalties;
- the debtor can propose compensations and novations via debtor exchange;
- the debtor can propose partial reductions for fiscal liabilities; in this case, the agreement of the National Fiscal Administration Agency must be expressed within 30 days, otherwise the agreement is presumed;
- the debtor can obtain from the syndic judge a temporary suspension of legal seizure, based on the offer for judicial moratorium; the temporary suspension is maintained until the appoved judicial moratorium is published or until the offer of the debtor towards the majority of the creditors is rejected;
- the homologation of the judicial moratorium by the syndic judge determined the suspension of all foreclosure procedures;
- the individual legal seizure of all signatory creditors over the debtor are suspended starting with the date the judicial moratorium finding decision has been communicated;
- at the same date, the flow on interest, penalties as well as any other debt-related expenses towards the signatory creditors will be suspended;
- the measures incorporated by the judicial moratorium, including the modification of debts, profits and co-debtors, fidejussors and third guarantors;
- during the procedure, the debtor will continue its activity within the boundaries of the usual business, under the conditions of the judicial moratorium, under the supervision of the conciliator;
- the modification of debts stipulated in the judicial moratorium remain irrevocable if the procedure finalizes successfully.

[5]Law no.381/2009 regarding the implementation of judicial moratorium and ad-hoc mandate, art.21, par. 2, let.d

Conclusions

Law no. 381/2009 regarding the implementation of the judicial moratorium and the ad-hoc mandate introduces a more flexible mechanism, compared to the insolvency procedure, for companies in distress that is having problems reorganizing its activity, whose truly important characteristic, which cannot be achieved contractually, is the power to have all debtors executed by the creditors.

Basically, this law is addressed to those debtors that are victims of unfavourable circumstances, but that deserve protection, because the business has a chance to recover, for the benefit of its employees, its creditors (including the state, for budgetary debts), the local community and itself, its disappearing caused by bankruptcy being able to generate unfavourable consequences for the entire social environment it performs, starting with the employees (who rick to lose their jobs), local community, (which loses the income generated by taxes and fees, and which has to bear the increase of the unemployment rate locally), the Romanian state (which loses a tax payer and is to bear the unemployment expenses as well as those for professional reorientation of those made redundant), for suppliers and banks etc. The judicial moratorium is a solution to avoid the entrance of companies into insolvency.

Even if the provisions of this law apply to any legal person that reorganizes a company in financial distress, we believe it will target especially medium and large companies, since both the ad-hoc mandate as well as the judicial moratorium involve significant additional costs, consisting in the remuneration of the ad-hoc mandate, the conciliator, the expert accountant or the authorized auditor. Since these costs are hard to be sustained by a small company, while the economic, financial, fiscal and social implications are more important for medium-sized and large enterprises, due to the specialization involved by the size of the company and the difficulty to chose another type of activity. Compared to the insolvency procedure, the judicial moratorium agreement has a smaller impact on the image and trading credibility of the company in distress and besides, it is based on an amicable agreement with the creditors. Nevertheless, more concepts and time spans used by the law are unclear or inappropriate, being capable to make the successful practical implementation difficult.

Indeed, the solution offered by the lawmaker is a method to avoid insolvency, based on legal grounds, but one can never know if it will be able to save the companies from bankruptcy, if no additional and more permissive measures are implemented together with an infusion of capital.

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