THE IMPACT AND CONTROVERSIES OF THE NEW CIVIL CODE IN THE INSOLVENCY PROCEDURE – THE PATRIMONY SEPARATION

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Abstract
The law no. 287/2009 on the New Civil Code brings important changes to the law institutions and their principles, being established and acknowledged both by the judicial doctrine and by the legal practice.
Still, the theme of this paper is not addressed to the legislative technique approached by the legislator, but is rather aimed at highlighting the impact, the implications, the changes, the controversies and the difficulties in application, brought by the New Civil Code to the insolvency procedure regulated by the Law no. 85/2006.
The law no. 85/2006 on the insolvency procedure, as well as many other regulating laws belonging to the commercial law, have remained in force, as they are not included in the provisions of the Law no. 287/2009 on the New Civil Code, and as such we cannot ignore the changes in the national commercial legislation after the entering into force of the New Civil Code, namely after October 1st 2011.
The new regulations, such as the definition of the professional and the enterprise, the deed of trust, the mortgage and the administration of the mortgaged goods, the prescription of debts, the separation of patrimonies, the forfeiture of the term benefit, have an impact upon the enforcement of the procedure of insolvency.
Without pretending an exhaustive approach, this study shall reveal a possible interpretation and enforcement of the provisions of the New Civil Code with respect to the procedure of insolvency, being aimed at bringing a plus in the incipient doctrine in this field.
Just like in the study regarding the remand agreement called "The prediction and prevention of insolvency Law 85/2006 on the procedure of insolvency" presented and sustained in the 4th edition of the International Scientific Session - Challenges of the Knowledge Society – this paper shall tackle the provisions of the two laws through the eyes of the practitioner, of the professional who enters into direct contact with the court of law and the enforcement of the law, under a double aspect, of the lawyer and the practitioner under insolvency, trying to delimit their practical applicability.

Keywords: *New Civil Code, impact, change, insolvency procedure, separation of patrimonies.*

1. Introductory aspects

The adoption of a new civil code which regulates the doctrinal and jurisprudential provisions was necessary in the context of the evolution of society and the attempt to rally to the European legislation.

The law no. 287/2009 on the New Civil Code, brings important changes for the institutions of law and their principles, being established and acknowledged both by the judicial doctrine and by the legal practice.

In all certainty the New Civil Code brings necessary changes in the socio-legislative reality of Romania, but unfortunately it arises multiple controversies and creates the premises of some solutions which lack in equity.

The difficulty in the enforcement of the New Civil Code is given on the one side by the lack of its agreement with the laws on which it concerns, and on the other hand by the ambiguity of the legislator's method of expression.

Still, the theme of this paper is far from being addressed to the legislative technique approached by the legislator, but it aims at highlighting the impact, the implications, the changes, the

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controversies and the difficulties in application, brought by the New Civil Code with respect to the procedure of insolvency regulated by the Law no. 85/2006.

The law no. 85/2006 on the insolvency procedure, as well as many other regulating laws belonging to the commercial law, have remained in force, as they are not included in the provisions of the Law no. 287/2009 on the New Civil Code, and as such we cannot ignore the changes in the national commercial legislation after the entering into force of the New Civil Code, namely after October 1st 2011.

The new regulations, such as the definition of the professional and the enterprise, the fiduciary, the mortgage and the administration of the mortgaged goods, the prescription of debts, the separation of patrimonies, the forfeiture of the term benefit, have an impact upon the enforcement of the procedure of insolvency.

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Just like in the study regarding the remand agreement called "The prediction and prevention of insolvency Law 85/2006 on the procedure of insolvency" presented and sustained in the 4th edition of the International Scientific Session - Challenges of the Knowledge Society – this paper shall tackle the provisions of the two laws through the eyes of the practitioner, of the professional who enters into direct contact with the court of law and the enforcement of the law, under a double aspect, of the lawyer and the practitioner under insolvency, trying to delimit their practical applicability.

Certainly, the current reality prefigures many changes to the Law no. 287/2009 on the New Civil Code.

2. The field of applicability of the procedure of insolvency starting October 1st 2011

Since the adoption of the Law no. 85/2006 and up until the present, the sphere of applicability of the procedure of insolvency has extended its limits under the aspect of the recipients subject to it.[1]

In the first approach, the Romanian legislator reserves the procedure of insolvency exclusively for the trader.

Currently the procedure of insolvency applies to certain categories of professionals, as defined in the New Civil Code.

2.1. The form of the Law no. 85/2006 on the procedure of insolvency

In the current form of the Law no. 85/2006 on the procedure of insolvency, the procedure of insolvency concerns the following categories of debtors:

The companies;
The corporate companies;
The cooperative organizations;
The agricultural companies;
The economic interest groups;
Any other legal entity of private law which also develops economic activities;
Traders, natural persons, acting individually;

[1] Under the aspect of the evolution of the procedure of insolvency and bankruptcy, also see Stanciu D. Carpenaru, Vasile Nemes, Mihai Adrian Hotca, the Law no. 85/2006 on the procedure of insolvency, Hamangiu Publishing – 2008;

I. Turcu, The Bankruptcy – the current procedure, Lumina Lex Publishing – 2005.

Family businesses.

Without entering into details regarding the enforcement of the procedure of insolvency on the various categories of debtors, currently there also are categories of debtors subject to the procedure of insolvency under conditions regulated by special laws.

This is the case of autonomous administrations, administrative and territorial units, insurance companies, credit institutions, financial and banking institutions.

The Law no. 85/2006 is also aimed at the natural persons who hold the quality of trader acting individually, as well as to the family businesses.

The law no. 85/2006 on the procedure of insolvency states that any other legal entity of private law which also develops economic activities, can be subject to this procedure.

We can see that the legislator uses notions like trader, economic activities, commercial deeds, enterprise.

In this regulation, until the entering into force of the Law no. 287/2009, the notion of enterprise was defined as being an economic unit engaged in production, the provision of services or trade, currently the legislator giving another form, another regulation and applicability to the notion of enterprise.

2.2. The professional and the enterprise in the sense of the New Civil Code

The art. 3 par. (1) of the New Civil Code itself regulates the field of applicability, respectively the professionals, as well as the relationships between professionals and any other subjects of civil law.

Further, the same article, through the next paragraph, defines the notion of "professionals" as being all those who exploit an enterprise.

The exploitation of an enterprise is represented by the systematic exercise, by one or more people, of an organizational activity consisting in the production, management or alienation of goods or the provision of services, irrespective of it having a lucrative purpose or not.

As such, a professional is a person who exploits an enterprise, this being the only definition given to it by the New Civil Code.

We can see that the legislator does not offer an explanation of the newly-introduced notion, namely the "professional" - through the definition of the enterprise, a professional is he who exploits it.

We draw the conclusion that the professional is not in all cases the holder of the enterprise, but it is sufficient for him to have the quality of explorer of the enterprise.

The sphere of professionals includes all those who, during the exploitation of an enterprise, develop a systematic activity related to production, management, alienation of goods or provision of services, these including the categories of trader, entrepreneur, economic operator, as well as any other person authorized to develop trading or professional activities, according to the provisions of art. 8 of the Law no. 71/2011 for the enforcement of Law no. 287/2009 on the Civil Code.

From the economics of the previously mentioned text we can conclude that the liberal professions also fall under the incidence of the New Civil Code, being included in the category of professionals, as they develop professional activities in the meaning of art. 8 of Law no. 71/2011.

Under these circumstances, the professional is not mistaken for the trader, as the latter is only a category of professional.

2.3. The trader-professional

Starting from those shown in the previous section, we shall se that together with the entering into force of the New Civil Code, the trade is also extended to the persons who, according to the old regulations, did not perform deeds of commerce.

To this respect, the art. 6 of the Law no. 71/2011 gives a definition of the trader, showing that the references to traders are considered to be performed for natural persons or, as appropriate, for legal entities subject to the registration in the trade register.

As such, the category of traders is determined as being all natural persons or legal entities subject to registration in the Trade Register.

The simple obligation of registration in the trade register transfers the quality of trader on the natural person or legal entity.

So, if before the adoption of the New Civil Code, for example the certified natural persons subject to registration in the Trade Register were not subject to the legal conditions of the trader, the former developing economic but not trading activities, but currently they receive the quality of trader.

What is more, we can see the method of expression of the legislator with respect to the condition imposed so that a person be assigned the quality of trader, respectively not that of being registered in the Trade Register, but being subject to registration in the Trade Register.

This provision, be it intentional or not, can be interpreted only in the sense that a simple obligation of registration in the Trade Register confers to a natural person or legal entity the quality of trader even until the performance of the formalities of registration and publicity, and thus until the moment the respective person begins to be an entity.

This interpretation leads to a series of legal effects, having as period of birth the initial moment of exploitation of the new enterprise in a systematic way of an organized activity which consists of the production, management or alienation of goods or the provision of services, irrespective of them having a lucrative purpose or not.

Thus, it is irrelevant if we find ourselves in the presence of an irregularly created company or of a natural person who develops trading activities, or who is engaged in the provision of services or a productive activity which is not yet registered in the trade register, as they have an obligation to register and shall be subject to the legal conditions applicable to the trader.

2.4. The professionals subject to the procedure of insolvency

The procedure of insolvency, until the date of entering into force of the New Civil Code, was applicable to the categories of natural persons or legal entities mentioned in art. 1 of the Law no. 85/2006.

The law which regulates the procedure of insolvency states the possibility of it being enforced on the traders which are natural persons and act individually.

By extending the notion of trader to the certified natural persons, currently they too can be applied the procedure of insolvency.

We must keep in mind that until now, the certified natural persons responded for their obligations with the assignment patrimony, if created and, in addition, with the entire patrimony.[2]

In case of insolvency, the certified natural person can be subject to this special procedure, stated by the Law no. 85/2006 on the procedure of insolvency, through the simplified procedure only

[2] The Emergency Ordinance no. 44 as of April 16th 2008 on the development of the economic activities by authorized natural persons, individual enterprise and family businesses, with the subsequent modifications and integrations

ART. 20 (1) The ANP is responsible for its obligations with the assignment patrimony, if created and, in addition, with its entire patrimony or, in case of insolvency, it shall be subject to the simplified procedure stated by the Law no. 85/2006 on the procedure of insolvency, with the subsequent modifications, if it has the quality of trader, according to art. 7 of the Commercial Code.

(2) The creditors shall execute their debts according to the common law, if the ANP does not have the quality of trader.

(3) Any interested person can make the proof of the quality of trader within the procedure of insolvency or separately, through action in observation, if justified by a legitimate interest.

if the debtor – CNP makes the proof that he has the quality of trader, according to the definition of trader included in art. 7 of the Commercial Code.[3]

As such, this was the exception in terms of insolvency, the rule being that all creditors shall execute the debts according to the common law, if the certified natural person does not hold the quality of trader.

In the light of the new provisions brought by the New Civil Code, even though the traders-natural persons are still not given the possibility of performing a judicial reorganization, they can recur to the simplified procedure of bankruptcy, thus creating the advantage for them that they can be released from their debts at the conclusion of the bankruptcy, thus being able to restart their initial professional activity.

The method of elaboration of the New Civil Code leads to certain controversies and positive discriminations with respect to the other professionals which continue to be excluded from the procedure of insolvency.

The discriminatory role between the various categories of professionals is obvious, for if we performed an analysis of the people registered in the trader register as developers of a professional activity under the form of a certified natural person, we would notice that, apart from the actual traders, there are journalists, singers, taxi drivers, bloggers, as well as other categories which obtain incomes from copyrights, who are registered.

Still, as we all know, the intellectual property does not have a trading nature, either in the old sense given to the notions of trader and trade or even in the current regulations.

Although it is difficult to guess the reasons for which the legislator transformed into a trader any person subject to registration in the trade register, until a possible explanation or change, all that is left for us is to enforce the law as it is currently in force and thus hold open the way of the procedure of insolvency for other categories of debtors than those expressly listed by the Law no. 85/2006 on the procedure of insolvency.

3. The separation of patrimonies in the procedure of insolvency. The creditors of the patrimonial assets.

The tendency of the legislator through the adoption of the New Civil Code aims at separating the patrimonial assets of a person, which means that from the general patrimony a part of it can be dislocated through special assignment.

Thus, through the separation of patrimonies, the creditors of a person's general patrimony cannot go after the goods corresponding to a distinct patrimonial asset.

In their turn, the creditors of the patrimonial asset with special assignment can only go after the goods corresponding to the patrimony in relation to which the debt was born and only to the extent that their debt is not covered in this way, can they foreclose the goods belonging to their debtor's general patrimony.

The separation of patrimonies springs either from the deed of trust and the complete administration of goods, or from the matrimonial conventions, the succession rights or the patrimony with professional assignment.

It is important to notice that the deed of incorporation of a class of goods affected by a special patrimony, is not usually affected as a consequence of the debtor's insolvency.

To this respect, the creditor of the respective assets, not only has a guaranteed debt, assigning a preferential degree before the other creditors, but can also manage the goods corresponding to the respective patrimonial assets.

The New Civil Code forfeits the restrictive provisions regarding the use of clauses which forbid the alienation of the buildings instituted through the regime of circulation of real estate

[3] Idem 2.

properties and even gives the possibility to institute over them a conventional inalienability[4], which leads to the legal imperceptibility.

The latter can have a major effect on the debtor's general patrimony and can prejudice its general creditors, as they will not be able to go after these goods.

3.1. The deed of trust

The deed of trust regulated by art. 773-791 of the New Civil Code, is an institution which does not have a correspondent in the old regulations.

It applies in the procedure related to a debtor's insolvency, as we will clearly see, being an instrument which is able to create separations of patrimonies.

Considering that the rule of separation of patrimonies is still valid in a case of insolvency, this new element is able to lead to the remission if not even the annihilation of its purpose.

Surely the deed of trust in the current regulation presents a value for the development of business, as it can be used both as a legal instrument for the management of goods and as a guarantee, but undoubtedly it will also be a means to fraud the creditors, to launder money and hide values, as well as to avoid certain legal provisions through its creation.

The institution of the deed of trust shall produce effects which shall be felt by the personal creditors of the debtor subject to the procedure of insolvency.

The deed of trust is defined by the regulating law as being the legal operation by means of which one or more constitutors transfer real rights, liability rights, guarantees or other patrimonial rights or an ensemble of such rights, present or future, to one or more fiduciaries which exercise them with a determined purpose, for the use of one or more beneficiaries.

This springs from the law or from the fiduciary agreement concluded under an authenticated form.

The fiduciary agreement is one of the oldest real agreements, having its origins in the Roman law, where it was called *pactum fiduciae*.[5]

For an analysis of the institution of the deed of trust through the perspective of the implications in the insolvency procedure, it is necessary to start from the definition given to this institution by the legislator.

As such, the deed of trust is the transfer of real rights, liability rights, guarantees or other patrimonial rights or of an ensemble of such rights, present or future, to the fiduciary for a period of time limited to a maximum of 33 years.

By concluding a fiduciary agreement, the fiduciary is transferred the property over a good which is the object of the deed of trust for a determined period of time.

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[4] The law no. 287/2009 on the New Civil Code

Art. 627 - The inalienability clause. Conditions. Field of enforcement.

(1) The alienation of a good can be forbidden by convention or testament, but only for a duration of maximum 49 years and if there is a serious and legitimate interest for it. The term starts at the date of acquirement of the good.

(2) The acquirer can be authorized by the court to dispose of the good if the interest which justified the clause of inalienability of the good has disappeared or if a superior interest imposes it.

(3) The nullity of the clause of inalienability stipulated in an agreement attracts the nullity of the entire agreement, if determined at its conclusion. In the onerous agreements, the determining characters is presumed, until the contrary is proven.

(4) The clause of inalienability is implied in the conventions from which arises an obligation to assign a property in the future towards a determined or determinable person.

(5) The assignment of the good by succession cannot be stopped through the stipulation of inalienability.

[5] A. Bureau, Le contract de fiducie: e′tude de droit compare′, Allemagne, France, Luxembourg, www.juripole.fr.

After the creation of the deed of trust, the creator forfeits the right given as fiduciary, assigning the property to the fiduciary, for a determined period of time, for administration purposes.

For the regulation of the deed of trust, the legislator expressly states that the rights which arise from the deed of trust constitute an autonomous patrimonial asset, different from the other rights and obligations in the fiduciaries' patrimonies.

In an interpretation of these provisions we notice that the fiduciary rights do not make a distinct patrimonial asset, autonomous with respect to the patrimony of the creator but only with respect to the patrimony of the fiduciary.

At a theoretical level and strictly as a legal operation, the deed of trust might be interpreted as being the division of the creator's general patrimony into two patrimonies, respectively the patrimonial asset with special assignment and the patrimonial asset of the remainder of the general patrimony after the constitution of the deed of trust.

Still, as effects, the fiduciary patrimonial asset is taken out of the creator's patrimony for the entire period of existence of the fiduciary agreement, in order to create for the fiduciary an autonomous patrimony, distinct from the other rights of its patrimonies.

I consider that given the express provisions of the norm, we find ourselves in the presence of a derogation from the principle of intra-patrimonial transfer, as the latter is incompatible with the transfer from a patrimony – that of the creator – into another patrimony – that of the fiduciary – the essence of the principle being the transfer through division, within the same patrimony.

There are contrary opinions with respect to the compatibility of art. 32 and art. 2324 of the New Civil Code with that of art. 773 of the New Civil Code.[6]

This is how the creator's personal creditors cannot go after the goods included in the fiduciary patrimonial asset, even through the enforcement of the provisions of art. 2324 of the New Civil Code.

In order to avoid as much as possible the situations of fraud and circumvention of certain legal provisions, the quality of fiduciary is limited to certain categories of professionals, namely the credit institutions, the investment and investment management companies, the companies performing services of financial investments, the insurance and reinsurance companies, as well as the lawyer and notaries public.

Still, the creator or the beneficiary of the deed of trust can be any legal entity or natural person.

The separation of patrimonies thus defends the debtor from creditors, others than the creditors of the patrimony of the fiduciary asset.

In this situation, the creator's personal creditors cannot foreclose the goods in object of the deed of trust, not even through the procedure of insolvency.

The deed of trust creates the premises for a safeguard of the debtor's estate, both in the case of its own insolvency and in the case of the fiduciary's insolvency.

This happens because, when starting a procedure of insolvency against the fiduciary, the fiduciary agreement is terminated, this being a derogation from the provisions of art. 86 of the Law no. 85/2006, which expressly forbids the introduction into the contracts of any clause which might lead to the termination of the agreement in case of insolvency.

I consider that in this case of termination it is necessary to merge the provisions of the New Civil Code with the special regulating norms of the institutions which can hold the quality of fiduciary, which state special procedures for their recovery or bankruptcy.

Furthermore, it is necessary to take into account the provisions of the laws for the organization of the professions of lawyer and notary public, which do not give these categories of

[6] Mihaela Paraschiv – Judge in the Court of Appeal of Bucharest, The New Civil Code – Notes; Correlations; Explanations, C.H. Beck 2011 Publishing, page 13.

professionals the possibility to be traders, thus not being subject to the procedure of insolvency under any of its forms.

Considering that the deed of trust can also be terminated at the moment of reorganization of a legal entity, without mentioning that it is applied to a legal entity which is a fiduciary or a creator – and where the law does not make distinctions, we must not make any either – we can consider that the legislator applies this case of termination in relation both to the effects of the creator's reorganization and to that of the fiduciary-legal entity.

Also, the legislator does not make any distinctions between the reorganization of the legal entity through procedures of division, fusion, etc and the legal reorganization through the procedure of insolvency.

As such, the fiduciary agreement is terminated through the start of the procedure of insolvency against the fiduciary, which according to the Law no. 85/2006 can be in simplified procedure – bankruptcy or general procedure – a legal reorganization (thus covering a form of reorganization) or when there are effects of the reorganization of the legal entity of the fiduciary through the subjection to certain procedures of transformation, division, fusion, etc. – another form of the reorganization of the legal entity.

With respect to the termination of the deed of trust through the reorganization of the creator's legal entity, we notice that the deed of trust does not stop at the beginning of the procedure of insolvency against the latter, but only when there appear effects of the reorganization of the legal entity inasmuch as within the procedure of insolvency a legal reorganization is discussed.

At the same time, the deed of trust stops when there appear effects of the reorganization of the legal entity other than the legal reorganization, respectively the reorganization through division, fusion, etc.

No other solution would be possible if we apply the theory of incompatibility of the principle of intra-patrimonial transfer in the creation of the deed of trust, as the fiduciary good is not under the creator's patrimony but under that of the fiduciary, and as such it cannot be part of the assets and liabilities of the debtor-creator.

These remain valid because, as shown, the fiduciary agreement is not terminated at the beginning of the creator's procedure, both from the perspective of art. 86 of the Law no. 85/2006 and from that of art. 790 of the New Civil Code.

Definitely, we shall not exclude other interpretations of the art. 790 of the New Civil Code.[7]

Starting from these premises, a conclusion would be that the beginning of the procedure of insolvency against the debtor who is also the creator of a deed of trust, does not have effects on the patrimonial assets of the fiduciary, until the moment of production of the effects of the reorganization of the legal entity, which is the only case in which the deed of trust would be terminated by means of the procedure of insolvency.

Thus, when starting a procedure of insolvency through simplified procedure and bankruptcy, the fiduciary patrimonial asset cannot be part of the assets and liabilities of the debtor subject to insolvency.

The theory is sustained on the one hand by the fact that the deed of trust also exists beyond the moment of opening of the creator's procedure of insolvency, and only to the extent that the procedure of insolvency follows the general procedure for legal reorganization, there is the possibility of returning the goods afflicted by the deed of trust into the debtor's general patrimony through the termination of the deed of trust, and on the other hand the legislation lists, expressly and with limitation, the causes of termination of the deed of trust.

[7] Alexandru-Serban Ratoi – lawyer Piperea & Asociatii, The New Civil Code – Notes; Correlations; Explanations, C.H. Beck 2011 Publishing, page 276.

We can see that the legislator, willingly or not, from the express and limited list of causes for the termination of the deed of trust, has excluded the possibility of its termination through the creator's bankruptcy, but only through its reorganization, as previously shown.

In the other case, that of the reorganization of the creator-legal entity, the deed of trust stops, which means that together with its termination, the goods corresponding to the fiduciary return into the debtor's general patrimony.

This might be an effect of the termination of the deed of trust through reorganization only in one case, that of the inexistence of the person of the beneficiary from the fiduciary agreement.

Inasmuch as the fiduciary agreement stipulated a beneficiary – other than the person of the creator and the fiduciary agreement is terminated at the moment of production of the effects of the creator's reorganization, beyond this moment, the effect of the termination is that of transferring the fiduciary patrimonial assets existing until then, to the beneficiary.

As such, the goods in object of the deed of trust are definitely taken out of the fiduciary's special autonomous patrimony and enter into the beneficiary's general patrimony thus operating the transfer of property over the respective goods.[8]

In these conditions, the possibility of satisfying the liabilities of the general creditors of the debtor-creator from the fiduciary goods, is limited to the return of these goods, as an effect of the reorganization, on condition of the inexistence of the beneficiary in the fiduciary agreement or when there is an identity between the beneficiary and the creator of the deed of trust.

All these can be considered to be either derogations from the principles instituted through art. 31-32 of the New Civil Code, or disagreements of the legislator within the same norm. I previously sustained that, according to the principle of separation of patrimonies, the creditors cannot go after the goods subject to the deed of trust.

Article 786 of the New Civil Code imposes two exceptions from this principle:

- the case of the special creditors of the liabilities arising from the goods in object of a deed of trust through the cumulative fulfilment of two conditions, namely the liability needing to be encumbered by a real warranty and the forms of publicity for the opposability of this warranty be fulfilled prior to the establishment of the deed of trust.

- the case of the general creditors of the creator, but only based on a definitive court decision for the admittance of the action through which the fiduciary agreement was cancelled or turned non-opposable in any way, with retroactive effect.

The first exception applies through the opposability of a warranty inscribed prior to the establishment of the deed of trust which is preferred instead of the warranty created with the deed of trust, the second exception applying as an effect of the return of the fiduciary good into the creator's general patrimony which shall be responsible for its debts according to art. 2324 of the New Civil Code.

By merging the provisions of art. 31-32 of the New Civil Code[9] with those of art. 2324 of the New Civil Code[10] we interpret that the pursuit of the patrimonies must be performed in a

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[8] The New Civil Code

Art. 791. The effects of the termination of the fiduciary agreement

(1) When the fiduciary agreement is terminated, the fiduciary patrimonial assets existing at that respective time is transferred to the beneficiary or, in the absence of the latter, to the creator.

(2) The merging of the fiduciary patrimonial assets into the beneficiary's or the creator's patrimony shall take place only after the payment of the fiduciary debts.

[9] The New Civil Code

Art. 31. The patrimony. Patrimonial assets and assignment patrimonies

(1) Any natural person or legal entity is the holder of a patrimony which includes all the rights and debts that can be evaluated in cash and which belong to them.

(2) It may be the object of a division or an assignment only in the cases and under the conditions stated by the law.

certain order, namely once the general patrimony is divided into several patrimonial assets with special assignment, the creditors will be able to pursuit for the satisfaction of the debt, the patrimonial asset which gave birth to that debt and only to the extent to which the debt was not cancelled through the valuation of the goods corresponding to the respective patrimonial asset, as such being able to pursuit the goods of another patrimonial asset belonging to the debtor and only until the value left uncovered is reached.

There is a single exception from these provisions, which is expressly stated by the legislator, respectively the patrimonial asset afflicted by the exercise of the profession can be only followed by the creditors whose liabilities arose in relation to the profession and, at the same time, they cannot pursuit those goods belonging to the debtor, even if the entire value of the debt was not covered.

Furthermore, not even the debtor's general creditors can pursuit the patrimony corresponding to the profession.

The institution of the fiduciary also holds those unenforceable provisions because, as shown, the legislator has created an absolute exception, even if it was not expressly explained, from the pursuit of this patrimonial asset by other creditors except for the fiduciaries, both through foreclosure and through the procedure of insolvency.

I conclude with a rhetorical question - does the interpretation previously given to the institution of the deed of trust represent a legal manner to fraud, an error of vision of the legislator or of the author of this study?

3.2. The inalienability and imperceptibility of the goods

We are the observers of a new conception of the Romanian legislator on the legal circulation of goods.

If until October 1st 2011, the date when the New Civil Code entered into force, we were subject to the legal regime of the circulation of goods which claimed that all goods enter into the civil circuit except for those which are expressly declared by the law as being inalienable and imperceptible, the New Civil Code brings an element of novelty in the regulation of this regime, through the institution of the conventional inalienability.

According to the latter, through a convention or a will the alienation of a good can be forbidden for a duration of a maximum of 49 years.

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(3) The assignment patrimonies are the fiduciary patrimonial assets, created according to the provisions of title IV and book III, those affected by the exercise of an authorized profession, as well as those patrimonies determined according to the law.

Art. 32. The intra-patrimonial transfer

(1) In case of division or assignment, the transfer of the rights and obligations from a patrimonial asset to another, within the same patrimony, is performed based on the conditions provided by the law and without bringing any prejudice to the creditors' rights over each patrimonial asset.

(2) In all cases stated in par. (1), the transfer of the rights and obligations from a patrimonial asset to another is not an alienation.

[10] The New Civil Code

Art. 2.324. The creditors' common guarantee

(1) He who has a personal obligation is responsible with all his assets and real estates, both present and future. They serve as common guarantee for his creditors.

(2) The imperceptible goods cannot be the object of the guarantee mentioned in par. (1).

(3) The creditors whose debts were born in relation to a certain division of the patrimony, authorized by the law, must firstly go after the goods in object of the respective patrimonial asset. If they are not sufficient for the satisfaction of the debts, other goods belonging to the debtor can be followed.

(4) The goods in object of a division of the patrimony corresponding to the exercise of a profession authorized by the law can be followed only by the creditors whose debts were born in relation to the respective profession. These creditors cannot go after the other goods belonging to the debtor.

The inalienability can be instituted inasmuch as there is a serious and legitimate interest for it.

The clause of inalienability is implied in the conventions which give birth to the obligation to assign in the future the property to a determined or determinable person.

If the inalienability is created through convention or through will, only the acquirer has an active legitimacy in a law suit based on the authorization of the disposition of the good, which means that a debtor's creditor, under the protection of the clause of inalienability, cannot request the acceptance or authorization of the execution over the respective good.

Still, the nullity of the clause of inalienability stipulated in an agreement attracts the nullity of the entire agreement if it was determined on its conclusion. In the onerous agreements, the determining character is presumed, until the contrary is proven.

The effects of the clause of inalienability are reflected in the consequences borne by those who act against the interdiction of alienation, namely, the resolution of the agreement in which the clause was stipulated, the obligation to pay damage or even the nullity of the agreement concluded with the violation of the clause. The latter sanction is, though, conditioned by the satisfaction of certain opposability conditions.[11]

Also as an effect of the institution of conventional inalienability there is the legal imperceptibility of the good for which the clause was stipulated for the duration of its validity, respectively maximum 49 years.

To this respect, the imperceptibility of the good protected by the clause of conventional inalienability was legislated, which means that the good cannot be followed by the creditors of the beneficiary of the clause, for the entire period in which it produces effects in a valid manner.

As a rule instituted by the New Civil Code, the inalienable and imperceptible goods are imposed certain conditions related to the validity of the clause of inalienability according to the provisions of art. 2329 of the New Civil Code.[12]

As an effect of this new regulation in the procedure of insolvency, the inalienable and imperceptible goods cannot be foreclosed by the creditors and cannot be included in the assets and liabilities of the debtor subject to the procedure of insolvency.

As a consequence of the modifications brought by the regulation of the principle of specialty of the capacity of use of a legal entity, previously regulated by art. 34 of the Order no. 31/1954, by the art. 206 and the art. 208 of the New Civil Code, the legal entity can be the holder of any right and obligation, except for those which through their nature or by law can only belong to natural persons.

As such, the legal entity has obtained, since October 1st, the capacity to receive liberalities under the conditions of the common law, from the date of the deed of creation, except for the testament foundations which ca receive liberalities only from the date of opening of the testator's inheritance.[13]

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[11] Bogdan Dumitrache, Legal Executor, The National Union of Legal Executors.

[12] The New Civil Code

Art. 2.329. Clauses of imperceptibility

(1) The conditions required for the validity of the clauses of inalienability apply accordingly to the clauses in which the imperceptibility of a good is stipulated.

(2) All goods which are, according to the law, inalienable, are also imperceptible.

(3) In order for them to be opposable to third parties, the imperceptibility clauses must be included in the public registers or in the real estate registers, as appropriate.

[13] The New Civil Code

Art. 208. The capacity to receive liberalities

By exception from the provisions of art. 205 par. (3) and if the law does not dispose otherwise, any legal entity can receive liberalities in the conditions of the common law, from the date of the deed of registration or, in the case of the testamentary foundations, from the moment of opening of the testator's inheritance, even in the case when the liberalities are not necessary so that the legal entity be legally created.

We find ourselves again in the impossibility to include in the assets and liabilities a good belonging to the patrimony of a debtor afflicted by a clause of inalienability and imperceptibility.

Definitely, during the following period we shall see more donations with "duties" justified by a "legitimate and serious interest", for the benefit of legal entities, which will have as an effect, be it intended or not, the decrease of the assets and liabilities for the detriment of the good-faith creditors.

4. Conclusions

As stated in the introductory part, this study is far from covering all the implications, changes and difficulties arising together with the entering into force of the New Civil Code and especially in relation to the procedure of insolvency.

The study was limited to the impact of the separation of patrimonies over the procedure of insolvency, but the changes and problems arisen by the enforcement of the New Civil Code are multiple, even if we are still in the incipient phase of its enforcement.

The newly implemented legal norm is, at least in its current form, defective, leaving space for interpretations through the claim of certain notions which constituted doctrinal and jurisprudential springs since 1864 and until the present day.

An enforcement can obviously not be performed unless by claiming well-known notions, by bringing additions from the old regulations, inasmuch as they are still compatible.

It is important to observe the space allowed by the new legal norm for the speculations and for the "removal" of the patrimonial goods from the procedure of insolvency.

The changes brought by the New Civil Code to the procedure of insolvency seem to obstruct more than sustain the purpose of the Law no. 85/2006 and tend, without a full and deep analysis, towards a lack of efficiency.

All these without insisting on the legislator's awkwardness in the elaboration of the New Civil Code, which apart from the legal technique approached, equals the notions of bankruptcy and insolvency, insolvency and insolvability, etc.

The separation of patrimonies, through the division of the general patrimony of the person in various patrimonial assets subject to a special assignment such as the deed of trust, the management, represent only an approach of the "bankrupt" impact on the Law concerning the procedure of insolvency.

In a future approach of the impact of the New Civil Code on the Law no. 85/2006 on the procedure of insolvency, we shall tackle the provisions of the institution of the decay from the term benefit, the mortgage and, especially, the taking over of a mortgaged good for administration, the prescription of debt, the special obligations and agreements – part of them being terminated at the beginning of the procedure of insolvency and all of them bringing significant changes and derogations to the procedure of insolvency.

We are still trying to support the efforts to enforce, improve, modify this norm, by searching, as practitioners, legal solutions in the sense that a norm should produce legal effects without ceasing to believe that our efforts from the initial stage of the Law no. 287/2009 shall lead to certain results, the contribution of each of those involved directly in its enforcement being materialized into a doctrine, a practice or in jurisprudence.

De lege ferenda imposes the intense cooperation with the various categories of practitioners under direct contact with the enforcement of the laws, not only with theoreticians, as a vision of ensemble and interpretation, which can be possessed profoundly by the lawyer, but also by the practitioner under insolvency, the magistrate and other similar practitioners.

At the same time, it is necessary to explain the institutions with a regime of absolute novelty for the Romanian legal system, the correlation of the norms still in force with those regulated by the New Civil Code.

Mainly with respect to the procedure of insolvency, it is very important not to lose sight of the purpose of the law which, as already seen, tends to be eluded, through the creation of levers which shall secure the debtors' goods, thus encouraging illegal, disloyal practices performed with the purpose of committing "legal" fraud, as well as for the development in ill-faith of "clean" practices for money laundering, all these in the detriment and damage of the contractual partners – the creditors.

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