THE CREDITOR AS PARTICIPANT IN INSOLVENCY PROCEEDINGS

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Abstract

A creditor is the party who, within a binding judicial relationship, has a claim on the services of giving, doing or not doing of the second party, called debtor.

In insolvency a creditor is an individual or a legal entity that is entitled to claim payment of an amount of money by the debtor, in relation to whom the creditor holds an uncontested, liquid and enforceable claim.

Insolvency Law no. 85/2006 defines the concept of creditors entitled to request initiation of the insolvency proceedings, as well as the concept of creditors entitled to participate in the insolvency proceedings.

Aim of this study is an in-depth analysis of the two categories of creditors and the requirements for holding this quality.

Keywords: *Procedure, insolvency, creditor, debtor, receivables*

Introduction

The field broached by this study is insolvency, as part of the greater area of commercial law.

Although by passing of the New Civil Code and almost total abrogation of the Commercial Code the Romanian legislator has determined to unify civil legislation, we consider that commercial law continues to exist as a distinctive legal branch, part of private law.

It is true, however, that the provisions of the New Civil Code regulate the civil judicial relationships of non-professionals, as well as those of professionals or professionals and non-professionals. Concerning professionals, the New Civil Code has a number of special regulations, hence derogatory from those of common law, including merchants.

As regards merchants, these are subject to insolvency proceedings, which is a special judiciary procedure.

The institution of bankruptcy was first regulated the Romanian Commercial Code passed in 1887; nearly a century later Law no.64/1995 on judiciary reorganisation and bankruptcy proceedings came into force, and was abrogated by insolvency proceedings Law no.85/2006. At present the legislator is working on an Insolvency Code, such as to unify all legal provisions of both insolvency and pre-insolvency proceedings.

Based on specialist doctrine and relevant jurisprudence this study provides an analysis of the categories of creditors entitled to request initiation of insolvency proceedings and entitled to participate in insolvency procedure, respectively.

1. The creditor entitled *to request* initiation of insolvency proceedings

A *creditor* is the party who, within a binding judicial relationship, has a claim on the services of giving, doing or not doing of the second party, called *debtor*. In insolvency[1] a

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creditor is an individual or a legal entity that is entitled to claim payment of an amount of money by the debtor, and who by this special procedure, the *solutio debiti*[2], intends to recover their receivable. In the judicial practice of insolvency possible sources of such obligations are the most frequently encountered *contracts*, and also unilateral judicial deeds, business management, unjust enrichment, non-owed payments, illicit acts, as well as any other facts or acts tied by legal provisions to the generation of such obligation[3].

The legislator has defined the *significance*-bearing terms and phrases of insolvency proceedings of a debtor under art.3 of Insolvency Law no.85/2006.

For creditors *participating in insolvency proceedings* the law stipulates several categories of creditors, holding this quality at the same time or successively during the special procedure.

Thus, art.2 of Law no.85/2006 stipulates that the *aim* of insolvency proceedings is to initiate collective proceedings in view of covering the insolvent debtor's liabilities.

Literature establishes *collectivity*[4]*, in our opinion creditors collectivity* as one of the principles of insolvency proceedings, considering that its aim, according to art.2 of Law no.85/2006, is to initiate collective proceedings in view of covering the insolvent debtor's liabilities, thus to redeem the receivables held by the debtor's creditors. This principle follows from art. 3 par. 1 no. 3 of the Insolvency Law, which defines the collective proceedings as entailing the *joint* participation of the recognised creditors in view of recovering their receivables by the means provided by law.

Doctrine[5] also includes the opinion insolvency proceedings constitutes *a procedure of collective compulsory enforcement (foreclosure).*

A further opinion[6] asserts that judiciary reorganisation proceedings, as a stage of insolvency proceedings, is *alien* to the concept of compulsory enforcement (foreclosure), while bankruptcy proceedings, as a subsidiary phase of insolvency proceedings is a collective procedure, operating as a *remedy* or as compulsory enforcement (foreclosure), as the case may be.

In *our opinion* insolvency proceedings are neither a form of foreclosure, this being regulated by a special law, nor of judicial execution, which is a *phase of the civil process*, regulated by general law, namely the Code of Civil Procedure. The rules provided by the Code of Civil Procedure for satisfying the debtor's creditors in the case of common law judicial execution differ from the provisions of Insolvency law concerning the distribution of funds obtained by liquidation of the debtor's assets in bankruptcy proceedings. Furthermore, the authorities conducting judicial execution differ, namely court, fiscal, bank executors, etc. in the former situation, while in insolvency the authority conducting the proceedings, held to maximise the realisation of the debtor's assets and distribute the funds obtained from debtor assets liquidation is the judiciary administrator or the liquidator, depending on the phase of the proceedings, namely observation period, judiciary reorganisation or bankruptcy.

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[1] Regulated by Insolvency Procedure Law no.85/2006 Published in Monitorul Oficial [Official Journal] no.359/21 04 2006.

[2] Dicționar de adagii și alocuțiuni juridice latine [Dictionary of Latin Judicial Adages and Allocutions], *solutio debiti* = payment of debt.

[3] For details see *S. Neculaecu*, Izvoarele obligațiilor în Codul civil [Sources of Obligations in the Civil Code], art.1164-1395. Analiză critică și comparativă a noilor texte normative [Critical and Comparative Analysis of the New Norms], Editura C.H. Beck, București, 2013, pp.23-556.

[4] *I. Adam, C.N. Savu*, Legea procedurii insolvenței. Comentarii și explicații [Insolvency Procedure Law. Comments and Explanations], Editura C.H. Beck, București, 2006, p.6, *I. Schiau*, Regimul juridic al insolvenței comerciale [Judicial Regimen of Commercial Insolvency], Ed. All Beck, București, 2001, p. 23-33.

[5] *I. Turcu*, Tratat de insolvență [Treatise of Insolvency], Editura C.H.Beck, București, 2006, p. 548, *I. Băcanu*, Chap. XV, Procedura reorganizării judiciare și falimentului [Judiciary Reorganisation and Bankruptcy Procedure], in *S. Zilberstein, V.M. Ciobanu*, Tratat de executare silită [Treatise of Compulsory Enforcement (Foreclosure)], Editura Lumina Lex, București, 2001, p.556.

[6] *Gh. Piperea*, Insolvența. Regulile. Realitatea [Insolvency, Rules, Reality], Editura Wolters Kluwer, Romania, 2008, pp.349-350.

In substantiation of this opinion we show that insolvency proceedings, while conducted mostly outside the court, have nevertheless *judiciary* and *professional* character[7].

The concept of *creditor*, *in a wider sense*, as defined by art.3 par.1 no.7 of Law no.85/2006, refers to an individual or legal entity holding a claim on the debtor's assets, and who has expressly requested the court to register this claim in the final table of receivables or in the consolidated final table of receivables, and who can prove their claim on the debtor's assets according to the provisions of insolvency law. According to art. 64 of Law no.85/2006 exempt from filing a request for claim registration are the debtor's employees who are recorded *ex officio* by the judiciary administrator/liquidator in the table of the debtor's receivables.

In relation also to this definition of the creditor participating in insolvency proceedings, *we second* the opinion according to that insolvency proceedings are not merely *collective*, but *concurrent*[8], and from this viewpoint do not represent *collective foreclosure proceedings*, but a *special* and *dynamic*[9] procedure with the aim of satisfying the debtor's creditors, in accordance with the provisions of the special law.

The concept of *creditor entitled to request initiation of insolvency proceedings*, as defined at art.3 par.1 no.6 of Law no. 85/2006, refers to a creditor who has held an *uncontested, liquid and enforceable claim* on the debtor's assets *for more than 90 days*.

According to the provisions of art.379 par.3 - 4 of the former Code of Civil Procedure[10] a claim is *uncontested or certain*, when its existence follows from exactly the *deed of debt* or from other, even not notarised deeds issued by the debtor or recognised by them. The claim is *liquid* when its quantity is *determined* by the very deed of debt or *can be determined* by the deed of debt or other, even not notarised deeds issued by the debtor or recognised by or binding for them, according to legal provisions or stipulations in the deed of debt, even if such determination requires special calculations.

According to art.662 par.2 and 3 of the new Code of Civil Procedure[11] the claim is uncontested or certain when its undoubted existence follows from the *executory title* itself and is liquid when its object is determined or when the executory title includes sufficient elements for its determination.

These legal provisions that define *differently* the concept of uncontested and liquid claim have the judicial character of common law norms, as insolvency law does not define this concept expressly.

Within this context it needs mentioning that the Insolvency Law represents a *special procedural law*, and consequently its component norms are judicial procedural norms, thus being imperative, of strict interpretation and application.

According to its art.149, Law no.85/2006 is completed by the provisions of the civil Code and the Code of Civil Procedure, to the extent of provisions *compatibility*. Here from follows the nature of general judiciary and *in our opinion subsidiary* norm of the provision included by the Code of Civil Procedure and the Civil Code, respectively, unlike those included by the Insolvency Law.

Thus we *emphasize* that the provisions of the Civil Code and the Code of Civil Procedure, respectively, or of any other laws that are general in relation to insolvency law,

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[7] *St.D.Cărpenaru*, Procedura reorganizării şi lichidării judiciare [Judiciary Reorganisation Proceedings], Editura Național Imprim, Bucureşti, 1996, p.22, for details on the judiciary, unitary and professional character of the procedure.
[8] *St.D.Cărpenaru*, op.cit., p.20, *Gh. Piperea*, op. cit, pp.347-350.
[9] *M. Grosaru*, Judecătorul sindic [The Insolvency Judge], Editura Universul Juridic, Bucureşti, 2012, p.16
[10] Decreed on 9 September 1865 and promulgated on 11 September 1865, amended and updated on 20 11 2010, Editura C.H. Beck, Bucureşti 2010.
[11] Law no.134/2010 of the Code of Civil Procedure, published in Monitorul Oficial [Official Journal] no.485/15 07 2010, applied by Law no.76/2012 published in Monitorul Oficial [Official Journal] no.365/30 05 2012, amended.

under no circumstances replace the provisions of special insolvency law, but complete these where the special law makes no distinction.

Consequently the provisions of art.379 of the Code of Civil Procedure, and of art.662 of the new Code of Civil procedure are applicable within the framework of insolvency proceedings for establishing the uncontested, liquid and enforceable character of claims.

Further within this context it needs be pointed out, that insolvency law is applied to judicial relationships between either *merchants*, or merchants and non-merchants; within these judicial relationships the debtor is always a *merchant*, or a legal entity of private law conducting *economic activity*.

As regards the quality of debtor and creditor of merchants, these, as defined by the Commercial Code[12], by Law no.31/1990[13] regarding commercial companies, by Law no.26/1990[14] concerning the Trade Registry and by other special laws, represent the category of individuals or legal entities most often adopted in fiscal matters.

Within the context of the provisions of the New Civil Code[15] an issue raised in doctrine, but especially in jurisprudence is whether insolvency law will be applied to *professionals*, who according to art.3 par.2 and 3 of the New Civil Code are all those who deploy an *enterprise*, its deployment meaning systematic conducting by one or more persons of an organised activity consisting in producing and administration of goods or in providing services, regardless if for profitmaking purposes or not[16].

The concept or enterprise was defined as an agricultural, industrial, constructions, commercial, services or financial entity that conducts an economic activity[17].

In order to correlate the two concepts, namely that of 'merchant', deeply rooted in judicial mentality and that of 'professional', resulted from the monist principle related to civil legislation adopted by the legislator of the new Civil Code, transitional judicial norms were issued, respectively the provisions of art.6 and art 8 of Law 71/2011 concerning the application of the Civil Code Law.

According to art. 6 par.1 of Law no.71/2011 the legal norms applicable at the date of coming into force of the Civil Code refer to merchants as to individuals or legal entities subject to recording in the Trade Registry, with certain exceptions expressly iterated in par.2 of the same article.

According to art.8 par.1 of the same law, the concept of 'professional' introduced in art.3 of the New Civil Code includes the categories of merchant, entrepreneur, economic agent, as well as any other persons authorised to conduct professional economic activities, as these notions are provided by law at the date of coming into force of the Civil Code. Par. 2 of the same article establishes *as a principle*, that in all valid legal norms, the phrases 'deeds of

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[12] Code of Commerce of 1887, published in Monitorul Oficial [Official Journal] no.31/10 05 1887, with amendments, partially abrogated by Law no.71/2011 for application of Law no.287/2009 of the Civil Code

[13] Published in Monitorul Oficial [Official Journal] no.126/17 11 1990, amended.

[14] Published in Monitorul Oficial [Official Journal] no.121/07 11 1990, amended.

[15] Law no.287/2009 of the Civil Code, published in Monitorul Oficial [Official Journal] no.511/24 07 2009, republished in Monitorul Oficial [Official Journal] no.505/15 07 2011, amended by OUG [Government Emergency Ordinance] no.79/2011, published in Monitorul Oficial [Official Journal] no.696/30 09 2011 and by Law no.60/2012, published in Monitorul Oficial [Official Journal] no.255/17 04 2012.

[16] For a better understanding of the concepts of 'professional individual', 'professional legal entity', 'enterprise' and 'merchant' see *S. Angheni, Drept comercial. Profesioniști – Comercianți* [Commercial Law. Professionals-Merchants], Editura C.H. Beck, București, 2013, pp.2-34. For merchants – legal entities subject to insolvency procedures see *A. Capriel, Procedura reorganizării și lichidării judiciare* [Judicial Reorganisation and Liquidation Procedure], Editura Lumina Lex, București, 1995, pp.8-10, *Gh. Piperea, Drept comercial. Întreprinderea* [Commercial Law. The Enterprise], Editura C.H. Beck, București, 2012, pp.31-41.

[17] A. Buglea, R. Bufan, O.C. Bunget, C.M.Imbrescu, L.E. Stark, A. Medelean, D. Pascu, Noțiuni de economie aplicate procedurii de insolvență [Economic Concepts Applied to Insolvency Proceedings], A textbook devised by a consortium headed by Pricewaterhousecoopers as part of the programme "Support for Improving and Implementation of Bankruptcy Legislation and Jurisprudence", Phare 2012, Ministry of Justice, 2006, p.24,

commerce' and 'acts of commerce' are replaced by the phrase 'production, commerce or service activities'.

Upon analysis of the legal provisions referred to above it can be observed, that the concept of *merchant*, as defined prior to the coming into force of the new Civil Code is not replaced by the concept pf *professional*, but is *included* by the latter. Consequently the merchant is a part of the professional as a whole.

According to art.31 par.1 and 2 of Law no.85/2006 any creditor *entitled to request initiation of insolvency proceedings* needs to formulate a request indicating magnitude and grounds of the claim, possible real securities put up by the debtor, possible precautionary measures concerning the debtor's assets and to attach all documents justifying the claim and all deeds of securities.

In relation to the application of these legal provisions the opinion[18] was asserted that in view of solving a creditor's request for initiating insolvency proceedings of a debtor, any evidence other than *written deeds* is *not admissible.* This opinion has not been wholly shared by judicial practice[19]; occasionally it was deemed that the insolvency judge can administer even expert reports as evidence in order to establish that the creditor's claim is uncontested and most of all liquid.

As far as we are concerned, we *consider* that for solving the creditor's request for insolvency proceedings initiation administration of evidence other than the written deeds mentioned at art.31 par.1 and 2 of Law no.85/2006 cannot be considered *de plano* inadmissible, as such a request represents a civil suit, and until insolvency proceedings are actually initiated, the request is judged by the procedures of common law.

We *consider*, however, that for solving this request the insolvency judge need not determine the *exact value* of the creditor's claim, but needs to determine whether the creditor holds an uncontested or certain, liquid and enforceable claim that exceeds the *threshold value* provided by law and whether the debtor is in insolvency or not[20]. Upon initiation of insolvency proceedings of the debtor, the judiciary administrator/liquidator is held to verify the claim requests, including the request of the plaintiff creditor, and will record the exact values of the claims into the creditors table. Thus expert reports as evidence could prove useful for verifying state of insolvency of the debtor that has contested this state, or for aspects related to the creditor's written deeds attached to the request for insolvency proceedings initiation, like for example false deeds, etc., but not, however, for proving the very existence of the plaintiff creditor's claim, which has to be proved only by the written deeds attached to the creditor's request. Thus, in judiciary practice[21] it could be observed that if a completed *expert report* did not yield a centralised situation of the plots of land for that the plaintiff creditor has calculated a certain tax based on the concession contract closed with the debtor, and the disagreements of the parties concern the value of that tax, the claim invoked by the creditor is neither uncontested, nor liquid.

For a creditor to request initiation of insolvency proceedings of a debtor, the legislator has not imposed the requirement of the creditor obtaining beforehand of an *executory title* in relation to the debtor, but merely to attach *justifying deeds* to the request for initiation of insolvency proceedings.

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[18] *Gh. Piperea, Drept comercial vol.II* [Commercial Law vol. II], op.cit, p.232, Civil decision no.618/17 04 2012 of the Appeal Court Bacău, II[nd] Civil Section for administrative and fiscal suits, in *S.P.Gavrilă*, op.cit., p.199.

[19] Civil decision no.454/R/28 09 2007 of the Appeal Court Braşov, unpublished.

[20] In this respect see Civil decision no.167/C/23 04 2009 of the Appeal Court Oradea, in Procedura insolvenței. Culegere de practică judiciară 2006-2009, Volumul I, Deschiderea procedurii insolvenței, Participanții la procedură [Insolvency Procedure. Collection of Judiciary Practice 2006-2009, Volume I, Initiation of Insolvency proceedings. Participants in the Procedure], Editura C.H. Beck, 2011, p.50.

[21] Civil decision no.4/11 01 2007 of Constanța County Court – Commercial section, irrevocable and unpublished.

Evidently submitting an executory title attached to the request for initiation of insolvency proceedings of the debtor is bound to facilitate analysis of the admissibility requirements for the invoked claim.

In jurisprudence[22] it could be established, that in cases when the creditor attached an executory title to the request for initiation of insolvency proceedings in order to document the claim and the debtor has filed a contestation of the state of insolvency requesting the creditor to deposit a certain *security*, on grounds of art.33 par.3 of Law no.85/2006 such request of the debtor has been usually dismissed, as there is the creditor's request entails no risk of prejudice for the debtor, as long as the creditor's claim is confirmed by an executory title.

A situation frequently encountered in insolvency matters is that of a creditor submitting a request for the initiation of insolvency proceedings with an executory title attached, such as to justify the claim, which creditor has previously also filed a request for *compulsory execution (foreclosure)* by a court executor, the latter conducting common law foreclosure proceedings.

Situations were encountered when the insolvency judge has dismissed the creditor's request for initiation of insolvency proceedings, considering the request of *lacking interest*, which is a requirement for promoting any action in the justice system, as long as at the same time the creditor conducts common law proceedings of foreclosure (compulsory execution) of the debtor.

We *consider* as erroneous such court practice[23] of dismissing the request for initiation of insolvency proceedings on grounds of the deeds attached to the request for initiation of insolvency proceedings showing that the plaintiff creditor has also initiated common law compulsory execution (foreclosure) proceedings of the respondent debtor, based on an executory title consisting of a course decision, which is ongoing, as the amount of money claimed by the plaintiff is going to be recovered through common law foreclosure. Such interpretation is also in disagreement with the logical judicial rationale, according to that *he who can do more, can also do less.*

Also in jurisprudence[24] it was retained that the creditors are not obliged to prove that prior to filing the request for initiation of insolvency proceedings they have tried to recover the claim by common law compulsory execution (foreclosure) proceedings of the debtor. It was also retained[25] that when the creditor has attached an executory title to the request for initiation of insolvency proceedings, and this title had been partially enforced during common law foreclosure proceedings, the insolvency judge is held to determine the value of the *residual claim* to be recovered by the creditor from the debtor.

In support of this opinion which we *second*, we argue that in *commercial law*, which lingers even after coming into force of the New Civil Code, the creditor can deploy all judicial

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[22] Civil sentence no.1342/sind/31 05 2012 of Brasov County Court, irrevocable and unpublished, Civil sentence no.1686/sind/20 10 2010 of Brasov County Court, irrevocable and unpublished, Civil sentence no.1772/sind/06 09 2012 of Braşov County Court, irrevocable and unpublished, Civil sentence no.896/sind/12 05 2010 of Brasov County Court, irrevocable and unpublished, Civil sentence no.1436/sind/17 06 2009 of Brasov County Court, irrevocable and unpublished, Civil sentence no.281/sind/04 02 2009 of Brasov County Court, irrevocable and unpublished.

[23] Civil sentence no.371/26 03 2003 of Dâmbovița County Court, in Manual de bune practici în insolvență, Programul Phare 2012 "Suport pentru îmbunătățirea și implementarea legislației și jurisprundenței în materie de faliment [Textbook of Good Practice in Insolvency, Phare 2012 Programme "Support for Improving and Implementation of Bankruptcy Legislation and Jurisprudence", p.399, Civil sentence no.1182/sind/19 11 2008 of Braşov County Court, unpublished, Commercial decision no.458/22 05 2009 of Alba Iulia Appeal Court, in Procedura insolvenței. Culegere de practică judiciară 2006-2009, Volumul I [Insolvency Procedure. Collection of Judiciary Practice 2006-2009, volume I] op.cit., p.40, Civil sentence no.2364/14 11 2007 of Călărași County Court, in Procedura insolvenței. Culegere de practică judiciară 2006-2009, Volumul I, [Insolvency Procedure. Collection of Judiciary Practice 2006-2009, volume I], op.cit,p.79.

[24] Civil sentence no.2271/08 09 2003 of Bacău County Court, in *Manual de bune practici în insolvență*, [Textbook of Good Insolvency Practice], op.cit. p.397.

[25] Commercial decision no.477/15 06 2011 of Galați Appeal Court, published in *S.P.Gavrilă, Law no.85/2006 privind procedura insolvenței. Practică judiciară*, [Insolvency Procedure Law. Judiciary Practice], Editura Hamangiu, București, 2013, pp.146-147.

means provided by law for recovering the claim from the debtor. By the initiated proceedings the creditor will, however, not be able to obtain an amount *superior* to the claim.

In judiciary practice[26] it was further retained that when an executory title ceases to hold this judicial power, for example a bank loan contract that does not qualify as executory title for common law foreclosure, upon admitting the contestation of execution, this can represent, according to art.31 par.1 and 2 of Law no.85/2006 proof of the claim when filing a request for initiation of insolvency proceedings.

Having established that the provisions of the Code of Civil Procedure are applicable in insolvency proceedings only to the extent of compatibility of the provisions, according to art.149 of Law 85/2006 and that art.31 par.1 and 2 with application of art.3 par.1 no.6 of Law 85/2006 represent special judicial norms hence derogatory from the provisions of art.662 par.2 and 3 of the New Code of Civil Procedure, we *conclude* that the creditor entitled to request initiation of insolvency proceedings does not have to prove the existence of an executory title to confirm the claim, even after the coming into force of the New Code of Civil Procedure.

As regards the value of the claim of the creditor entitled to request initiation of the insolvency procedure, the legislator has introduced the concept of *threshold value*, regulated by art.3 par.1 no.12 of Law 85/2006, which at present is of 45,000 lei, and of 6 national average salaries for employees, respectively.

Consequently, in order to file a request for initiation of insolvency proceedings, the entitled creditor needs to have an uncontested, liquid and enforceable claim on the debtor, superior to the threshold value and more than 90 days due.

Enforceability of the claim - a requirement for claim admissibility in insolvency proceedings and for the debtor to be obliged to pay a certain amount of money – is given by the *due-date of the obligation*, as indicated in the deed underlying it[27].

The civil obligation in a wide sense was defined[28] as the judicial relationship in which one party, the creditor, is entitled to claim from the other party, the debtor, execution of the owed service.

Debt was defined[29] as the passive component of the obligational relationship, this being the service assumed by the debtor.

Comparing the provisions of the former Code of Civil Procedure with those of the New Code of Civil Procedure that came into force on 15 02 2013, it can be noticed that the provisions of art.379 of the Code of Civil Procedure did not define the enforceability of the claim, unlike the provisions of art.662 of the New Code of Civil Procedure that do include such a definition.

In relation to the *enforceability* of the claim, insolvency law includes special provisions that stipulate at art.3 par.1 no.6 that a creditor entitled to request initiation of insolvency proceedings is a creditor holding an uncontested, liquid and enforceable claim older than 90 days.

Consequently, in order to formulate a request for initiation of insolvency proceedings such a creditor needs to wait at least 90 days starting the due-date of the debtor's obligation to pay amount of money to the creditor, in other words from the date of its becoming collectible.

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[26] Commercial sentence no.28/S/24 01 2008 of Iași County Court, Commercial Section, in *Procedura insolvenței. Culegere de practică judiciară 2006-2009, Volumul I*, [Insolvency Procedure. Collection of Judiciary Practice 2006-2009, volume I], op.cit, p.43.

[27] For details see *S.M.Miloș, Creanțete sub condiție suspensivă versus creanțele nescadente. Dreptul de a participa la procedura insolvenței*, [Receivables under Suspensive Circumstances versus Not Due Receivables. The Right to Participate in Insolvency Proceedings], in Phoenix, October-December, 2011, pp.4-8.

[28] *L. Pop, Tratat de drept civil. Obligațiile, Vol.I Regimul juridic general*, [Treatise on Civil Law. Obligations. Vol. I General Judicial Regimen], Editura C.H. Beck, București, 2006, p.5.

[29] *C. Stătescu, C. Bârsan, Drept civil. Teoria generală a obligațiilor, ediția a IX-a revizuită și adăugită*, [Civil Law. General Theory of Obligations. 9th edition, revised and expanded], Editura Hamangiu, București, 2008, p.1.

As regards the *judicial nature* of the 90-day term, *we appreciate* this to be not a procedural term, although included by a procedure law, but a term including also material law provisions. We consider this term as having been introduced by the legislator in favour of the debtor, and can thus be qualified as a *legal grace period*.

We appreciate that all these judicial norms related to the claim of the creditor entitled to request initiation of insolvency proceedings are *imperative*. Consequently the insolvency judge entrusted with solving a creditor's request for initiation of insolvency proceedings is held to verify *ex officio* the admissibility requirements for the claim invoked by the creditor. It is in this sense that courts of law have ruled[30], namely that the creditor's claim will be checked *ex officio* by the insolvency judge even in the absence of debtor's defence in this regard, or of a debtor's contestation of the state of insolvency, formulated according to art.33 par.2 of Law no.85/2006.

2. The creditor entitled *to participate* in insolvency proceedings

Another concept defined by insolvency law is that of a *creditor entitled to participate in insolvency proceedings*, who, according to art.3 par.1 no.8 of Law no.85/2006 is the creditor who has filed a partially or entirely admitted request for recording the claim in the tables of receivables devised within the proceedings, and who has the right to participate and vote in the creditors assembly, including on a plan of the debtor's judiciary reorganisation, to participate in the distribution of the funds resulting from the debtor's judiciary reorganisation or liquidation of assets, to be informed or notified in relation to the status of the ongoing insolvency proceedings and to participate in any other procedure provided by insolvency law.

Analysing this legal provision *we establish* that only the creditor entitled to participate in insolvency proceedings is a *participant* in this special procedure, and is consequently granted the rights provided by this special law.

The quality of creditors participating in insolvency proceedings is not held by those *alien*[31] to this, namely creditors who have not filed a claim request, creditors who have filed a tardy request, creditors whose claim request was dismissed by the judiciary administrator/liquidator or who were removed from the table of receivables consequently to an admitted contestation of this filed by the debtor or by another creditor.

Thus any creditor can file a *claim request* according to art.64 and art.107 par. 4 of Law no.85/2006, but in order to become creditor entitled to participate in insolvency proceedings the claim statement has to be *admitted* by the judiciary administrator/liquidator with the *claim checking procedure* provided by art.66 and art.108 par.3 of Law 85/2006. Upon completion of this procedure of checking the claims, the judiciary administrator/liquidator will devise the *tables of receivables* that confirm the creditors' entitlement of participating in insolvency proceedings.

For creditors to be recorded in the table of the debtor's creditors, they have to enter a claim request in the insolvency file, according to art.64 of Law no.85/2006. In this sense all creditors recorded in the debtor's list according to art.28 par.1 lit.c of Law no.85/2006, need to be notified by the judiciary administrator/liquidator as provided by art.62 par.1 lit.b of the same law.

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[30] Civil sentence no.445/06 03 2003 of Bacău County Court, in *Manual de bune practici în insolvență,*[Textbook of Good Insolvency Practice], op.cit, p.395, Commercial sentence no.5173/27 11 2008 of the Bucharest Court, 7th Commercial Section, in *Procedura insolvenței. Culegere de practică judiciară 2006-2009, Volumul I,* [Insolvency Procedure. Collection of Judiciary Practice 2006-2009, volume I], op.cit, p.1.

[31] For details on creditors alien to insolvency proceedings see *Gh. Piperea*, Drept comercial vol.II, [Commercial Law, vol. II], Editura C.H. Beck, București, 2008, p.232.

In judiciary practice[32] it was deemed that the creditor who has filed a request for initiation of insolvency proceedings that was admitted by the insolvency judge does not have to also submit a claim request.

The claim request is checked by the judiciary administrator or the liquidator, according to art.67 of Law no.85/2006.

The checking procedure of the claim request consists in analysing the creditor's assertion related to the existence of an uncontested, liquid and enforceable claim, based only on the written deeds attached to the claim request filed by the creditor, according to art.65 par.2 and 3 of Law no.85/2006.

Consequently to checking the claim requests the judiciary administrator or the liquidator devises a *preliminary table of the debtor's receivables*, according to art.72 par.1 of Law no.85/2006. This table that renders efficient the *collective nature of insolvency proceedings* fulfils the *function* of a court decision issued in relation to "civil actions of claims", respectively to creditors' claim requests.

Interested persons can contest the preliminary table of the debtor's receivables, according to art.73 par.1 of Law no.85/2006.

The contestation represents the *legal remedy* available to mainly to the debtor and the creditors against the "decision" of the judiciary administrator or liquidator concerning the filed claim requests or the table of receivables, respectively.

The judiciary administrator or liquidator, respectively, is held to check the claim requests only based on the attached *justifying deeds*. It follows that within the checking procedure of the claim request the *insolvency practitioner*[33] does not consider any type of evidence as encountered in common law civil suits, but only written deeds, in addition to which explanations can be requested from the debtor, discussions can be conducted with each creditor, who can be asked to provide, if necessary additional information and documents, according to art.67 of Law no.85/2006.

It is thus established that similarly to the creditor entitled to request initiation of insolvency proceedings, also the creditor entitled to participate in such proceedings is not required by the legislator to provide an executory title for the analysis of the claim.

An issue was raised concerning evidence of the claim of creditors entitled to participate in insolvency proceedings, namely the issue of knowing if by contesting the preliminary table of receivables by a creditor whose claim request was dismissed because of lacking justifying documents, the insolvency judge can rule on the claim as in a *first instance court*. In jurisprudence[34] it was deemed, that in order to be recorded in the table of creditors, any creditor filing a claim request needs to hold an uncontested, liquid and enforceable claim prior to the initiation of the insolvency proceedings. Thus during insolvency proceedings claiming of damages following from the inadequate execution of contractual obligations assumed by the debtor, included in a contract closed by debtor and creditor prior to initiation of insolvency procedures but not determined by the start date of insolvency proceedings, claim based on justifying deeds, is not further possible.

In judiciary practice creditors frequently file claim requests accompanied by justifying documents like the contract closed by the parties and other deeds devised by the parties within the execution of this contract, invoices, commercial correspondence, etc. In a number of situations the legislator has established that certain justifying deeds of the claim request

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[32] Commercial decision no.14/10 01 2011 of Cluj County Court, in *S.P.Gavrilă, Law no.85/2006 privind procedura insolvenței. Practică judiciară*, [Insolvency Procedure Law no.85/2006. Judiciary practice], Editura Hamangiu, București, 2013, pp.193-196.

33 See OUG [Government Emergency Ordinance] no.86/2006 on the organisation of insolvency practitioners' activity, published in Monitorul Oficial [Official Journal] no.944/22 11 2006, republished in Monitorul Oficial [Official Journal] no.734/13 10 2011.

[34] Civil sentence no.2659/sind/29 11 2012 of Brasov County Court, irrevocable and unpublished.

represent, by effect of law, *executory titles*. This is the case of bank loans, lease contracts, promissory notes, cheques, taxation deeds, etc.

According to art.66 par.1 of Law no.85/2006, claims confirmed by *executory titles are not subject to checking* by the judiciary administrator or liquidator. According to art.66 par.2 of Law no.85/2006 *not subject to checking are budgetary receivables* following from executory titles uncontested within the terms provided by special laws.

Consequently in applying this legal provision, the judiciary administrator/liquidator will not be able to analyse and censor in any way the clauses included by a contract that, by law, represents an executory title.

The executory titles that can be attached by the creditor to the claim request are court decisions or other deeds that by law have similar judicial power.

In cases of attached to the claim request is a loan contract or a lease contract that by law represent executory titles, the issue was raised to know if the judiciary administrator or the liquidator is entitled, if requested by the debtor, to establish the certain clauses of the contract are *abusive clauses,* according to the provision of Law no.193/2000[35] concerning abusive clauses in merchant-consumer contracts.

In our opinion the judiciary administrator/liquidator cannot remove as abusive clauses of debtor-creditor contracts closed prior to initiation of insolvency procedures, as the judiciary administrator/liquidator cannot act as a substitute for a court of law.

In this sense the provisions of art.66 par.2 of Law no.85/2006 does not grant the administrator the right to check and analyse the claims confirmed by executory titles.

If the administrator records in the preliminary table of creditors a claim confirmed by executory title at the value that follows from the contract, and the debtor or another creditor contest this table, according to art.73 par.1 of Law no.85/2006, it was deemed[36] that the insolvency judge can establish, based on evidence, the existence of an abusive clause in the contract presented by the creditor.

According to art.4 of Law no.193/200 an abusive clause is "a clause that has not been directly negotiated with the consumer [...], if by itself or together with other provisions of the contract it creates to the disadvantage of the consumer and contrary to the requirements of good faith a significant unbalance between the parties' rights and obligations ".

In Law no.193/2000 the Romanian legislator has implemented into internal law Directive 93/13/EEC of the European Council concerning abusive clauses in contracts closed with consumers[37].

In this sense the supreme court[38] has established in relation to the applicability of art.4 of Law no.193/2000, that "a contractual clause that has not been directly negotiated with the consumer and that by itself or together with other provisions of the contract creates to the

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[35] Published in Monitorul Oficial [Official Journal] no.560/06 11 2000.

[36] *A.R.Adam*, Aspecte privind clauzele contractuale abuzive în procedura insolvenței, Volumul Conferinței internaționale de drept, studii europene și relații internaționale, cu titlul: „Politica legislativă între reglementarea europeană, națională și internațională. Noi perspective ale dreptului.", organizată de Universitatea Titu Maiorescu, București, [Aspects Concerning the Abusive Contractual Clauses in Insolvency Proceedings; in the volume "Legislative Policy between European, National and International Regulations. New Perspectives of Law" of the International Conference of Law, European Studies and International Relations organised by *Titu Maiorescu* University of Bucharest], 24-25 May 2013, Editura Hamangiu, 2013, pp.463-468.

[37] *I.Fl. Popa*, Reprimarea clauzelor abuzive [Repression of Abusive Clauses], in PR no.2/2004, p.194; *V.D. Dascălu*, Consideraţii privind protecţia intereselor economice ale consumatorului în contractele de adeziune cu clauze abuzive, [Considerations on the Protection of Consumer Economic Interests in Adhesion Contracts with Abusive Clauses], in RDC no.1/1999, p.51; *D. Chirică*, Principiul libertății contractuale și limitele sale în materie de vânzare – cumpărare [The Principle of Contractual Liberty and Its Limitations in Sales], in RDC no.6/1999; *I.I. Bălan*, Clauzele abuzive din contractele încheiate între comercianţi și consumatori [Abusive Clauses in Merchant-Consumer Contracts], in Dreptul no.6/2001, p.36; *C. Toader, A. Ciobanu*, in RDC no.7/2003.

[38] Civil decision no.1648/18 04 2011 of the High Court of Cassation and Justice – Commercial Section, unpublished.

disadvantage of the consumer and contrary to the requirements of good faith a significant unbalance between the parties' rights and obligations is considered as abusive".

Thus in *lease contracts* it is established that these include, in addition to a highest rank commissary pact for failure of due-date payment of the lease instalments by the lessee, also another *penalising clause* for the lessee, that stipulates that in cases contracts cancelled from the exclusive fault of the lessee, the lessor is entitled to claim full payment of the lease instalments with damages and interests for the entire duration of the contract, regardless of the recovery of the asset that is the object of the contract and/or of its subsequent realisation by the lessor.

In jurisprudence[39] it was established that the insolvency judges have admitted such contestations, deeming in essence that the clause included by the lease contract closed by debtor and creditor with identical or similar content to that presented above is abusive according to the provisions of Law no.193/2000.

Consequently to admitting such contestations the creditor-lessor will be recorded in the final table of creditors only with the value of the due lease instalments, not paid by the lessee to the date of seizing by the lessor from the lessee of the asset that is the object of the lease contract, respectively until the date of contract cancellation, and also of the interests, penalties and expenditure incurred by seizure of that asset. Thus eliminated from the claim of the creditor-lessor is the value of the lease rates for the period subsequent to the seizure of the asset from the debtor-lessee, respectively subsequent to the cancellation of the contract, until the due-date stipulated in the contract for payment of the lease instalments.

If the creditor-lessor has seized the asset that is the object of the lease contract from the debtor-lessee, and this asset was realised by the creditor in relation to a third party, *in our opinion* the creditor's claim should be diminished by the sum received as the price resulting from the subsequent realisation of the asset by the creditor-lessor.

A similar situation arises in bank loan contracts, where the insolvency judge is entitled to establish, in case of a contestation of the preliminary table of claims, that certain contract clauses are abusive, referring to bank commissions or to the undetermined value of interest during the contract.

Taxation deeds issued by the competent authorities and that, according to law, represent executory titles, cannot be censored by the insolvency judge in case of a contestation of the preliminary table of claims, as for these the legislator has provided a special contestation procedure within fiscal suits.

Conclusions

Considering the economic and financial crisis traversed by our country too, the field of insolvency is of highest actuality and interest, not only from a judicial viewpoint, but particularly from en economic one.

Insolvency procedure is not a simple modality of recovering claims, but collective proceedings of the creditors conducted in view of covering the debtor's liabilities.

From this perspective at present insolvency is no longer seen as "the end" of the merchant, but as means of "recovery".

Within the complex field of insolvency the present study aimed at a detailed and in-depth analysis of certain concepts defined by law, like: creditor, creditor entitled to request initiation of insolvency proceedings, uncontested, liquid and enforceable claim, the institution of claim checking, table of receivables, creditor entitled to participate in insolvency

[39] Civil sentence no.269/sind/31 01 2013, of Braşov County Court, irrevocable and unpublished, Civil sentence no.950/sind/11 04 2013, of Braşov County Court, irrevocable and unpublished, Civil sentence no.66/19 01 2011, of Brasov County Court, irrevocable and unpublished.

proceedings, aspects related to the concept of executory title, issues related to abusive clauses in consumer-merchant contracts, etc.

By this study we have tried to highlight and discuss the implications of civil legislation in a wider sense, and of the provisions of the Civil Code and the Code of Civil Procedure ion insolvency proceedings, as well as their application within this special procedure, in order to facilitate corroboration of the provisions of special insolvency law with those of common law.

Further, related to the discussed issues, doctrinarian and jurisprudential opinions were presented, as well as controversial aspects found in both literature and judiciary practice.

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