

CONSIDERATIONS REGARDING THE ON-GOING CONTRACTS AFTER THE INSOLVENCY PROCEDURE HAS BEEN INSTITUTED

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Abstract

The main purpose of the article is to highlight new aspects regarding contracts that a legal person had perfected before the insolvency procedure is opened. Once the syndic judge rules in favour of opening the procedure the judicial administrator, named in that case, has a special power, a right to opt, to either permit the contract to run its course or to denounce it thus ending its effects. Sometimes, due to the special nature of some contracts, the right of option is conditioned and certain procedures must be enforced. Also, due to an obvious possibility that the respective contract might create an unbalance to the debtors' accounts and other sectors, the judicial administrator must take special consideration and can also modify the articles of the contract, rendering new significance or substituting the content of the provisions. Nonetheless, a combination of these possibilities may be preferable to the judicial administrator, partially changing the contracts or keeping in effect only what is in the debtors favour.

Keywords: *insolvency, contracts, right to opt, judicial administrator, debtor.*

I. Introduction

Since last year we have a new Insolvency Law¹, which has only entered into force this year. Its official title refers to the procedures regarding the prevention of insolvency and of the insolvency, but in quickly got a special nickname The Insolvency Code.

The new Insolvency Law has changed some of the old provisions that the old law regulated. Among the most important aspects that this law has introduced are the new prevention procedures, to which the debtor can resort should it desire to avoid the standard insolvency procedure. Also, it has set new rules and new conditions for the possibility of the interested parties to find out, expose and obtain compensation from the people that were responsible for the debtor's insolvency. Finally, new criminal offences were regulated and some of the old ones were rewritten in order to adapt to the realities that could have been observed during the implementation of the old law.

Separately, as to the insolvency procedure in particular, the new law tries to bring balance between the interests of the debtor and those of the creditors. It tries to reconcile some of the aspects that proved difficult in the past. Some aspects like the easy access of the debtor to a reorganization plan or the low powers of the creditors are now stipulated differently so that any attempts of manipulating the procedure are forfeited.

The new law puts an end to the former practice that who among the creditors or the debtor is first to obtain the opening of the procedure has almost limitless powers as to appoint a judicial administrator or to have his debts written in the order of payments more easily.

A clear signal came also from the European Union that encourages the second chance to restructuring the business of the debtor from an early stage of the procedure and continuingly during the restructuring plan, in balance with the interests of the creditors.

New ideas were introduced by the Insolvency Code, most of them protecting the investments that were injected into the debtors that are in insolvency, also debts that are contracted during the insolvency procedure can be paid directly and not have to wait for the end of the restructuring and the opening of the bankruptcy stage. None the less, the protection of the secured debts, like the ones we will refer later in this paper and the regulation of the special delivery agreements which are vital for the debtors activity (electricity, water, gas etc.) that now can be paid by the judicial administrator during the procedure.

II. The focus of the present paper regards the on-going contracts that the debtor has contracted during its normal activity but which now will have a special situation because of the insolvency procedure. The topic revolves around three aspects that govern this situation. Firstly, there are the special effects that come with the opening of the insolvency procedure, that influence the on-going contracts. Secondly, there is the special right to opt of the judicial administrator by which he can choose either to keep the on-going contracts, thus he will have to pay them from the debtors patrimony, or to terminate them, giving way to the signing of a debt at the debtors table. Finally, some of the contracts have special provisions that regulate their effects in either of the judicial administrator's choice.

1. As regarding the special effects that come with the opening of the insolvency procedure, Law no. 85/2014 (Insolvency Code) only partially affects the

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on-going contracts. Nonetheless the importance of some of these effects must be pointed out.

1.1. Normally the first effect after the insolvency procedure has been opened will be that the debtor can no longer govern its own business. This means that the judicial administrator will decide every aspect regarding the activity of the debtor. Should the debtor opt for reorganisation he might be allowed to continue his activity and retain the decisions regarding his business. This effect has little impact regarding on-going contracts because the right to opt between keeping their effects or terminating them will be of the judicial administrator. However, should some contracts not be terminated and the debtor retain its decisions right, then these contracts will go on as normal and will be the concern of the debtor who will be verified by the judicial administrator.

1.2. The second effect upon opening of the insolvency procedure is that all judicial actions and all litigations will cease and any third parties or persons that have a claim regarding the debtor must come and submit a request to affiliate at the debtor table. The main point is that should any contracting party have any claim from the debtor it must join the debtor table and wait his turn, but also will have to see if the whole contract will be terminated by the judicial administrator, leaving only the option to sign his entire prejudice at the debtor table.

1.3. Other effects of the opening of the insolvency procedure regard the freezing of any penalties, interests or any other sums from non-payment, also suspension from public trading should the legal person have that status. This impacts the on-going contracts because should there be a clause regarding any penalties or other non-payment sanctions they will be suspended from the moment that the insolvency procedure has been instituted.

2. The insolvency procedure is usually instituted because before different juridical acts or contracts have been poorly implemented and business was conducted in an improper way. Thus the judicial administrator has the right to identify all acts and deeds of the debtor or of the persons that are in charge and annul them. Should some contracts be in the interest of the debtor he might keep them into effect.

2.1. The on-going contracts are those contracts that their effect unfold on a certain amount of time, or their effects could not be realised because the insolvency procedure has been instituted and the suspension effect that we mentioned before have been implemented.

Any types of contract qualify for an on-going contract, even if the effects are executed one time or several or multiple times. They may refer to any activity as long as it is legitimate. An exception was regulated by the Insolvency Code, regarding the utilities contracts that have their own special regime. On these lines the utility supplier cannot terminate the contract or cease delivering that utility to the debtor after the insolvency procedure has been instituted nor

can the judicial administrator terminate the contracts because it will result in leaving the debtor without vital means to continue its activities.

2.2. As a general principal, all on-going contracts must be continued after the insolvency procedure has been instituted. This special rule can be found in art. 123 par. 1 of the Insolvency Code.

It represents an exception from the general rule found in the Civil Code, art. 1417, that regulates the decadence from all benefits of a term upon the implementation of the insolvency procedure. Surely, the debtor must find itself in either the situation of insolvency or when he reduced the warranties of the creditors or refuses to give any.

This is in line with the main idea of the insolvency procedure that does not have the purpose of terminating any contracts but to continue them in the hope of restructuring the debtor activity.

2.3. A special rule instituted by art. 123 par. 1 of the Insolvency Code regards the annulment of all contractual clauses that specify the termination of the contract due to the implementation of the insolvency procedure, or specify the decadence from the benefits of the term or declare an anticipated maturity of any contract due to insolvency. The only exceptions from this rule are regarding the financial contracts and compensation (netting) contracts. This means that the excepted contracts can have a clause for termination should the insolvency procedure be instituted.

The practical effects of this rule reside in the fact that no creditor should be put above the other. The insolvency procedure is a collective procedure where all creditors come at the same debt table and their ranks are given only in accordance with the special provisions of the Insolvency Code.

2.4. The same article regulates the judicial administrator **right to opt** as one of the major rights of given to him by law. The right to opt has two different implementation options, differing on who is the first person to ask what should happen to an on-going contract.

a) The first possibility has as main decision maker the judicial administrator that in 3 month, after the insolvency procedure has been implement, must decide whether to keep or terminate the on-going contracts. This possibility has certain conditions in order to be implemented.

One of the conditions regards the time frame in which the judicial administrator must reach a decision. He has 3 months calculated from the official implementation of the insolvency procedure. According to art. 45 par. 1 letter d), the syndic judge that presides over the procedure must appoint in its opening sentence upon the person that will assume the judicial administrators obligations. From this moment the 3 month term begins.

The other condition regards whether the contracts that are in debate have been executed. The Insolvency Code regulates that should the contract be entirely executed or substantially executed the judicial

administrator may not terminate them. This extends also to the execution of the main obligations should any accessorial obligations remain. Due to the general principal that all that is accessory follows the main obligation, implementing what is left of the contract is the only solution permitted for the judicial administrator.

b) The second possibility will arise from the notification of the contracting party that contains the question regarding the decision of the judicial administrator as to terminate his contract or contracts. In respect, the contracting party addresses a notification, that mustn't have a specific form or content, but must contain the question wheatear the judicial administrator will terminate the contract.

The notification containing this request must be submitted by the contracting party in 3 months from the opening of the insolvency procedure. According to art. 99 of the Insolvency Code, upon being appointed as judicial administrator he must send a notification to all known creditors communicating them of the implementation of the procedure and inviting them to sign up their claims at the debt table. Now, although the contracting party has 3 month calculated from the opening of the insolvency procedure, in our opinion, it should include also the period necessary for the notification of the opening of the insolvency procedure to that party.

Upon receiving the notification asking about the termination of the contract, the judicial administrator has 30 days to answer it. The answer is not mandatory. Consequently, different effects will result, depending on the judicial administrator's actions:

i) The contract will be considered denounced and terminated upon the ending of the last day of the 30 days period should the judicial administrator give no answer to the notification asking about the termination of the contract;

ii) If the judicial administrator opts for continuing the contracts effect, he must report every trimester wheatear the debtor has funds to on-go the contract. This option implies that the judicial administrator give a written answer to the contracting party specifically saying that the contract will continue its effects;

iii) A special effect arises from the termination of the contract, either by express notice or from not answering the contracting party notification, and refers to damages. The contracting party may claim damages against the debtor, but the payment will be substituted to the order of payment specific to the insolvency procedure and regulated in art. 161 par. 4 of the Insolvency Code.

2.5. The judicial administrator right to opt cannot be implemented or finds no applicability should one of the following situation apply:

a) The contracting party, within 3 month from the opening of the insolvency procedure, denounces the contract or declares an anticipated maturity of the

contract and communicates either of them to the judicial administrator.

This situation implies that the contracting party considers the contract terminated without first sending a notification to the judicial administrator asking about the termination of the contract. Also, this possibility does not come in conflict with the interdiction of terminating the contract due to the implementation of the insolvency procedure, mentioned by us in the above paragraphs, because it is a unilateral decision taken after the implementation of the procedure and justified on the general right of the contracting party to denounce the contract should the other party fails to fulfill its obligations.

b) In the special conditions of a sale contract with the retention of the title. Since the sale was conditioned by the seller who will keep the property title until payment, the sale is cannot be completed without the title, should the insolvency procedure be instituted before payment of the contract the seller can retain the title and renounce the payment.

c) In the special conditions of a financial lease contract, the financing party must express its express consent regarding the continuation of the contract, within 3 months calculated from the opening of the procedure. Should the financing party not express its option at all the contracts will be by law considered terminated without any other persons intervention.

2.6. Separately from the right to opt, art. 123 par. 5 of the Insolvency Code regulates that the judicial administrator may **modify the terms of the contracts** negotiated or settled by the debtor. This separate right of the judicial administrator gives way to two different possibilities.

Firstly, the judicial administrator can modify the contracts that the debtor settles after the insolvency procedure has been implemented. Consequently, if the debtor does not lose its right to govern its own business he may enter into negotiations and sign contracts on his own. The judicial administrator only may stand watch for any law breaching and, should it consider that the terms of the contracts settled by the debtor are against its interests may decide to unilaterally modify those terms or exclude them without necessarily terminating the entire contract.

The other possibility is that the judicial administrator may not opt for the termination or keeping the on-going contracts of the debtor, which implies a decision regarding the entire contract, but may decide to rule out some terms from those contracts and keep the other effects. This possibility is subject to the contracting party right to denounce the contract should the other party fails to fulfill its obligations.

2.7. Finally, the last right of the judicial administrator regarding the on-going contracts is to **surrender the contracts** to paying third parties in order to maximize the debtor's fortune.

This solution may be taken into consideration by the judicial administrator should any third parties be interested in buying those on-going contracts from the

debtor. He may set any price for the contracts, as long as it is not in contradiction with the debtor's interests. The content of the surrender contract and its form are governed by the general rules regulated by art. 1566-1586 of the Civil Code.

3. Not all on-going contracts were left to the judicial administrator appreciation, because the law, due to their particularities, considered that special provisions must regulate their effects depending on the option made. Hence, the last part of the article is dedicated to the special contracts that were regulated by the Insolvency Code and that in the light of the right to opt of the judicial administrator will generate different effects by which the participants at the insolvency procedure are bound.

3.1. Regarding the sale contract with the retention of the title, art. 123 par. 6 of the Insolvency Code regulates that if the seller holds property title until payment in full, the sale will be considered fulfilled for the seller and, should he entered his rights at the cadastral register makes the sale opposable to the judicial administrator or the liquidator. The good will be part of the debtors belongings and the seller will benefit from a preference clause which is assimilated to a mortgage according to art. 2347 Civil Code.

3.2. Regarding the bilateral promise to sell that has a certain date, art. 131 par. 1 of the Insolvency Code regulates that the promising-buyer may ask for execution from the promising-seller which is now an insolvent debtor, should the formalities required by the law are met, the contract has a certain date and the following conditions are met: i) the price of the contract was paid in full and the good is in the possession of the promising-buyer; ii) the price is not below the market price; iii) the good is not crucial for the success of a restructuring plan.

Perfecting this contract can be done by the judicial administrator based on his right to sign on behalf of the debtor, perfecting a free of privileges or preference clauses contract. But due to the fact that the bilateral promise was perfected before the opening of the insolvency procedure and some other creditors might have already instituted preferences or privileges over the good the judicial administrator should he perfect the promise to a contract must recognise and note in the debt table the special rights of these creditors.

3.3. Regarding the labour contract art. 123 par. 7 and 8 of the Insolvency Code regulates that when the debtor is the employer the judicial administrator in exercising his right to opt must take into consideration the legal terms for notice given to the employees.

Hence, the termination of the individual labour contracts must be made on an urgent basis and with the notice in advance as they are both defined by the Labour Code. The termination of a collective labour contract must also respect half of the normal notice periode.

Separately, the Insolvency Code regulates the same rule of respecting the notice period, when

termination of the contract is decided by the judicial administrator, for the rental contracts.

3.4. Regarding the contracts that imply successive executions art. 123 par. 9 of the Insolvency Code regulates that the judicial administrator may keep their effect if it benefits the debtor but will pay only those executions or deliveries that come after the insolvency procedure has been implemented. All other obligations, prior to the opening of the procedure must be petition to be included in the debt table by the contracting party.

3.5. Regarding the credit loan contracts art. 123 par. 5 of the Insolvency Code regulates that with the consent of the contracting party the judicial administrator may change the terms of the contract should it benefit the debtors fortune.

3.6. Regarding the lease contract art. 123 par. 11 of the Insolvency Code regulates that if the financing party opts for the termination of the contract in the event of the user becoming an insolvent debtor he only may choose from two options:

- either he gives the good to the user and obtains in return a legal mortgage over it and the register of the value of that good in the debt table including all accessory sums calculated until the opening of the insolvency procedure;
- either taking back the good and registering other due sums in the debt table.

As mentioned in the previous paragraphs, this rule represents a special one, because a right to opt belongs to the financing party separately from the one of the judicial administrator and the option must be made by the financing party before 3 month from the opening of the insolvency procedure. After that period he loses his right and the contract is considered terminated by effect of the law.

Should the financing party chose to continue the contract, whit the express approval of the judicial administrator, then the effect may be as written in the contract or as modified by the consent of both.

3.7. Regarding the sale contract of movable goods that are in transit art. 124 of the Insolvency Code regulates that should the insolvency procedure be instituted while the movable goods are in transit from the seller to the buyer who is now an insolvent debtor one of this solution may apply:

- i) The seller may take back the good and return all expenses. This solution may happen only if the price has not been paid and the good has not been delivered to the buyer.
- ii) should the seller admit the goods to be delivered to the buyer, he will recuperate the price by claiming it from at the debt table.
- iii) if the judicial administrator demand the delivery off the good he must pay the full price from the fortune of the debtor immediately.

3.8. Regarding the commission contract art. 124 of the Insolvency Code regulates that if the agent holds goods or titles regarding assets that belong to the client and the agent becomes insolvent the client may

recuperate the entire assets from the agent because he works on behalf of the client.

3.9. Regarding the consignment contract art. 127 of the Insolvency Code regulates that the owner can recuperate the full of his goods but for the case that the agent might have claim or retention right over them. This principal applies to all cases where the debtor is precariously holding goods that belong to another.

If after the opening of the insolvency procedure the goods are no longer in the possession of the agent and cannot be recuperated then the owner can enter his claim in the debt table, at the value it had at the moment of the procedure opening. Should the goods be in the possession of the agent at the opening of the insolvency procedure and be lost afterwards the owner can claim in the debt table the full value of the goods.

3.10. Regarding the rental of immovable goods contract art. 128 of the Insolvency Code regulates that when the debtor is the landlord the contract will stay into force should the rent be at market value. Still, the judicial administrator may terminate the contract or

refuse to pay any debt or fulfil any obligation to the renter. In this last case the renter has the choice either to claim its loss at the debt table or to reduce the sum from the rent paid.

3.11. Regarding specialised personal services contract art. 129 of the Insolvency Code regulates that if the debtor is obliged to carry out specialised personal service to another contracting party the judicial administrator may terminate these contracts at any time leaving the other party, should he desire, to claim damages at the debt table.

III. In conclusion, the on-going contracts are in general submitted to the will of the judicial administrator or liquidator. The Insolvency Code has kept most of the old law provisions but improved those where practice and jurisprudence proved that a change was needed. This continuation or the termination of the contracts, at such an early stage of the insolvency procedure may prove vital to the success of the debtors restructuring so it must be carefully thought through.

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