ROLE OF THE INSOLVENCY ADMINISTRATOR AND OF THE OFFICIAL RECEIVER IN THE DYNAMICS OF THE CONTRACTS OF DEBTOR IN INSOLVENCY, IN THE REGULATION OF THE INSOLVENCY CODE

Eugenia VOICHECI[*]

Abstract

On 25 June 2014, the Law no.85/2014 was published in the Official Gazette, that sets forth the rules in the field of preventing insolvency and in the insolvency field itself.

A special attention needs to be paid on to the insolvency administrator and the official receiver, deemed by the doctrine in the former doctrine and in the former regulation, as participants in the insolvency procedure participants in the insolvency procedure.

This study does not aim to make an exhaustive inventory of the tasks of the duties of the two participants in the insolvency procedure.

This study starts from the premises that the insolvency procedure targets the covering of the debtor liabilities, by granting, where possible, the chance of redressing its activity.

It starts from an evident ascertainment: namely that, on the date of initiating the insolvency procedure, the debtor's activity is not interrupted ex abrupto and finally, that it may continue during the observation time, during the reorganization period and even after falling bankrupt.

Or, an ongoing activity implies the development of some previously concluded contracts, their denunciation and even the conclusion of some new contracts. Therefore, during the procedure, such dynamics of the debtor contracts is vitally important.

In the doctrine focused on the former regulation, the two participants in the procedure were deemed as "justice attorneys", and in this recent doctrine they were appreciated as "justice representatives".

This study proposes also another approach of the quality of representative of both participants in the procedure, an approach that would emphasize the legal relationships between the insolvency administrator and the official receiver, on one hand and the debtor in insolvency, on the other hand.

On other words, the study wants to emphasize where the insolvency administrator and official receiver, depending on the incumbent legal tasks, in relationship with the debtor.

Keywords: *Insolvency Code, debtor, opening the insolvency procedure, insolvency administrator and official receiver, contracts.*

Introduction

The study proposes an incursion in the matter of insolvency, as it is defined by the Law no. 85/2014 concerning the insolvency prevention procedures and the insolvency, regarded from a constructive perspective, respectively from the point of view of the contracts that ceases, continues to develop or is concluded during these procedures.

The importance of the study resides in the analysis of the role of the two practitioners in insolvency in the contracts' dynamics, as well as of the way in which their position is towards the debtor, the creditors, towards the third parties in the procedure, as well as towards the syndic judge, such a specific research being somehow faulty at this time in the specialty doctrine.

The analysis will consider an examination of the duties of each practitioner in insolvency, depending on the stages of the procedure, an examination of the institution of representation in the contractual and procedural matter, of the institution of the consent and of the company's will, as well as an examination of the authority relationship between the participants in the procedure in the contracts' dynamics.

This study topic is not found as being and examination subject in the specialty literature. It is unquestionable that both in the conditions of the Law no. 64/1995, and in the conditions of the Law no. 85/2014, the doctrine was concerned in details to emphasize the rile of the insolvency administrator and of the official receiver in the insolvency procedure, a particular and quasi-unanimous emphasis being put on the inventory of the legal tasks that fall upon them.

It must be underlines, under such aspect, the weight of the works representing comments on articles or annotations to the Insolvency Code[1].

[*] PhD Candidate, "Nicolae Titulescu" University, Faculty of Law (e-mail: **eugenia_voicheci@yahoo.com**).

[1] Turcu, Ion - *Codul insolvenței – Legea nr. 85/2014. Comentariu pe articole*, București, Ed. C.H. Beck, 2015; Cărpenaru, Stanciu D., Hotca, Mihai Adrian și Nemeș, Vasile - *Codul insolvenței comentat*, București, Ed. Universul Juridic, 2014; Țăndăreanu, Nicoleta - *Codul insolvenței adnotat*, București, Ed. Universul Juridic, 2014.

To an equal extent, there are studies that deal with the matter of the participants in the insolvency procedure and that focuses mainly also on the inventory of the duties of both participants in the insolvency procedure[2], as there are individual studies relating to the liability of the participants in the insolvency procedure.[3]

There are not, however, as far as we know, studies that would concentrate over the matter which we approach and that would emphasize particularly the role of the insolvency administrator and of the official receiver in the current contractual nexus in the insolvency procedure, raising multiple and particularly complex problems in this critical period of the debtor and that presents interest both for the debtor that tend to rehabilitate and to obtain the reinsertion in the economic circuit, and for the creditors motivated by the acute imperative of covering the unpaid debts.

The study will attempt to underline to what extent the practitioners in the insolvency designated in the procedure may be deemed representative of debtor, of creditors or justice attorneys as well as the multivalence of their activity in the procedure, as it will try to emphasize the degree of autonomy of their activity in the fulfilment of the legal provisions or as established by the syndic judge.

The content itself

General considerations over the insolvency prevention procedures and over the insolvency, over the bodies that apply the procedure and over the participants in the procedure.

The Law no. 85/2014 regulates the insolvency prevention procedures and the insolvency applicable to debtors mentioned in the art. 3 of the Law, corroborated with the art. 3 para. 2 Civil Code.

Insolvency prevention procedures are regulated in the Title I of the Law and are applicable to debtors that are found in financial difficulty, as it is defined by the art. 5 point 27 of the Law no. 85/2014. Art. 6 of the Law no. 85/2014 do not provide, as a condition for the enforcement of these procedures, the existence of the debtors' insolvency state.

The insolvency prevention procedures are the ad-hoc mandate and the arrangement with creditors.

According to the provisions of the art. 10 para. 1 and of the art. 23 para. 1 of the Law no. 85/2014, the ad-hoc attorney and the administrator appointed by the arrangement with creditors are proposed by the debtor and appointed by the Court President, respectively by the syndic judge, between the practitioners in insolvency certified according to the law. These legal provisions are fully compliant with the provisions of the art. 1 of GEO no. 86/2006, providing that the insolvency procedures, voluntary winding up procedures, as well as the insolvency prevention procedures provided by the law, including the financial supervision measures or special administration measures, are led by compatible practitioners in insolvency.

The insolvency procedure applies to debtors in insolvency, as it is defined in the art. 5 point. 29 of the Law no. 85/2014 and is regulated by the Title II of the same regulating act.

Law no. 85/2014 refers to the bodies that apply the procedure and to participants in the procedure in the Title II – Chapter I – Section II, without defining them, limiting to listing them and stating over their role, rights and duties in different stages of the procedures.

A part of the doctrine's opinions[4] were expressed in the meaning that the bodies enforcing the procedures are the courthouses, syndic judge, insolvency administrator and the official receiver. This appraisal is in accordance with the provisions of the art. 40 para. 1 of the Law no. 85/2014.

Other authors deemed[5], expressly or implicitly, that the bodies enforcing the procedure are part of the generic category of participants in the procedure, their relationship being from species to gender.

We appreciate as grounded the first opinion. Although the legal text quoted above don't make a firm distinction between the bodies enforcing the procedure and the participants in the procedure, none of them include the bodies enforcing the procedure in the category of participants in the procedure, but on the contrary, a clear dichotomy operate between the two categories.

In addition, it is ascertained that the provisions of the art. 40 para. 1 of the Law no. 85/2014 lists distinctly the bodies that enforce the procedure, while the title of the Section II represents a juxtaposition of the two categories, without making reference to "other participants in the procedure", as it is retained by the doctrine, an expression that

[2] Nemeș, Vasile - *Drept comercial,* Ediția a 2-a revizuită și adăugită, București, Ed. Hamangiu, 2015; coord. Bufan, Radu - *Tratat practic de insolvență*, București, Ed. Hamangiu, 2014; Sărăcuț, Mihaela - *Participanții la procedura insolvenței*, București, Ed. Universul Juridic, 2015.

[3] Popa, Carmen - "Natura juridică și limitele răspunderii civile a administratorului judiciar" http:/www.juridice.ro/341569/natura-juridica-si-limitele-raspunderii-civile-a-administratorului-judiciar/html

[4] Țăndăreanu, Nicoleta, op. cit., pag. 93-94; Turcu, Ion, op. cit., pag. 135-138 ; Cărpenaru, Stanciu D., Hotca, Mihai Adrian și Nemeș, Vasile, op. cit., pag. 115-119.

[5] Sărăcuț, Mihaela, op. cit., pag.8-10; Nemeș, Vasile, op. cit., pag. 496; Gheorghe, Cristian - *Drept comercial român,* București, Ed. C.H. Beck, 2013, pag. 708-718; coord. Bufan, Radu, op.cit., pag. 163; Cărpenaru, Stanciu D. - *Tratat de drept comercial român- Ediția a IV-a, actualizată*, București, Ed. Universul Juridic, 2014, pag. 721, corelat cu pag. 735.

would bind us to include the bodies enforcing the procedure in the category of the participants in the procedure.

An additional argument for supporting this orientation is grounded on the provisions of the art. 180 of the Law no. 85/2014, that, providing the discharge of any duties and obligations at the closing of the procedure for the syndic judge, the practitioners in insolvency and the assisting persons, marks undoubtedly the difference between the bodies enforcing the procedure and the participants in the procedure.

In conclusion, we appreciate that the Title II – Chapter I – Section II of the Law no. 85/2014 sets forth a clear difference between the *bodies enforcing a procedure* – that are the legal courts (court of law, syndic judge and the court of appeal), the insolvency administrator and the official receiver – and the *participants in the procedure* – that are the debtor through the special administrator and the creditors by the creditors meeting and the creditors meeting.

Insolvency administrator and official receiver –common general considerations

Provisions of the art. 1 of the GEO no 86/2006 concerning the organization of the activity of the practitioners in insolvency provide that the insolvency procedures, voluntary winding-up procedures, as well as the insolvency prevention procedures provided by the law, including the financial supervision measures or the special administration measures, are led by compatible practitioners in insolvency.

As a first remark over the mentioned legal text, we appreciate that the provision related to ”the management” of the procedure is, at least as concerns the insolvency procedure, not correlated in the text of the articles 2 and 3 of the Ordinance, where it is not provided that the insolvency administrator and official receiver lead to the procedure, but that they exercise tasks provided by the law or established by the courthouse, respectively *leads the debtor's activity* (s.n.) and exercises the activities provided by the law or those established by the legal court.

Law no. 85/2014 does not define the insolvency administrator and the official receiver. In addition, the provisions of this regulatory act makes reference to the official receiver (s.n.), while the art. 3 of GEO no. 86/2006 make reference to the receiver (terminology in accordance with the one used nowadays, in the Law no. 85/2006). Taking into account the principle of the law's supremacy, as well as that the Law no. 85/2014 represent the common law in the matter of insolvency and is subsequent to GEO no. 86/2006, we appreciate that the correct phrasing in terminological terms, is that of *official receiver*, that will be found in this entire study.

As it was also shown before, the Law no. 85/2014 does not have its own definitions for the insolvency administrator and nor for official receiver, the two practitioners in insolvency being defined, in exchange, by GEO no. 86/2006.

According to the provisions art. 2 of the GEO no. 86/2006, the insolvency administrator is the compatible practitioner in insolvency, authorized under the law, designated to exercise the duties provided by the law or established by the legal court, in the insolvency procedure, in the observation period and during the reorganization procedure.

Art. 3 of the GEO no. 86/2006 defines the receiver (hereinafter referred to as official receiver for the considerations mentioned above) as the compatible practitioner in insolvency, authorized by the law, designated to lead the activity of the debtor in the bankruptcy procedure, both in the general procedure, and in the simplified procedure, and to exercise the tasks provided by the law or those established by the legal court.

The legal text mentioned emphasized the two conditions which the practitioner in insolvency must fulfil mandatorily and indispensably, in order to be able to develop activity in one of the two mentioned qualities, conditions that, if analysed logically, refer to the authorization according to the law and to compatibility.

Law no. 85/2014 does not refer to any of the two conditions, and in the law silence, we deem that, as show also in the doctrine[6], that they must be checked according to the provisions of GEO no. 86/2006.

Thus, we deem that the fulfilment of the requirement of ”authorization according to the law” must be checked in relation with the provisions of the art. 30-35 of GEO no. 86/2006. Accordingly, we appreciate that the authorization must be made in accordance with the Statutes concerning the organization and exercising of the profession of practitioner in insolvency, issued by the National Union of Practitioners in Insolvency from Romania, entity that is a public utility legal person, autonomous and without lucrative purposes, with duties provided by the art. 46-48 of the Ordinance and that has self-regulating competence.

Similarly, we appreciate that the requirement of the compatibility of the practitioner in insolvency must be observed in relation with the provisions of the art. 27-28 of GEO no. 86/2006, that provide both cases of incompatibility themselves and interdictions of exercising the profession in certain situations and in front of certain courts.

It must be underlines the fact that, although the art. 2 and art. 3 of GEO no. 86/2006 refer to the

[6] Sărăcuț, Mihaela, op. cit., pag. 52-54.

duties established by the court of law, at least in the insolvency procedure, these legal provisions must be construed as making reference to the syndic judge, in consideration of the provisions of the art. 44 of the Law no. 85/2014, that provide that the distribution of causes, having as subject the procedure provided by this title (s.n. Title II Insolvency Procedure), to the judge designated as syndic judge is made randomly in a computerized system…[7]

Finally, as concerns the same legal texts examined previously, it is required also note that they contain a phrasing that is somehow inadequate, in connection with the obligation incumbent to each one of the two practitioners in insolvency. In real facts, both the insolvency administrator, and the official receiver must exercise also the tasks provided by the law, and those established by the syndic judge, they not being entitled to choose between the two types of tasks, that are, in this way, mandatory in equal extent. This aspect result from the interpretation of the provisions of the art. 58 para. 1 and 2, and of the provisions of the art. 63 of the Law no. 85/2014, legal provisions that don't confer to the practitioner in insolvency the right to choose between the duties established according to their legal and jurisdictional nature.

From this point of view, we appreciate that the text of the art. 2 and of the art.3 of GEO no. 86/2006 had to consecrate the obligation of the practitioner in insolvency to exercise their tasks provided by the law and (not **OR**) those established by the syndic judge.

The relationships between the insolvency administrator and the official receiver – on one hand– and the syndic judge, debtor and creditors – on the other hand.

In the fulfilment of the position and of the role for which they were designated, the insolvency administrator and the official receiver develops a specific and autonomous activity but which does not escape to the control exercised by the syndic judge and by the participants in the procedure.

Specific activity

This activity is circumscribed to the tasks conferred *in terminis* by the law – the art. 58 of the Law no. 85/2014 for the insolvency administrator and the art. 64 of the same regulatory act for the official receiver -, as well as to those established by the syndic judge.

Art. 58 para. 2 of the Law no. 85/2014 entitles the syndic judge to establish in duty of the insolvency administrator and other tasks besides those provided for by the para.1 of the same article, but excludes those from the sphere of these additional tasks those provided for the exclusive competence of the syndic judge, tasks provided by the art. 45 of the Law, which leads to the conclusion that the law ruler did not understand to delegate in favour of the insolvency administrator, even if they deem it to be a body enforcing the procedure, prerogatives of the ultimately judicial activity.

It is ascertained that the provisions of the art. 64 letter l of the same regulatory act, concerning the right of the syndic judge to establish also in the duty of the official receiver any other tasks that provided at the letters a-k ale of the same article, are no more excepted from the art. 58 para. 2 of the final thesis, that was referred to as previously.

We appreciate, however, that the interdiction of delegation to the official receiver of some strictly jurisdictional tasks is fully applicable also in case of this practitioner in insolvency for reason identity, Law no. 85/2014 not conferring to such practitioner a different status, but only tasks different from those of the insolvency administrator; consequently, it is applicable the legal principle of *ubi ratio, ibi semper solutio.*

The fulfilment of the legal tasks and of those set forth by the syndic judge must be made by the practitioners in insolvency in compliance with the following principles: the tasks must be achieved in compliance with the law, for the purpose for which the insolvency procedure was regulated, under managerial and optimal opportunity conditions, and considering the type of procedure that is developed.

There relevant under the aspect of conformity of the tasks with the law, the provisions of the art. 4 of the Law no. 85/2014, setting forth principles on which the insolvency procedure is based, these principles being imperiously necessary to be observed by the bodies enforcing the procedure and fully opposable to the participants in the procedure.

In addition, the provisions art. 182 of the Law no. 85/2014 are also relevant, regulating the matter of liability of the insolvency administrator and of the official receiver for exerting their duties with bad faith or with serious negligence, the two forms of guiltiness being related to the violations of the material or procedural law norms or to the faulty fulfilment of a legal obligation, that case the harming of a legitimate interest (para.1).

The same article provides in the second paragraph also the possibility of engaging the civil, penal, administrative or disciplinary liability of the insolvency administrator or of the official receiver for the acts performed during the procedure according to the common law regulations.

The conclusion that may be drawn by force of evidence is that, in the fulfilment of tasks that are conferred to them, the insolvency administrator and the official receiver must fully observe this law.

[7] For developments see Sărăcuț, Mihaela, quoted work, pages 34-35.

In the same way must be construed also the provisions of the art. 45 para. 2 thesis I of the Law no. 85/2014, providing that the tasks of the syndic judge are limited to the court control of the activity of the insolvency administrator and/or of the official receiver, which implies a control of legality, not of the opportunity of the measures adopted by these practitioners in insolvency.

Art. 45 para. 2 thesis II of the Law no. 85/2014 brings into first plan the managerial side of the activity of the two practitioners in insolvency, consisting of the decisions of opportunity which they adopt in connection with the activity of the insolvent debtor, the law text providing also here a type of control, this time coming from the creditors, through their bodies.

It must be underlines the fact that the activity which the insolvency administrator and the official receiver performs must be subsumed *ab initio and in* necessarily for the purpose for which the insolvency procedure was set up, as it is set forth in the art. 2 of the Law no. 85/2014: setting-up of collective procedures for covering debtor liabilities, by granting where possible, of a chance of redressing of its activity.

From the examination of the legal text involved, two ideas are depicted that constitute the same many imperatives for the activity of the two actors, whose activity we deal in this study: exercising the tasks which are incumbent thereto, must create the conditions of development of a collective procedure, to follow with priority the covering of the debtor liabilities, and to grant to the later, when the situation is favourable, the chance of redressing the activity, with the consequence of its reintroduction in the economic, commercial circuit.

In this context, the activity of these two practitioners in insolvency seems to have a difference nuance. Thus, if the purpose of exercising the incumbent tasks is the same– setting up of a collective procedure for covering the liabilities of the debtor in insolvency -, the insolvency administrator must observe also an additional imperative – granting of a change of redressing of the debtor's activity, when the analysis of its activity and of its patrimonial and financial state make possible such redressing.

That is why we appreciated that the fulfilment of the tasks incumbent to the two practitioners in insolvency must take into account also the type of procedure in which the debtor is and in which must be equally protected, of the situation allows it, both the creditors' interests, by covering the debtor's liabilities, and those of the debtor, when it is able to redress.

Autonomous activity, but not non – censorable

The insolvency administrator and the official receiver are free to appreciate the way in which they follow to develop their activity in the procedure, as they also have the initiative of the undertaken enterprises, depending on the assessment which they make in legal, economic and financial terms to the debtor's activity and to its patrimonial standing. Also, it may be asserted with fair grounds, that the activity of the practitioners in insolvency within the procedure is an autonomous one, that may be imposed but, which, following the exercised control a control mainly *a posteriori*), may be infirmed, therefore corrected.

It may be ascertained that the provisions of the art. 45 para. 2 of the Law no. 85/2014 contain the norm of principle, according to which the syndic judge exerts the legal control (n.n. of the legality of acts) of the activity of the insolvency administrator and of the official receiver, and the control of the managerial activity (n.n. opportunity control) is achieved by the creditors, by their bodies.

Also with value of norm of principle, it must be outlines also the provision of the art. 45 para. 1 letter j and m of the Law, that, interprets *per a contrario*, but also in corroboration with other legal provisions (*exempli gratia* art. 59 para.5, art. 111, art. 113 etc. of the Law), sets forth that the debtor, creditors or other interested persons may challenge the taken measures, as well as the reports drawn out by the insolvency administrator and by the official receiver.

Similarly, it must be shown also that the proposals formulated by the insolvency administrator or by official receiver of the starting by the debtor in procedure of the bankruptcy are not effect producing by themselves. According to the provisions of the art. 92 para. 3 and 4, that also the provisions of the art. 97 para. 4 and art. 98 of the Law no. 85/2014, these proposals are subject to the parties' debate, respectively to the approval by the creditors' meeting, and their validity is made by meeting passed by the syndic judge (art. 92 para. 5 and art. 98 para. 3 of the same regulatory act).

The control is not however unequivocally; at their turn, the insolvency administrator and the official receiver may request the censorship for reasons of illegality of the decisions of the creditors' meeting, through actions for annulment, under the conditions of the art. 48 para. 7 of the Law no. 85/2014, save the decisions by which they were appointed.

Equally, we appreciate that at least the insolvency administrator may censor those acts and operations undertaken by the debtor who was not taken off the management right – through the special administrator – by violating or exceeding the limits of the art. 84 and 85 para. 1 and 2 of the Law no. 85/2014, through actions for annulment, under the conditions of the art. 45 para. 1 letter i final thesis of the Law.

In conclusion, we deem that in the insolvency procedure there is a bi-univocal control of the actions undertaken by the bodies enforcing the procedure and of those of the participants in the procedure, with the mention that the decisions passed by the syndic judge may be strictly appealed by the legitimate procedural active persons, under the conditions and with the limits provided by the law for the judicial control.

Role of the insolvency administrator and of the official receiver in the dynamics of the contracts concluded by the debtor

The aforementioned presentation, although apparently ample developed, was deemed as necessary precisely in order to determine the position of the two practitioners in insolvency in procedure, of their role in this procedure and of the relationships in which they stand in relation with the courts of law and with the participants in the procedure.

The examining of the role which they play in the complex network of contracts concluded by the debtor in insolvency proves to be a challenge and implies a laborious action, that emphasize not only the multitude of contracts concluded before opening the procedure but also those that arise, develop and denounced during the procedure, as the capacity or on the contrary, a true incapacity of the debtor to manage them may outline.

It is of interest as well, the position in which the practitioner in insolvency stands in this dynamics of the contracts, respectively its capacity of representative of the debtor or of the creditor as well as the purpose aimed by him in his action to conclude, develop or denounce certain contracts.

A first relevant issue for choosing this topic consist in the multitude and variety of contracts that may be developed in the insolvency procedure.

As a first note, it must be underlined also the fact that the Law no. 85/2014 does not contain an inventory, not even illustrative, but the less exhaustive of the contracts of the debtor in insolvency.

A second note aims to the fact that a careful examination of the art. 5 of the Law no. 85/2014 outlines the multitude of contracts for which the law ruler felt the need of some definitions.

It is required to specify that the law ruler treated the contractual issue to which we refer exclusive for the situation in which a law subject, named debtor and being part of the categories especially provided in the art.3 of the law, is in state of financial difficulty, as it is defined by the art.5 pct.27 of the Law, or in insolvency, as it is defined by the art.5 point 29 of the same regulatory act.

By examining the Law no.85/2014 it may be concluded that the law mentions and in certain cases defines a series of contracts specific to the procedure, a part provided by special laws or by the common law, part proper for the insolvency prevention procedures.

From the first category, we remind the compensation agreement (netting), qualified financial contracts, bilateral compensation contract, service agreements, raw materials, materials or utilities contracts, guarantor agreement, other contracts concluded by the debtor (sale, leasing, labour contracts, service agreements, consignation agreements, etc.).

The second category also comprise the contracts specific for the insolvency prevention procedures.

For instance, specific for the procedure of ad-hoc mandate is the "understanding" (art.13 para.2) which the ad-hoc attorney proposed by the debtor and appointed by the president of the court, must be made between the debtor and one or more creditors of the later, in order to exceed the state of financial difficulty, of safeguarding the debtor, of keeping the jobs and covering the debts over the debtor. If the "understanding" is concluded, the ad-hoc mandate ends.

Analysing the art.13 para.3 of the Law no.85/2014 it may be concluded that the "understanding" made by the ad-hoc attorney has the vocation of representing in reality, a complex convention, similar to a redressing plan, as long as it is based on the proposals of the ad-hoc mandate in connection with remissions, spreading in instalments, or partial duty reduction, with the continuation or cessation of some ongoing contracts, with staff reduction or with any other measures deemed as necessary.

In the same way, specific to the other procedures of preventing insolvency is the conclusion of an arrangement with creditors, on the basis of the offer submitted and notified by the temporary administrator appointed under the arrangement with the creditors, approved by the creditors representing at least 75% of the value of the debts accepted and unchallenged and homologated by the syndic judge.

This arrangement with creditors having a status and value of contract results from the circumstances that the meeting of creditors may request taking of a specific penalty – termination - in case of failure of the debtor to observe the undertaken obligations, as well as from the analysis of the provisions of the art.36 of the law, referring *in terminis* to " the term provided for in contract".

The particular variety of the types of contracts provided by the Insolvency Code cannot have but one meaning: contracts are the economic instrument and the legal means indispensable both to redressing of debtors found in financial difficulty or in

insolvency, and also their winding up, that is why also this detailed regulation of contracts.

It is no less relevant that although the Law no. 85/2014 dos not clearly define the debtor subject to the insolvency procedure, as it was made by the Law no. 85/2006, from the corroborated analysis of the provisions at. 38, art. 52, art. 53, art. 54, art. 55, art. 67 para. 1 letter i – n, art. 68 etc. it results that there may be subject to the insolvency procedure the professionals who are freelancers or legal entities that must register in an advertising system, most of them being trading professionals. From here as well the variety and complexity of the contracts that must be managed in the procedure, being obvious that the trading activity is basically focused on contractual legal relations.

The approach of the issue of the contracts of the debtor in insolvency implies their grouping in two large categories depending on the time of opening the insolvency procedure: contracts concluded before opening the insolvency procedure and contracts concluded after that moment.

As concerns the contracts concluded before opening the insolvency procedure, it must be noticed that it is not taken into question the quality of representative or of supervising body of the practitioner in insolvency, such contracts being concluded by the debtor by statutory representative.

In this case, it must be considered also that the insolvency administrator or the official receiver may decide, in case that the debtor was not taken off the management right, if it maintains one or more contracts, of it /they may continue in the same terms, if the amendments of some clauses is required, may supervise the execution, but also may decide their assignment, or it may decide if the termination of denunciation is required.

With reference to the contracts concluded in the same period the practitioner in insolvency is entitle to submit actions for annulment under the conditions of the art. 117-122 of the Law no. 85/2014.

As concerns the contracts concluded after opening the insolvency procedure, it must be underlined that they may be concluded by the debtor through the special administrator, under the conditions of the art. 87 para.1 letter a of the Law no. 85/2014, if the debtor was not taken off the management right, by the debtor through the insolvency administrator, under the conditions of the art. 87 para. 1 letter b of the Law if the debtor's management right was taken off and by the debtor through the official receiver, in the bankruptcy procedure, when the debtor is mandatorily take off the management right.

Against the legal acts concluded by the debtor after opening the procedure, by the violation of the legal interdictions, the insolvency administrator and the official receiver may formulate an action for annulment, as it results from the interpretation *per a contrario* of the provisions of the art. 45 para. 1 letter i final thesis of the Law no. 85/2014.

We deem that understanding of the role of the practitioner in insolvency in relation with the competences that are granted thereto in the management of the contracts of the debtor must be approached in considering the quality of the representative of the debtor, which the law confers thereto, and on the other hand, in considering each operation undertaken in connection with these contracts.

Quality of representative of the insolvency administrator and of the official receiver

Preliminary, and of special importance, it is due to underline the fact that in the contents of the Law no. 85/2014 the law ruler speaks about the quality of the practitioners in insolvency of the debtor's representatives and never as creditors' representative.

The law does not make the difference– and nor we think that it would be necessary– between the procedural and material plans, and that is because the Law no. 85/2014 concerning insolvency prevention procedures and insolvency itself is, in its essence, a law of procedure.

In this study it is of interest only the quality of representative of the debtor acquired after the opening of the procedure, because before this time, it is absolutely clear that the representation cannot be but the statutory one.

In the suit proceedings, the attention is drawn by an unfortunate provision being ambiguous: according to the art. 41 para. 5 of the Law no. 85/2014, in litigations that were promoted based on the common law, after opening the insolvency procedure the summoning of the debtor is made at his registered seat and at the registered seat of the insolvency administrator/official receiver, without mentioning who is the representative through which the summoning takes place as procedural act. The legal text presents a significant minus compared to the former regulation contained in the art. 87 point 5 of the Code of civil procedure since 1865, that provided that the persons subject to the procedure are summoned through the administrator or as applicable through the official receiver, thus conferring to the practitioner in insolvency the quality of representative in the suit.

From the corroboration of the provisions of the art. 56 and art. 57 from the Law no. 85/2014 it results that, in case that, after opening the procedure, the debtor does not have his management right taken off, he has the quality of representative of the debtor, since the date of appointing of the special administrator in this situation ending the mandate of the statutory directors (art. 54 thesis II of the Law). Under the same issue, we have to underline that,

although the pre-quoted article makes general reference to the mandate of the statutory directors, it is relevant in the meaning of the analysis that it is taken into account inclusive the representation mandate granted to the statutory director/directors.

In relation to the provisions of Article 56(2) of the Law no. 85/2014, it is beyond any doubt that the insolvency administrator and official receiver have the capacity of representative of the debtor after the latter was withdrawn the right of administration.

The issue related to the involvement of the debtor in the management of the contracts concluded before the start of the procedure and not terminated after this moment, as well as to those concluded after the start of the procedure can be settled as the representation of this contracting party, namely they are managed and concluded by the special administrator when the right of administration was not withdrawn, and by the insolvency administrator, respectively by the official receiver when this right was withdrawn.

The issue is only apparently settled.

We emphasize, in the first place, that the issue of representation by special administrator is present only during the period of time during which the debtor benefits of the right to manage its activity, so that it is about only the competencies of the special administrator and those of the insolvency administrator, in the case of appointment of an official receiver, ceasing the mandate of the special administrator as the representative of the debtor.

By continuing the analysis, we must emphasize that the mandate of the special administrator is defined by Article 56(1)(d) of the Law no. 85/2014, providing that this representative of the debtor manages the debtor's activity under the supervision of an insolvency administrator, after confirming the plan, only if the debtor was not withdrawn the right of administration.

During the supervision period, pursuant to Article 87 of the Law no. 85/2014, the debtor, by the special administrator, may continue the performance of current activity and to make payments under the supervision of the insolvency administrator, if the debtor submitted a reorganization request and was not withdrawn the right of administration, and under the management of the insolvency administrator, if the was it was withdrawn the right of administration.

The analysis of the two legal texts identifies the fact that the right of representation granted to the special administrator is not pure and simple, but conditional on the surveillance performed by the insolvency administrator.

Current activities are defined by Article 5(1)(2) of the Law no. 85/2014, and the surveillance activity performed by the insolvency administrator is defined by section 66 of the same paragraph of the same article. This latter operation, as configured, involves that the insolvency administrator, after permanently analysing the debtor's activity, gives its approval related to the measures involving the debtor from patrimonial point of view, as well as those aimed to lead to its restructuring/reorganization.

The law does not provide *in terminis*, but the analysis of the abovementioned legal provisions leads to the firm conclusion that this is about an approval limiting the decision-making powers of the special administrator and rending useless its representation power, conditioning it on the approval of the insolvency administrator.

Fate of the insolvent debtor's contracts

As it was shown above, the insolvency administrator and official receiver have a right to life and death related to the contracts concluded by the debtor before the start of the insolvency procedure.

Pursuant to Article 123 and Article 129 of the Law no. 85/2014, the practitioners in insolvency appointed in the procedure can terminate contracts in progress.

Pursuant to Article 130 of the same law, they can request the liquidation of the debtor's rights being partner in an agricultural company, unlimited company, limited partnership, limited liability company or shareholder in a joint-stock company.

Pursuant to Article 123(5) of the Law, the insolvency administrator can, with the agreement of the co-contractors, change the clauses of the contracts concluded by the debtor.

Article 123(10) of the Law gives to the insolvency administrator the right to transfer, under certain conditions, contracts in progress concluded by the debtor to third parties.

Article 128 also gives to both practitioners in insolvency the right to refuse to fulfil certain obligations undertaken under contracts.

Even if there are no express provisions for this purpose, we consider that the insolvency administrator and official receiver have the right, at least in connection with the capitalization of the debtor's assets (as sale), to conclude contracts with third parties.

The only limitations of the quasi discretionary right to manage of the practitioners in insolvency, as representatives of the debtor, are those provided by Article 89(4) and (5) of the Law no. 85/2014, aiming the special case of certain types of contracts (qualified financial contracts, netting agreement, operations with qualified financial instruments).

Representation or… much less?

Analysing the provisions of Article 54 and Article 55 of the Law no. 85/2014 providing the cessation of the statutory directors' mandates and the suspension of the activity of the general assembly of partners/shareholders/members of the debtor entity, we deem that, in this case, it is not about a temporary or final transfer of the statutory powers of representation to the insolvency administrator or

official receiver, but a true transfer of the deliberative and executive attributes, after a true annihilation of the company's will, the legal entity's agreement, in the favour of the practitioner in insolvency.

This transfer is temporary or final, as the debtor in insolvency succeeds to finalize the reorganization plan and to re-enter the economic flow or ends in bankruptcy.

Conclusions

In this paper, we have tried to identify the role, functions and characteristics of the insolvency administrator's activities and those of the official receiver in insolvency procedure.

We have also aimed to identify the way in which the bodies applying the procedure perform their activity in relation to the other bodies applying the procedure and participating in the procedure, focusing on the obligation to perform an activity in accordance with the law, the purpose and principles of the insolvency procedure. From this point of view, we believe that, in relation to the legal responsibilities they are given, the principles they have to comply with and the responsibilities set out by the syndic judge, the two practitioners in insolvency can be deemed "representatives" or "agents" of justice.

We have argued the capacity of representative of the debtor of the insolvency administrator and the official receiver, listing the powers they are given from procedural point of view, but also the roles they play in the management of the contracts concluded by the debtor.

We end by concluding that these practitioners in insolvency are clearly true representatives of the debtor in the insolvency procedure, not having this capacity in relation to the creditors, who are represented by their own bodies.

We also believe that the practitioners in insolvency assure a balance of the interests of all parties involved in the insolvency procedure, which they have to implement in accordance with the spirit and letter of the law.

We believe that the analysed issues must be deepened, and the stated purpose if this paper is to start a debate on these issues.

Bibliography:

- Coord. Bufan, Radu *Tratat practic de insolvency,*București, Ed. Hamangiu, 2014;
- Cărpenaru, Stanciu D. *Tratat de drept comercial român,*București, Ed. Universul Juridic, 2014;
- Cărpenaru, Stanciu D. Hotca, Mihai Adrian; Nemeș, Vasile *Insolvency Code comentat,* București, Ed. Universul Juridic, 2014;
- Gheorghe, Cristian *Drept comercial român*, București, Ed. C.H.Beck, 2013;
- Nemeș, Vasile Drept comercial, ediția a II-a revizuită and adăugită, București, Ed. Hamangiu, 2015;
- Sărăcuț, Mihaela *Participantsi la insolvency procedure*, București, Ed. Universul Juridic, 2015;
- Turcu, Ion Insolvency Code Law no. 85/2014. Comentariu pe articole, București, Ed. C.H.Beck;
- Țăndăreanu, Nicoleta *Insolvency Code adnotat*, București, Ed. Universul Juridic, 2014;
- [1]Popa, Carmen - "Natura juridică and limitele răspunderii civile a insolvency administrator" http:/www.juridice.ro/341569/natura-juridica-si-limitele-raspunderii-civile-a-administratorului-judiciar/html