

Transanction contract in insolvency proceedings

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Abstract

Among the sources of commercial obligations, an important part in the trading activity is represented by the contract.

Compared to the previous regulation that emphasized the essential character of the transaction, namely that it allowed the parties to make mutual sacrifices, the current doctrine holds the fact that the reciprocity of sacrifice is essential to be able to make the difference between a transaction and a mere acquiescing.

The particularity of the transaction contracts consists in the reciprocity of assignments between parties, but it is of no interest whether the assignments between the parties have an equal value.

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The contract is defined by art. 1166 of the Civil Code as being: „the agreement of will between two or several persons with the intention to constitute, amend or extinguish a legal report.”

In the economic field, the contract is generally considered to be the main and most appropriate means to provide general welfare. [1]

In a market economy, the commercial obligations may be undertaken if they are based on the principle of contracting freedom, which implicitly results from numerous legal provisions: constitutional, of civil right, inserted in organic laws, international deeds, etc.

The principle of contracting freedom results from the fact that both individuals, and legal entities, have the right to freely enter into contracts.

The grounds of the principle of contracting freedom are based on the so-called theory of the autonomy of will drafted by the French jurist Charles Dimonliu, who, when he drafted it, he considered the need to find a solution for the conflicts of inter-province laws that had appeared in the France of the 17th century. [2]

The contract constitutes the main source of obligations. Its importance is taken into account in all the activity fields, from the simplest needs of the people, until the professional trading activities.

If any contract is fair by itself, and the obligation is born out of the parties' wills, it is natural that they should set their contents [3] and main legal mechanism transposing the variant agreed by the parties during amiable settlement in case of conflict concerning the execution of obligations, regardless of their source. [4]

The civil code of 1864, in art. 1704, defined transaction as „a contract by which the parties finalizes a trial that has already been initiated, or prevent a trial that may be born out of mutual concessions, consisting in mutual cancellations of claims or in new provisions executed by, or promised by a party in exchange of the cancellation, by the other party, of the litigious or doubtful right” [5], particularly referring to the element of mutual concessions.

Article 2267 of the Civil Code stipulates: „(1) The transaction is the contract by which the parties prevent or extinguish a conflict, including in the stage of foreclosure, by concessions or mutual cancellations of rights or by transfer of rights from one another; (2) By a transaction, legal relations may be born, amended or extinguished, that are different from those making the object of the conflict between the parties.”

Considering that the contract freedom is a principle which materially governs the civil and commercial contracts, we believe that, on the economic market, the transaction contract is circumscribed to this principle, to its limits and to the requirement of good-faith. [4]

The effects of the opening of the insolvency proceedings against the debtor may be both of patrimony, and of non-patrimony nature: cancel the debtor's right to administrate the wealth; suspend all judicial and extra-judicial actions and the foreclosure measures to execute the outstanding debts of the debtor or its goods; suspend the course of the prescription related to the actions required to execute the outstanding debts against the debtor; suspend the flow of interests, increases and penalties; suspend the transactions of the debtor's shares on the regulated markets; hand-over, by the judicial manager/liquidator, of the debtor's documents, etc.

The opening of the insolvency proceedings represents an important event for the debtor, meaning the cessation of the activity carried out until then and its entering a judicial, collective, concursual and equalitarian procedure, involving a new situation and a regulation of its special and different activity than the one that was previously applicable, and all these with the precise purpose to cover the liabilities according to art. 2 of the Law 85/2006.

In the recent doctrine, it has been appreciated that the “cancellation” of the right represents the transfer of the use of the right from the rightful managers to the special manager and, particularly, to the insolvency specialist.

After initiating the insolvency proceedings, the state of the debtor’s wealth [6] is important for the debtor’s co-contractors, who wish to satisfy their needs mainly by these means.

All the co-contractors are invited to participate in the insolvency proceedings, which will consist in short deeds and deadlines where they will be invited to participate and which they will have to observe, otherwise they will be deprived of the right to execute their outstanding debt against the debtor, for the failure to submit in due time the debt statement.

In some situations, the creditors may be satisfied by an amiable settlement with the debtor, right after the proceeding opening decision is given.

This amiable settlement of the debt recovery conflict by the creditors is called a transaction, and its purpose is to achieve a faster and, why not, a safer recovery of a part of the debt, through the mechanism of mutual concessions.

The transaction is specified by the Law 85/2014 in article 58 letter m): „the main duties of the judicial manager, under this heading, are: (...) enter into transactions, discharge from debts, discharge of fidejussors, waive the real securities, provided that these operations are confirmed by the judge-syndic.

In the execution of these duties, the judicial manager must show good faith, not to prejudice the creditors’ interests, because the acts considered by the law-maker have a particular impact on the debtor’s wealth. For the same reason, the judge syndic should show maximum diligence and prudence in the operation of confirmation of the acts stipulated by the legal norm. [7]

The insolvency proceedings continue to be executorial, and article 2267 of the Civil Code includes foreclosure in the regulation of the transaction.

In art. 58 of the Law 85/2014, transactions occur next to other activities that the judicial manager may carry out, among which the discharge from debts, the discharge of fidejussors, etc.

All these enumerations send to the situations where the debtor has a debt over third parties, and by using the institution of transaction, it may recover something, in the frame of the principle of maximization of the debtor's wealth.

The possibility to enter into a transaction is burdened by the specificity of the insolvency proceedings involving the order of preference to the distribution of outstanding debts registered in the table, but also, we believe, the consent of the Creditors' Assembly concerning the transaction. We may speak of a transaction only after the creditors during the Assembly sign that they agree with the execution of a transaction.

We must consider the fact that there is a concordance between the privileged debts (salary, budget), the secured debts and the unsecured debts.

The parties cannot waive these imperative norms by signing a transaction contract, because this would violate the principle of contracting freedom, specified in art. 1169 of the Civil Code.

The transaction contract must be entered into after opening the procedure providing the transparency and legality of contract signing. To be able to provide the transparency and legality of the transaction contract in the insolvency proceedings, two objectives must be accomplished:

- 1) The judicial manager must justify the accomplishment of the principle of maximization of the debtor's wealth. [8],[9].

The transaction must be indeed very advantageous for the debtor, to increase the chances to be accepted by the creditors' Assembly.

- 2) Not to create violations of the concursual rights. This is why we appreciate that the creditors' written consent from the creditors' Assembly is imperative, to avoid any discussions between the creditors, in the sense that some of them could be disfavored.

The French law incriminates the covenants entered into by a creditor and a debtor after the opening of the insolvency proceedings.

The transparency and legality of entering into the transaction contract after opening the proceedings are also provided by the satisfaction of the condition of confirmation by the judge syndic.

This condition of confirmation is checked in the end, when the parties have agreed, the debtor obtained the written consent of the other creditors in the Creditors' Assembly, the parties being thus able to submit to the judge the transaction to be confirmed.

Conclusions

In practice, the transaction contract in the insolvency proceedings is not very common, due to the mechanism of the insolvency proceedings, which consists in stages and deadlines that must be observed, otherwise the creditors invited in the insolvency proceedings will be deprived of their right to execute their outstanding debt against the debtor, for failure to submit in due time the debt statement.

Only the large companies, with a big number of assets in their patrimony could transact with the purpose to win something and to be able to get back on their feet than to lose everything. [10]

Also, we believe that the debtor companies that have very large outstanding debts to recover from their own debtors could benefit from this as well.

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