STAY OF JUDICIAL AND ENFORCEMENT ACTIONS IN CASE OF OPENING THE INSOLVENCY PROCEEDINGS

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Abstract:
A stay of judicial or extrajudicial actions, as a result of opening the insolvency proceedings, aims to protect the competitive, collective and egalitarian character of the procedures regulated by law no. 85/2014 on insolvency prevention and insolvency procedures, thus avoiding the risk of individual actions to pursue or enforce creditors' claims on the debtor's assets and eliminating the uncertainty over the liabilities. This imperative legal norm, of public order, was appreciated as having as its purpose the concentration of all disputes with the debtor's property as its object, in the exclusive competence of the syndic judge appointed in the insolvency procedure. Creditors whose actions were thus suspended will have to declare their claims in the judicial reorganization and bankruptcy procedure.
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Stay of judicial and extrajudicial actions

According to provisions of art. 75 paragraph 1 of Law no. 85/2014, from the date of the opening of the procedure, all judicial, extrajudicial actions or enforcement measures for the purpose of recovering any debts on the debtor's assets are automatically suspended. The exploitation of their rights can only be done within the insolvency procedure, by submitting applications for the admission of claims. Their reinstatement is possible only in the case of the annulment of the decision to open the procedure, the revocation of the decision to open the procedure or in the case of the closure of the procedure under the conditions of art. 178. If the decision to open the procedure is cancelled or, as the case may be, revoked, the judicial or extrajudicial actions to realize the claims on the debtor's assets can be put back on the docket, and the enforcement measures can be resumed. On the date when the decision to open the procedure becomes final, both the judicial or extrajudicial action, as well as the suspended enforced executions, cease.

The appeals promoted by the debtor against the actions of some creditors started before the opening of the procedure are not subject to legal stay, nor are the civil actions from the criminal processes directed against the debtor. Both legal actions against co-

debtors and/or third party guarantors and legal actions to determine the existence and/or amount of claims against the debtor, born after the date of the opening of the procedure are also exempted from the provisions of art. 75.

The stay of judicial and extrajudicial actions is carried out *ope legis*, a judicial decision in this regard not being necessary. The suspensive effect is produced from the pronouncement of the decision to open the insolvency procedure, and not from the date of registration of the petition.

Subsequently, both the judicial or extrajudicial action cease on the date of the definitive stay of the decision to open the procedure, as well as the suspended enforced executions. Regarding the ending moment of judicial or extrajudicial action or enforcement, it operates by effect of the law, just as in the case of stay by effect of law[1]. The decision to open the insolvency procedure remains final on the date of expiry of the term for exercising the appeal, or on the date of the pronouncement of the decision on appeal, to the extent that the appeal has been rejected.

In case the opening of insolvency proceedings against a company that has the defendant status in an action through which a creditor seeks to realize a claim on it occures while such a process is pending, the judgment must be suspended, and on the date of finality of the decision to open the procedure, the judicial action ceases[2].

The ending of the action pursuant to art. 75 of Law no. 85/2014 is a procedural measure newly introduced by the provisions of Law no. 85/2014, appearing as a genuine exception to the provisions of the Civil Procedure Code, which regulates the solutions that can be pronounced by civil courts (e.g. annulment, rejection, admission), its purpose being to stop the actions in claims and enforced executions directed against the debtor (for which the insolvency procedure was opened by final judgments pursuant to Law no. 85/2014) and the capitalization claims only within the collective procedure.

In such case, the action does not remain without an object, because such a solution would imply the disappearance of the object of the request, respectively the disappearance of the claim whose capitalization is sought. The purpose of the law is to verify/value the claim in the collective procedure, the solution that must be pronounced being the one provided by the law: "completion of the action".

As for the procedural act ordering the ending of the trial, according to the provisions of art. 424 paragraph 1 of the Civil Code, it must be a sentence, because in this case the court divests itself without resolving the case[3].

The cause of stay includes the actions that have as their object the recovery of court costs against the debtor.

Thus, in the practice of the courts[4], it was established that, within the meaning of art. 453 Civil procedural code, the legal nature of court costs is bivalent, they represent, on the one hand, the damage caused by the procedural fault, and, on the other hand, the compensations that the party losing the claims must pay to the other party. The right to claim the restitution of court costs is a patrimonial right of claim, the creditor having the obligation to prove the existence of a certain, liquid and enforceable claim consisting of the amounts claimed under this title. The request by which the creditor requests the obligation of the debtor - an insolvent company - to pay court costs has the nature of an action to realize a claim on the debtor's assets, so that it is correct to apply the provisions of art. 75 para. (1) from Law no. 85/2014, which refers to the stay of all judicial, extrajudicial actions or enforcement measures for the realization of claims on the debtor's assets.

Also in practice[5], it was ruled that, in the event that, through the preliminary court action, it was requested, on the one hand, the partial cancellation of a debt assignment contract, and, on the other hand, the obligation of the defendant party, an insolvent company , upon the payment of certain sums of money, the decision of the court to suspend, under the provisions of the Insolvency Law, only the petition in claims relating to the insolvent defendant is legal, since this stay can only operate for the request through which it was sought to realize a claim on the insolvent debtor, the petition regarding the partial cancellation of the assignment contract not being able to lead directly to the realization of the debt. Thus, since the stay of the judgment does not concern the entire action filed against the insolvent defendant, the solution of partial rejection of the action against this defendant is legal and fundamental, the lack of an express mention regarding the end of the claim which is rejected without causing the annulment of the decision[6].

Application of art. 75 para. (1) from Law no. 85/2014 by the court specialized in the settlement of labor disputes

Since the insolvency procedure has a competitive, collective and egalitarian character, all creditors who have claims against the debtor must register these claims in the credit table. This is the rationale for which the legislator ordered that all judicial, extrajudicial actions or enforcement measures for the realization of claims against the debtor or his assets be suspended, otherwise the competitive, collective and egalitarian nature of the procedure cannot be respected.

However, only claims that comply with the legal conditions, that is certain, liquid and enforceable, and that are expressed in a document recognized by law as having an enforceable nature, can be registered at the credit table, and not the simple requests of creditors.

The text of art. 75 paragraph 1 of Law no. 85/2014 refers to judicial, extrajudicial or enforced execution actions, for the realization of claims against the debtor or his assets, i.e. to satisfy creditors, therefore these are the actions susceptible of being suspended, not the actions that tend to the recognition or ascertainment of a claimant's claim on the debtor.

In the absence of a recognition of his claim, through a final and irrevocable court decision, the plaintiff, participating in the insolvency procedure, would not be able to submit to the credit table and would not benefit from the entire procedure. Therefore, it is up to the court, vested with judging such a request, the competence and, at the same time, the obligation to analyze to what extent the plaintiff's action tends to realize his claim or only to ascertain its existence and extent.

Consequently, compared to the mandatory interpretation made by the Constitutional Court[7], it falls under the provisions of art. 75 of Law no. 85/2014 only the actions aimed at satisfying the creditor's right, respectively the payment of claims, not the actions that infer uncertain rights or in relation to which the creditor does not hold a valid title for registration in the credit table.

In fact, only such an interpretation satisfies art. 6 ECHR, in the interpretation of the European Court of Human Rights, which established that "the right to a fair trial, guaranteed by art. 6 § 1, must be interpreted in the light of the principle of the supremacy

of law, which presupposes the existence of an effective legal way that allows the claim of civil rights

In the same way, the High Court of Cassation and Justice held in its jurisprudence[8] that "if the plaintiff did not invest the court with an action to realize a claim against a company against which the opening of the general insolvency procedure was ordered, his claims regarding only the finding of the development of some labor relations, the decision of the court to suspend the trial of the case based on the provisions of art. 36 of Law no. 85/2006, motivated by the fact that the opening of insolvency proceedings was ordered against a company other than the one against which some claims were sought, the conclusion thus pronounced being given by the wrong application of these legal provisions."

In the actions in which the plaintiff only requested that the defendant recognize his claimed rights, the court must verify the title of the plaintiff's claim, the provisions of art. 75 of law 85/2014 not being applicable.

Practical solutions to remove the violation of the legal provisions regarding the enforcement of insolvent companies

a) Enforcement appeal

Whether formulated under art. 712 et seq. of Civil Procedure Code or art. 260 et seq. of Law no. 207/2015 regarding the Fiscal Procedure Code, the enforcement appeal is the optimal solution that leads to the restoration of the state of legality and the annulment of the enforced enforcement started illegally.

In order for the procedural approach to be as effective as possible, it is recommended to request the cancellation or termination of the entire forced execution, and not just the cancellation of certain acts of execution, because in the case of violation of the legal provisions regarding the forced execution of insolvent companies, all the forced execution is illegal, and not just certain acts of execution.

In this regard, art. 703 para. (1) point 5 C. proc. civil law provides that: "(1) *Enforcement ceases if: the enforcement has been cancelled*", and art. 704 C. proc. civil law provides that: "*Non-compliance with the provisions regarding the enforced execution itself or the execution of any act of execution entails the nullity of the illegal act, as well*

as of the subsequent acts of execution, the provisions of art. 174 et seq. being applicable accordingly".

To the extent that only certain enforcement documents are annulled, the creditor may issue other enforcement documents within the same enforcement procedure and another appeal will have to be made for subsequent issued enforcement documents.

Moreover, to the extent that the cancellation of the entire enforced execution is not requested, within the term established by art. 715 para. (1) point 3 C. proc. civ., respectively within 15 days from the date when "the debtor contesting the execution itself received the decision approving the execution or the summons or from the date when he became aware of the first act of execution", the forfeiture of the right to also requests the cancellation of the enforced execution, only the right to request the cancellation of individual enforcement acts remains, within 15 days from the date when the appellant became aware of the enforcement act that he is contesting

b) The possibility of the insolvent debtor to file a request to lift the seizure from the insolvency account, addressed to the syndic judge

To the extent that the forced execution was carried out by seizing the insolvency account, the insolvent debtor has the opportunity to file a request to lift the seizure from the insolvency account, addressed to the syndic judge under art. 45 para. (1) lit. r) and art. 163 para. (3) from Law no. 85/2014. The provision of art. 163 para. (3) of the law, gives effectiveness to the competitive, collective and egalitarian character of the procedure, in accordance with which the suspension of judicial or extrajudicial actions after the date of the opening of the procedure is instituted.

Conclusions

A stay of judicial and enforcement actions in case of opening the insolvency proceedings, ordered based on the provisions of art. 75 paragraph 1 of Law no. 85/2014, can only concern those judicial or extrajudicial actions and enforcement measures directed against a debtor in order to recover some claims likely to be entered in the credit table, and not the actions initiated in order to obtain/establish a claim against the debtor, a contrary solution being likely to flagrantly violate the provisions of art. 6 ECHR, in the conditions where, as an example, the people who would try to obtain the recognition of a

patrimonial right would see themselves put in the situation that their actions will not be analyzed effectively and within a reasonable time by the court, as much while the processes initiated to establish such a right would be suspended for a long time (most of the time).

References:

[1] Themis Magazine, no. 2/2020 of National Institute of Magistracy
[2]Decision no. 520 of March 9, 2021, pronounced by the Second Civil Section of the High Court of Cassation and Justice
[3]The meeting of the presidents of the specialized sections of the ICCJ and the Appeal Courts in Căciulata, May 15-16, 2017
[4]ICCJ, Second Civil Section, Dec. no. 2323 of November 12, 2015
[5]ICCJ, Second Civil Section, dec. no. 524 of February 17, 2015 - Jurisprudence Monitor no. 52/2015
[6]Carpenaru, D.Stanciu, Hotca, Mihai-Adrian, Nemes, Vasile, Codul insolventei comentat, 2nd edition, Universul Juridic Publishing House, Bucharest, 2017
[7]Decision of the Constitutional Court of February 5, 2013, published in the Official Gazette of Romania, Part I, no. 176 of April 1, 2013
[8]Civil decision no. 1526/05.06.2015, ICCJ - Second Civil Section