Opening insolvency proceedings at creditors request. Conditions for application submission

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Abstract
By association with other legislation, where the economic and social considerations are more important than other legal factors, the main objective consists in saving the debtor and the research for viable solutions to the detriment of payment of liabilities, in our insolvency legislation, trying to satisfy the interests of both creditors and debtors, covering the debt with reorganization of the debtor. The paper analyzes the circumstances in which creditors are entitled to make application but also the legal consequences of non-compliance with these conditions.
Keywords: *insolvency, creditor, debtor, threshold value, reorganization*

In order to open insolvency proceedings it have to be presented an application to the competent court, by the persons to whom the law recognizes the locus standi in this regard. [1]

Law 85/2014 provides on art. 65 that,, procedure is opened by a petition filed in court by the debtor, by one or more creditors, or by persons or institutions expressly provided by law. (2) Financial Surveillance Authority file a petition against entities regulated and supervised by itself, according to available data to meet the criteria laid down by special legal provisions for initiating proceedings under this law."

Article 70 of the Insolvency Code reveals that ,, any creditor entitled to request the opening of proceedings under this title may apply for the opening of proceedings against a debtor's alleged on insolvency ... " .

In judicial practice it was observed that most of the times , creditors are applying for opening the insolvency proceedings of the debtor, whereas termination of payments due by the debitor has negative consequences for creditors heritage .
The new insolvency code defines the "creditor", both by reference to the opening of insolvency proceedings, as well as by the participation in the insolvency procedure. [2]

Article 5, point 20 gives the legal definition of "creditor" showing that it is 'creditor entitled to apply for opening the insolvency proceedings the creditor whose claim on debtor's assets is quarrel, liquid and chargeable for more than 60 days

Point 19 of article.5 shows that creditor means those entitled to participate in the procedure meaning the holder of a right on a claim on the property of the debtor, which has registered a request for that claim following her admission either is receiving rights and obligations settled by this law for each stage of the proceedings.

The quality creditor ends as a result of the failure to register or by removal from the tables of creditors made successively in the proceedings or by procedure closure; Are having the quality of creditors without making personal statements of claim, the debtor's employees. " [3]

In the new Insolvency law we meet also other creditors categories such as art. 5 pt. 21 - ,, current creditor or creditor with current claims " ; art. 5 pt. 22 - ,, unsecured creditors " ; art. 5 pt. 23 - ,, indispensable creditors " and art. 5 pt. 24 - ,, foreign creditor " .

All these creditors are part of the creditors entitled to participate at the insolvency proceedings.

As stated in the old regulation of insolvency on art. 31 para. 1 Law 85/2014 stipulates in art. 70 , paragraph 1 , that any creditor who wishes to request the opening of insolvency proceedings presumed to be insolvent debtor must specify:

a) The amount and basis of claim;

b) the existence of a right preferably constituted by the debtor or established by law;

c) the existence of precautionary measures on the assets of the debtor ;

d) the declaration of any intention to participate in the debtor's reorganization , in which case you will have to specify, at least in principle , how wishes to participate in the reorganization procedure. "

From the two major categories of creditors, only those who have the quality of ,, creditors entitled to request the opening of insolvency proceedings ’’ have the locus standi for submitting an application in court. [4]

We appreciate that was determined correctly the person that is able to submit the application in court covering the opening of insolvency proceedings, as it has locus standi quality.

This determination of the person with an active locus standi of the application submission was made by reference to the requirements posed by the debt claimed , given the definition of insolvency , which is ,, the state of the debtor's assets which is characterized by insufficient funds available in order to pay certain debt that is

uncontested, liquid, and enforceable against the company, , insolvency being obviously presumed when the debtor , after 60 days in arrears do not pay his debt to one or more creditors , and imminent when it turns out that the debtor cannot pay at the maturity the outstanding liabilities incurred with the funds available on the due date .

The outstanding debt on purposes of Law 85/2014 , means that debt whose existence follows from the very act of debt or, from other documents , even unauthentic , emanating from the debtor or recognized by him. [5]

Claims based on which is triggered the insolvency proceedings must accomplish the same conditions as those for which it can begin forced tracking on movable and / or immovable property of the debtor .

In order to initiate insolvency proceedings, a creditor who has an outstanding debt, amount and debt that is uncontested, liquid, and enforceable against the company, that exceed the threshold stipulated by Law 85/2014, does not require obtaining an enforceable title, as in common law.

Once opened the procedure, even other creditors are no longer required to hold an enforcement order to be able to lodge claims on the list of creditors, they can just submit a simple request for such procedure, which attach documentary evidence of claims. (art 102 par. 3 provides that ,, the request for claims must be made even if they are not established by evidence.)

The easiest way through which a creditor may achieve his own claim against the insolvent debtor is the consensual procedure , given the demands of collective procedure opening but also the declaration of claims ,all this being also subject to a stamp duty of only 200 lei [6] regardless the amount of the claims , while their actions on common law are charged according to art. 3 of OUG 80/2013 . Art . 3 para. 1 of OUG 80/2013 stipulates that ,, actions and claims valued in money , brought to the courts , are charged as follows:

a) . up to 500 lei - 8% but not less than 20 lei

b) . from 501 lei to 5,000 lei - 40 lei + 7% for exceeding 500 lei

c) . between 5001 and 25000 lei - 335 lei + 5% exceeding 5,000 lei

d) . between 25,000 and 50,000 lei - 1355lei + 3 % for exceeding 25,000 lei

e) . between 50001 and 250000 lei - 2105 lei + 2% in excess of 50,000 lei

f) . over 250,000 lei - 6105 lei + 1 % for exceeding 250,000 lei.

When the insolvency proceedings are opened, all creditors are able to lodge claims in such way they came into the contest as the distribution of amounts resulting from the liquidation of the debtor's property

Trough all the creditors coming at the distribution of amounts always the unsecured creditors will be in benefit.

Art . 72 para. 1 of the Act provides that ,, in case of the application for opening insolvency proceedings brought by the creditor on the debtor's request , made within the period specified in par. 3, the syndic judge may order, upon closing procedure, on the creditor task , a surety of up to 10% of the claim at a certain bank, but not more than 40,000 lei. Bail will be recorded within 5 days from the notification of the measure, under penalty of rejection the procedure initiation. "

Considering the requirements of this article , as legal practice has shown [7], [8] , the court must examine the file correctly, with ought making any abuse in admitting applications for the imposition of bail, and with ought making use of this possibility just to get rid of the file.

The law limited the amount of the bail to the value of 40,000 lei , in order to avoid excessive sizing bail at the expense of the creditor heritage .

Insolvency Code provides as novelty, how it can be used to compensate the creditor bail filed by the debtor, where the application for opening insolvency proceedings is rejected.

Align . 4 of art. 72 of the Insolvency Code provides that ,, if the syndic judge establishes that the debtor is not insolvent , rejects the creditor request , which will be considered as not having any effect even registered. In this case, bail will be used to cover the debtor's damages for bad faith introduction of such a request, as disposed by the syndic judge. "

The debtor must submit an application to the insolvency proceedings, showing that the application to initiate the procedure was made in bad faith, that he suffered an injury and that there is a causal link between the act of making a claim in bad faith and injury.

Being an amount of money to be deposed by the creditor as guarantee for covering the expenses in case of an unmeritorious claims covering the opening of insolvency proceedings, the bail is based on the idea of creditor risk and debtor anticipated warranty, which shall provide a safe means to cover damage they would suffer if the creditor's claim will be rejected. [9]

Where the court agrees with the debtor's request, ex officio the syndic judge cannot oblige the creditor to pay any amount under this head [10], recording of the bail being a prerequisite condition of admissibility of the application of creditors.

If the is no record of the set bail amount the claimer creditor action will be dismissed de plano without analyzing the application, only the tax authorities being exempt under Art. 177 para. 3 Tax Code , by any bail [11] .

The doctrine stated that the establishment by the legislature of an exception to the general rule of payment of fees, taxes , commission or bail for claims, actions and any other measures that the tax authorities are undertaking for the purposes of tax debts administration does not represent an infringement of the provisions of art. 124 para. 2 of the Constitution, according to which justice is unique, impartial and equal for all, all exceptions found its justification in that, in the event that creditor belongs to the government, the risk that the debtor damaged by the effect of insolvency proceedings cannot obtain compensation for damage due to creditor insolvency do not exist, according to the principle that the government is never in default.

As the new insolvency code lays down no derogating rules, bail refund will be ordered by the court conclusion, if the conditions provided for by art. 1063 par. 1, 2 and 4 of the new Code of Civil Procedure are accomplished

If was explicitly triggered by the debtor that is not intended that the applicant be required to pay compensation for any damage caused by submitting the request to initiate the procedure , by decision of rejecting the claim of the creditor itself , the syndic judge shall order the restitution of the bail.

If the debtor does not make such a statement the refund of bail can only be made at the request of the interested party (creditor) , after a period of at least 30 days after the final decision of rejecting the application for opening procedure . Even if the syndic judge would divest the request will be solved also by the same judge.

The term ,, any entitled debtor " used by the legislator in the new insolvency code emphasizes the fact that in order to open the consensual procedure not discrimination between unsecured creditors and those with preference cause will be made.

Also, no discrimination to the nature or source of the claims is made, the legal text inferring that a single creditor may initiate one or more claims. It is however certain that further, the proceedings shall be mandatory collective. [12] .

According to par. 3 of art. 70 of the insolvency code, ,, if between the time of the application and the moment of the judgment of such request are submitted applications by other creditors against the same debtor , the court , through the registry , will verify , ex officio , at the time if the case is pending and shall submit the application to the existing file .

The Syndic judge shall determine the accomplishment of the conditions relating to minimum quantum of claims in relation with the aggregate claims value of all creditors who have submitted applications and respecting the threshold stipulated in this title and shall communicate the debtor requests.

As a debtor with unpaid debts due at least at 60 days in amount of 40,000 lei , may be subject to insolvency proceedings , then thereof , a fortiori should be passive subject of such and similar debt debtor close to this level , and also salary arrears to a single creditor , obligations that collected exceed the specified amount .

Conclusions

By opening insolvency proceedings, all the creditors want to recover the debt. Both guaranteed creditors , as well as the unsecured ones in order to be able to recover the debts should be required to submit statement of claim within the time limit imposed by the court, otherwise it is likely to be exhausted all chances to cover the debts of the debtor assets in insolvency proceedings.

Therefore, in the framework of the insolvency proceedings, recovery of debts is much stricter in comparison with the foreclosure, such recovery being subject to detailed rules and time limits provided for, by law.

”This work has been financed from the POSDRU/159/1.5/S/141699 contract, an ID 141699 strategic project, co-financed from the European Social Fund, by means of the Sectoral Operational Program Human Resources Development 2007-2013”.

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